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Constitutional Law - First Amendment - Free Exercise of Religion

Kimberly A. Taylor

CONSTITUTIONAL LAW—FIRST AMENDMENT—FREE EXERCISE OF RELIGION—The United States Supreme Court held that when a law that is neither neutral nor generally applicable burdens religious practices that law must be justified by a compelling state interest.

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

In April, 1987, the Church of the Lukumi Babalu Aye, Inc. ("Church")[1] leased land in the city of Hialeah, Florida ("City") for the purpose of building a church to practice the Santeria religion,[2] which included the religious rite of animal sacrifice.[3] In response, the Hialeah City Council ("City Council") met on June 9, 1987, and adopted a resolution that declared the City's steadfast opposition to religious practices that were contrary to "public morals, peace or safety."[4] At this meeting, the City Council also adopted the Florida Animal Cruelty Statute.[5] Thereafter, the City Council passed three ordinances which prohibited the possession of animals intended to be sacrificed,[6] the sacrifice of animals within the

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1. The Church, organized and existing under Florida law since 1973, is a non-profit corporation. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2223 (1993).

2. The Santeria religion, also known as Yoba or Yoruba, has been practiced for nearly 4000 years, beginning in West Africa; it was brought to Cuba by slaves and later brought to the United States by Cuban exiles. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1469-70 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993).

3. *Lukumi*, 113 S. Ct. at 2223.

4. *Id.* The resolution provided, in part, "The city reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." *Lukumi*, 113 S. Ct. at 2234-35 (quoting Hialeah, Fla., Resolution No. 87-66 (1987)).

5. *Lukumi*, 113 S. Ct. at 2223. The Florida animal cruelty statute provides:

> Whoever 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.

FLA. STAT. ch. 828.12 (1982).

The attorney general for the state of Florida, in an opinion letter, indicated that an unnecessary killing under the Florida animal cruelty statute would include an animal sacrifice if the sacrifice was part of a ritual and not undertaken primarily for the purpose of food consumption. *Lukumi*, 113 S. Ct. at 2223 (citations omitted).

6. *Id.* at 2224. Ordinance 87-52 provides, in part:

> Sacrifice—to unnecessarily kill, torment, torture, or mutilate an animal in a public or

city limits,[7] and the slaughter of animals in an area not zoned for slaughterhouses.[8]

The Church and Ernesto Pichardo[9] ("Plaintiffs") brought an action in the United States District Court of the Southern District of Florida, contending that the ordinances violated the First Amendment,[10] and seeking a declaratory judgment, injunctive relief and money damages.[11] After a non-jury trial, the district court held that the ordinances did not violate Plaintiffs' First Amendment rights, and ruled in favor of the City.[12] The district court found that the ordinances regulated conduct, not belief, and that they served a secular purpose and had a secular effect.[13] Because the ordinances survived these threshold tests, the court then balanced the competing interests of the City in maintaining the ordinances and those of the Church in continuing the religious practice of animal sacrifice.[14]

The court acknowledged that the ordinances imposed a burden on the religious acts of the Church, but found that the City had compelling interests in maintaining public health,[15] protecting the welfare of children,[16] preventing cruelty to animals,[17] and restrict-

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> private ritual or ceremony nor for the primary purpose of food consumption . . . Slaughter—the killing of animals for food . . . No person shall . . . possess . . . any . . . animal, intending to use such animal for food purposes . . . . This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed . . . . 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.

Lukumi, 113 S. Ct. at 2236 (quoting HIALEAH, FLA; ORDINANCE 87-52 (1987)).

7. *Lukumi*, 113 S. Ct. at 2224 (citing HIALEAH, FLA; ORDINANCE 87-71 (1987)).

8. *Lukumi*, 113 S. Ct. at 2224 (citing HIALEAH, FLA; ORDINANCE 87-72 (1987)).

9. Pichardo held the title of *Italero* and was the Church's leader. *Lukumi*, 113 S. Ct. at 2223.

10. The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceable to assemble, and to petition the Government for redress of grievances." U.S. CONST. amend. I.

11. *Lukumi*, 113 S. Ct. at 2224.

12. *Id.*

13. *Lukumi*, 723 F. Supp. at 1483.

14. *Id.* at 1484.

15. *Id.* at 1485. The district court found a danger to the Church members from the risk of sacrifice and consumption of diseased animals, and a risk to the general public from the improper disposal of animal carcasses. *Id.*

16. *Id.* The court found persuasive the testimony that children who witnessed animal sacrifice were likely to be affected psychologically. *Id.* at 1486.

ing animal slaughter to areas zoned for that purpose.[18] The district court held that the City's compelling interests outweighed the burden imposed upon the Church and, therefore, the ordinances did not violate the First Amendment.[19] Further, the court held that the Church was not entitled to an exemption from compliance with the animal sacrifice ordinances because such an exemption would defeat the City's compelling interests in enacting the ordinances.[20]

Plaintiffs appealed to the Eleventh Circuit Court of Appeals, which affirmed the decision of the district court holding that the ordinances did not violate the United States Constitution.[21] In reviewing the district court's opinion, the circuit court did not apply the standard adopted by the Supreme Court in *Employment Division v. Smith*.[22] Rather, the circuit court held that the standard used by the district court in upholding the ordinances was stricter than the *Smith* standard and, therefore, it was unnecessary to consider *Smith*.[23] The Church appealed and the United States Supreme Court granted certiorari.[24]

The Supreme Court reversed the circuit court's decision and declared unconstitutional the challenged ordinances.[25] The Court began its analysis by noting that the Free Exercise Clause of the First Amendment was applicable to the states by virtue of the Fourteenth Amendment.[26] The Court asserted that religious prac-

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17. *Id.* The district court concluded, based on an expert's testimony, that the animals were kept in poor conditions and killed in an unreliable method, and that the ritual sacrifice was cruel. *Id.*

18. *Lukumi*, 723 F. Supp. at 1486.

19. *Id.* at 1487.

20. *Id.*

21. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 936 F.2d 586 (11th Cir. 1991) (per curiam), *rev'd*, 113 S. Ct. 2217 (1993).

22. 494 U.S. 872 (1990). *Smith* held that a neutral and generally applicable criminal law did not violate the Free Exercise Clause, even if it burdened religious practices. *Smith*, 494 U.S. at 885. However, the Court noted that a prohibition applicable only to religious practices would violate the Free Exercise Clause. *Id.* at 877. See notes 161-175 and accompanying text.

23. *Lukumi*, 113 S. Ct. at 2225. In affirming the district court's decision, the circuit court did not rely on the court's finding of a compelling state interest in protecting the welfare of children. *Id.*

24. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 112 S. Ct. 1472 (1992), *rev'd*, 113 S. Ct. 2217 (1993).

25. *Lukumi*, 113 S. Ct. at 2222. Justice Kennedy, writing for the majority, was joined by Justice Stevens (as to the entire opinion), and Chief Justice Rehnquist, and Justices White, Scalia, and Thomas (as to the entire opinion except the section that discussed the intent of the City in enacting the ordinances). *Id.*

26. *Lukumi*, 113 S. Ct. at 2225. Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction

tices are protected under the First Amendment, even if those practices are abhorrent or incomprehensible to others.[27]

In determining whether the ordinances violated the Free Exercise Clause of the First Amendment, the Court used the standard set forth in *Smith*.[28] Under this test, the Court looked first to whether the ordinances were neutral and of general applicability.[29] The City argued that the language of the ordinances demonstrated that they were neutral, but the Court found that the use of the words "sacrifice" and "ritual" suggested the possibility of unconstitutional infringement on religious practices.[30] The Court then looked beyond the text of the ordinances and determined that the effect of the ordinances as to religious practices was not neutral.[31] The Court found that the ordinances were designed to achieve a "religious gerrymander."[32] Finally, the Court found persuasive the fact that the ordinances were broader than needed to protect the proffered governmental interests.[33]

The Court then determined that the ordinances were not generally applicable.[34] The Court found that because numerous excep-

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thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

27. *Lukumi*, 113 S. Ct. at 2225 (citing Thomas v. Review Bd., 450 U.S. 707, 714 (1981)).

28. *Lukumi*, 113 S. Ct. at 2226 (citing Employment Div. v. Smith, 494 U.S. 872 (1990)).

29. *Lukumi*, 113 S. Ct. at 2226.

30. *Id.* at 2227. The Court noted that while these words did have a secular meaning, the religious origins of these words supported the proposition that the ordinances were enacted to target religious practices. *Id.*

31. *Lukumi*, 113 S. Ct. at 2228. The Court noted that the definition of unnecessary killing excluded virtually every killing of animals that did not take place as part of a religious sacrifice. *Id.* In addition, certain religious practices, such as Kosher slaughter, were recognized as exempt. *Id.*

32. *Lukumi*, 113 S. Ct. at 2228 (citing Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). In the political arena, a gerrymander is a geographical division of a state into voting districts to achieve an unlawful purpose. BLACK'S LAW DICTIONARY 687 (6th ed. 1990). The Court drew a parallel, opining that the ordinances were designed to target Santeria religious practices, and not any legitimate governmental interest. *Lukumi*, 113 S. Ct. at 2228.

33. *Id.* at 2229. The Court reasoned that the public health could be protected by regulations relating to disposal, and that regulating conditions in which animals were kept and methods of slaughter would serve the City's interest in the prevention of cruelty. *Id.* at 2229-30.

34. *Id.* at 2232.

tions were carved out of the ordinances, the ordinances were underinclusive for achieving the purported aims of protecting public health and preventing animal cruelty.[35]

Citing *McDaniel v. Paty*,[36] the Court noted that legislation that targeted religious beliefs was unconstitutional.[37] The Court then commented that a law targeting religious practices must be justified by a compelling state interest.[38] In holding that the ordinances in question could not satisfy this test, the Court focused on the City's failure to narrowly tailor the ordinances.[39] The City's argument that the ordinances advanced a compelling interest was rejected by the Court because the ordinances failed to regulate secular conduct producing the same type of harm.[40]

In a concurring opinion, Justice Scalia explained that the terms "neutral" and "generally applicable" were developed by the Court to test the constitutionality of statutes challenged under the Free Exercise Clause of the First Amendment.[41] He asserted that if a law was neutral and generally applicable, it would not be unconstitutional, even if the law affected religiously motivated activities.[42] Further, Justice Scalia noted that while the requirements of neutrality and general applicability often overlapped, the neutrality prong of the test was used to adjudge the language of the statute and general applicability looked to whether the statute had a discriminatory effect.[43]

In a separate concurrence, Justice Souter agreed with the majority's holding that the challenged ordinances targeted religious

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35. *Id.* With respect to the City's interest in preventing cruelty to animals, the Court found statutory exceptions for hunting, fishing, medical experimentation, killing of stray and abandoned animals, and using poison on private property. *Id.* In regard to the City's concern for public health, the Court found that the disposal of carcasses by hunters and restaurants was unregulated; nor were there regulations directed at hunters regarding consumption of uninspected meat. *Id.* at 2233.

36. 435 U.S. 618 (1978). In *McDaniel*, a provision of the Tennessee Constitution that prohibited ministers from participating in the state constitutional convention as delegates was held to violate the Free Exercise Clause because it was not justified by a compelling state interest. *McDaniel*, 435 U.S. at 629. See notes 139-143 and accompanying text.

37. *Lukumi*, 113 S. Ct. at 2227 (citing *McDaniel*, 435 U.S at 626).

38. *Lukumi*, 113 S. Ct. at 2227.

39. *Id.* at 2234 (citing Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 232 (1987)).

40. *Lukumi*, 113 S. Ct. at 2234.

41. *Lukumi*, 113 S. Ct. at 2239 (Scalia, J., concurring). Chief Justice Rehnquist joined in Justice Scalia's concurrence. *Id.*

42. *Id.*

43. *Id.* In Justice Scalia's opinion, a law that failed one part of the test was likely to fail the other as well. *Id.*

practices and were therefore unconstitutional.[44] However, Justice Souter disagreed with the Court's application of the rule set forth in *Smith*, and argued that this rule ought to be reconsidered in a case involving a neutral and generally applicable law.[45]

Relying on *Wisconsin v. Yoder*,[46] Justice Souter asserted that the Free Exercise Clause of the First Amendment required governmental neutrality.[47] However, Justice Souter argued, the neutrality standard enunciated in *Smith* required only formal neutrality, whereas prior decisions by the Court, such as *Jimmy Swaggart Ministries v. Board of Equalization*[48] mandated substantive neutrality.[49] Finally, Souter noted that because the standards set forth in *Smith* conflicted with the Court's earlier Free Exercise Clause decisions without overruling those decisions, the Court should reconsider the *Smith* test in a future case, although a reconsideration of *Smith* was not necessary to the outcome of the present case.[50]

Justice Blackmun wrote a concurring opinion in which he, like Justice Souter, urged the Court to reconsider its holding in *Smith*.[51] In Justice Blackmun's view, the fact that the ordinances in question targeted religious practices necessarily led to the conclusion that such ordinances would not satisfy the compelling interest test.[52] Blackmun suggested that the decision would have been more difficult if the Church had been seeking an exemption from a neutral, generally applicable law that prohibited cruelty to animals.[53]

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

45. *Id.* In Justice Souter's opinion, the *Smith* test was inapplicable in *Lukumi* because the ordinances discriminated against religious conduct, and on that basis were unconstitutional. *Id.* at 2243.

46. 406 U.S. 205 (1972). In *Yoder*, the Court held unconstitutional a Wisconsin statute mandating attendance at school until age sixteen, as applied to the Amish whose religious principles opposed public education past the eighth grade. *Yoder*, 406 U.S. at 234. See notes 130-138 and accompanying text.

47. *Lukumi*, 113 S. Ct. at 2240 (Souter, J., concurring).

48. 493 U.S. 378 (1990). The *Swaggart* Court upheld a state sales tax as applied to the sale of religious materials. *Swaggart*, 493 U.S. at 392. The Court noted that the tax was neutral in its application and did not substantially burden religious practice. *Id.* at 396. See notes 152-160 and accompanying text.

49. *Lukumi*, 113 S. Ct. at 2242-43 (Souter, J., concurring). Substantive neutrality looks to the effect of the law on religious practices and requires a compelling interest to justify a substantial burden. *Id.* Formal neutrality, by contrast, is satisfied so long as the object of the law was not to prohibit religious practices. *Id.*

50. *Id.* at 2250.

51. *Lukumi*, 113 S. Ct. at 2250 (Blackmun, J., concurring). Justice Blackmun's concurring opinion was joined by Justice O'Connor. *Id.*

52. *Id.* at 2251.

53. *Id.* Justice Blackmun noted that the Court's unanimous ruling in this case should

The Supreme Court first considered whether the Free Exercise Clause of the First Amendment permitted a challenge to the constitutionality of a statute that burdened religious conduct over 100 years ago in *Reynolds v. United States*.[54] In *Reynolds*, the defendant had been convicted of violating a statute that prohibited bigamy in the Territory of Utah, and he asserted his religious beliefs as a defense.[55] The Court held that the Free Exercise Clause prohibited the regulation of religious belief, but was not applicable to conduct.[56] The Court determined that the statute in question regulated conduct and was therefore constitutional.[57] Further, the Court refused to grant an exemption to the defendant from compliance with the statute, asserting that an exemption would render religious doctrine superior to law.[58]

This holding was reaffirmed in *Davis v. Beason*.[59] At issue in *Davis* was the constitutionality of a statute that disqualified polygamists, and members of organizations that advocated polygamy, from voting.[60] Petitioner, a Mormon, was indicted for violating the statute.[61] The Court held that the protection afforded under the Free Exercise Clause of the First Amendment extended only to beliefs, and not to actions otherwise prohibited by law.[62] Because polygamy was prohibited by law, the Court ruled that the statute did not violate the Constitution.[63]

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not be viewed as indicative of the weight the Court would give to a state interest in preventing animal cruelty through a neutral and generally applicable state law. *Id.*

54. 98 U.S. 145 (1878).

55. *Reynolds*, 98 U.S. at 146, 150. The defendant was a member of the Church of Jesus Christ of Latter-Day Saints ("Mormon"), and believed his religious duty compelled polygamy. *Id.* He requested the jury be instructed that if, in its judgment, his marriage was founded on his religious beliefs, then he must be acquitted. *Id.* at 161-62.

56. *Id.* at 166.

57. *Id.*

58. *Id.* at 167.

59. 133 U.S. 333 (1890).

60. *Davis*, 133 U.S. at 346-47. The statute also disqualified insane people, convicted felons, traitors and extortionists. *Id.* at 346.

61. *Id.* at 334. Prior to voting in the Territory of Idaho, the petitioner took an oath, as required by the statute, which included a statement that he was not a member of an organization promoting polygamy. *Id.* at 334. After the petitioner's membership in the Mormon church was discovered, he was indicted for conspiring to subvert the laws of Idaho. *Id.* at 334-35.

62. *Id.* at 342. This limitation was proper in the Court's view because religious freedoms were included in the First Amendment to prevent government from compelling particular religious beliefs. *Id.*

63. *Id.* at 342. The Court's position was quite adamant as evidenced by the following passage:

Probably never before in the history of this country has it been seriously contended

The Supreme Court first recognized that conduct could be protected under the Free Exercise Clause some fifty years later with its decision in *Cantwell v. Connecticut*.[64] In *Cantwell*, the defendant had been convicted of violating a state statute requiring religious or charitable solicitors to obtain a license from the secretary of the public welfare council prior to solicitation.[65] The statute authorized the secretary to issue the license only after determining that the solicitor was acting on behalf of a legitimate religious cause.[66] The state contended that the statute was enacted to advance the state's interest in preventing fraud.[67] The issue before the Court was whether the statute unconstitutionally infringed upon the defendant's free exercise of religion.[68]

The Court held that the Free Exercise Clause of the First Amendment[69] protected conduct attributable to religious beliefs.[70] However, the Court stated that because the state could regulate conduct, the statute must be examined to determine whether it unduly infringed upon the free exercise of religion.[71] The statute was declared unconstitutional because the Court determined that the

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that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

Id. at 343.

64. 310 U.S. 296 (1940).

65. *Cantwell*, 310 U.S. at 301-02. The statute provided:

No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both.

Id. (quoting CONN. GEN. STAT. § 6294 (1937)).

66. *Cantwell*, 310 U.S. at 305. The Court noted that the secretary's determination was necessarily based on his own judgment as to what constituted a religious cause. *Id.*

67. *Id.* at 302.

68. *Id.* at 304-05.

69. According to the Court, the Fourteenth Amendment requirement of due process of law prohibited the states from violating the fundamental rights contained in the First Amendment, including the rights under the Free Exercise Clause. *Id.* at 303.

70. *Id.* at 303. The Court indicated that the Establishment Clause of the First Amendment protected belief, while the Free Exercise Clause protected conduct. *Id.*

71. *Cantwell*, 310 U.S. at 304.

state interest in preventing fraud did not justify the burden placed on the free exercise of religion.[72]

Shortly after *Cantwell*, the Supreme Court considered a challenge to a statute that burdened religious conduct as well as belief. In *West Virginia v. Barnette*,[73] the state board of education had adopted a resolution that required all students and teachers to participate in a salute to the flag of the United States.[74] The appellees objected to the flag salute on religious grounds.[75] For refusing to participate in the flag salute, the children were expelled from school and their parents were charged with allowing their children to be delinquent.[76] The Court addressed the issue of whether the state could constitutionally require a salute to the flag.[77] The Court held that the freedoms set forth in the First Amendment, including the freedom of religion, could only be restricted to protect a lawful state interest that was threatened by grave danger.[78] The Court concluded that the state's interest in national unity did not justify the infringement on First Amendment freedoms created by the compulsory flag salute.[79]

The *Cantwell* Court's test of the validity of a statute burdening the free exercise of religion was applied to a license tax in *Murdock v. Pennsylvania*.[80] In *Murdock*, a city ordinance required all solicitors and canvassers to pay for a license prior to undertaking any activity in the city.[81] Petitioners were convicted of soliciting without a license, and challenged their convictions, arguing that the ordinance interfered with their freedom of religion.[82]

The Court addressed the issue of whether the collection of a li-

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72. *Id.* at 305. In particular, the Court objected to the secretary adjudging the legitimacy of religious causes. *Id.* The Court opined that if the regulation had applied to all solicitors and had not included a test based on religion, it would have been enforceable. *Id.*

73. 319 U.S. 624 (1943).

74. *Barnette*, 319 U.S. at 626.

75. *Id.* at 629. The appellees were Jehovah's Witnesses and believed that saluting the flag was bowing to an image, which was forbidden by their religion. *Id.*

76. *Id.* at 630.

77. *Id.* at 636.

78. *Id.* at 639. The Court noted that the state did not assert that refusal to salute the flag created a danger to the state's interests. *Id.* at 634.

79. *Barnette*, 319 U.S. at 641-42.

80. 319 U.S. 105 (1943).

81. *Murdock*, 319 U.S. at 106. The fee for the license tax was one dollar fifty cents per day, or seven dollars per week. *Id.*

82. *Id.* at 106-07. The petitioners, Jehovah's Witnesses, contended that it was their religious obligation to go from door to door distributing religious literature. *Id.* at 108. The Court noted that the petitioners were clearly engaged in religiously motivated conduct. *Id.* at 109.

cense tax from religious canvassers violated the canvassers' freedom of religion.[83] The Court first determined that the analysis did not depend on whether the petitioners were selling the religious materials or giving the materials to people in exchange for a donation.[84] The Court then noted that the ability to tax a privilege was tantamount to the ability to control that privilege.[85] Because freedom of religion is a protected privilege under the First Amendment, the Court held that the exercise of that privilege could not be taxed by the state.[86] Further, the Court held that the ordinance was not narrowly tailored to advance the purported governmental interest in protecting against the potential abuses of solicitation.[87]

The next year, the Court's view of the scope of religious conduct protected under the First Amendment was revealed in its decision in *Prince v. Massachusetts*.[88] The defendant in *Prince* was convicted of violating a state statute prohibiting child labor, for permitting a nine-year old girl to sell merchandise on a public street.[89] The merchandise the child sold was religious pamphlets.[90]

The Court considered the issue of whether a law prohibiting children from selling merchandise on a public street was constitutional when applied to prohibit religiously motivated activity.[91] The Court asserted that the state had a valid interest in providing

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83. *Id.* at 110.

84. *Id.* at 111. The Court observed that while there was not a bright line to distinguish commercial activity from religious activity, all religious organizations required funds, and this need alone did not render the religious activities commercial enterprises. *Id.*

85. *Murdock*, 319 U.S. at 112.

86. *Id.* at 114.

87. *Id.* at 116. In this regard, the Court noted that the licensing tax was not designed to defray the city's expenses related to solicitation, nor was it intended simply to register and identify solicitors. *Id.*

The next term, in Follett v. Town of McCormick, 321 U.S. 573 (1944), the Court held that the application of a flat license tax, similar to the tax in *Murdock*, to one who earned his living selling religious books was unconstitutional. *Follett*, 321 U.S. at 576-77.

88. 321 U.S. 158 (1944).

89. *Prince*, 321 U.S. at 159-160. The defendant was the aunt and legal guardian of the girl. *Id.* at 159. The child labor statute provided, "No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place." *Id.* at 160-61 (quoting MASS. GEN. L. ch. 149, § 69 (1939)).

90. *Prince*, 321 U.S. at 161. The child, a Jehovah's Witness, believed her salvation was dependent upon the performance of this work. *Id.* at 163.

91. *Id.* The Court noted that the question of whether the child's conduct constituted selling within the meaning of the statute had been answered in the affirmative by the state supreme court and, therefore, was no longer at issue. *Id.*

for the welfare of children.[92] Further, the Court recognized the defendant's right to freely exercise her religion, but indicated that the right was subject to regulation.[93] Therefore, the Court held, the interests of those engaging in the conduct must be balanced against the interests of the state.[94] The Court concluded that the state's interest in protecting children prevailed in this case.[95]

In *Fowler v. Rhode Island*,[96] the Supreme Court addressed for the first time in the context of religious freedom whether a law neutral on its face could nevertheless be discriminatory in application and, therefore, unconstitutional.[97] Defendant was convicted of violating a city ordinance that prohibited political or religious addresses in any city park.[98] The ordinance in question was not employed to preclude church services, nor sermons at those services, from being conducted in the park.[99] Focusing on the distinct treatment accorded different religions under the ordinance, the Court ruled that because the ordinance was employed to prevent religious practices of some groups, but not similar practices of others, the ordinance was unconstitutional.[100]

In *Braunfeld v. Brown*,[101] the Supreme Court demonstrated the limits of the holding in *Fowler*. The Court in this case addressed the issue of whether a law requiring all businesses to remain closed on Sunday, as applied to those observing a Saturday Sabbath, violated the Free Exercise Clause.[102] Appellants were store owners

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92. *Id.* at 165.

93. *Prince*, 321 U.S. at 166.

94. *Id.* at 165.

95. *Id.* at 168. The Court asserted that the state had more power to regulate matters involving children than those involving only adults. *Id.* The Court opined that if the ordinance had prevented adults from selling merchandise on public streets it would not have survived a similar constitutional challenge. *Id.* at 167.

96. 345 U.S. 67 (1953).

97. *Fowler*, 345 U.S. at 69.

98. *Id.* at 68. The ordinance provided:

> No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park.

Id. at 67 (quoting PAWTUCKET, R.I. ORDINANCE). The defendant, a Jehovah's Witness, had addressed a gathering of Jehovah's Witnesses in the park. *Id.* at 68.

99. *Id.* at 69. This point was admitted by the state at oral argument before the Court. *Id.* The trial court found that the defendant's address took place at a religious meeting. *Id.*

100. *Id.* The Court held that the state was not constitutionally entitled to draw a distinction between a sermon and an address as a means to regulate the conduct of some religious groups. *Id.* at 70.

101. 366 U.S. 599 (1961).

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

whose observance of a Saturday Sabbath required them to close their stores from Friday night to Saturday night.[103] They argued that they were entitled to an exemption from the Sunday closing law because the law interfered with the free exercise of their religion by virtue of an economic burden.[104]

The Court first noted that the statute economically burdened all those who would otherwise work on Sunday.[105] The Court then pointed out that the statute did not criminalize any religious conduct.[106] Therefore, the Court concluded that the statute regulated a secular activity and placed only an indirect burden on religious practices.[107]

The Court held that a generally applicable law that imposed an indirect burden on religion was constitutional unless the state could achieve its goals through a law imposing no burden on the practice of religion.[108] Because the economic effect of the legislation was deemed an indirect burden, the Court upheld the statute.[109] Finally, the Court refused to grant the appellants an exemption from the statute, holding that such an exemption might undermine the state's interest in providing a day of rest.[110]

While the Court in *Braunfeld* looked to the nature of the burden the statute imposed on religious conduct, in *Torcaso v. Watkins*[111] the Court set forth a different standard for laws that burden religious belief. In *Torcaso*, the appellant was denied a commission as a Notary Public because he refused to assert that he believed in God, as required by the Maryland Constitution.[112] This require-

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103. *Id.* Appellants, Orthodox Jews, were required by their religion to refrain from all work and close their businesses during the Sabbath. *Id.*

104. *Id.* at 601-02. One of the appellants asserted that the economic loss would force him to close his business if he were subject to the statute. *Id.* at 601.

105. *Id.* at 603.

106. *Id.* at 605. The Court noted that the statute would render appellants' practice of their religion more expensive. *Id.*

107. *Braunfeld*, 366 U.S. at 606.

108. *Id.* at 607.

109. *Id.* at 606. In addition, the Court found the state's interest in providing a day of rest could not be satisfied in any other manner. *Id.* at 607.

110. *Id.* at 608. Further, the Court noted an exemption might create enforcement problems and other difficulties, as those entitled to keep their businesses open on Sunday would have a significant economic advantage over the majority of businesses that were closed on Sunday. *Id.* at 608-09. The dissent asserted that the state interest must be compelling in order to justify a burden on religious practices. *Id.* at 613 (Brennan, J., dissenting). The state's interest in providing a day of rest, without exception, did not, the dissent contended, constitute a compelling state interest. *Id.* at 614.

111. 367 U.S. 488 (1961).

112. *Torcaso*, 367 U.S. at 489. The constitutional provision in question, Article 37 of

ment, the Court asserted, placed a burden on the appellant's religious beliefs.[113] The Court held that any law requiring a declaration of belief in any religious principle was unconstitutional.[114] The Court concluded that the provision of the Maryland Constitution requiring a declaration of belief in God violated the appellant's freedom of religion and was therefore unconstitutional.[115]

The Supreme Court's first significant expansion of the protection afforded religiously motivated conduct occurred in 1963 in the Court's decision in *Sherbert v. Verner*.[116] The appellant in *Sherbert* had been fired because she refused to work on Saturday, her religion's Sabbath.[117] Appellant filed for unemployment compensation when she was unable to find work.[118] She was denied benefits for failing to accept work without good cause.[119]

The Court addressed the issue of whether the denial of benefits to the appellant under the statute violated appellant's right of free exercise of religion.[120] In reviewing prior decisions that implicated the Free Exercise Clause, the Court noted that while religiously motivated activity was subject to regulation, the conduct that had been regulated was conduct that threatened public safety or peace.[121] The Court noted that appellant's conduct, refusing to work on her religion's Sabbath, was not conduct that threatened public safety or peace, and was not subject to regulation on that basis.[122] Therefore, the Court held that appellant's conduct could only be regulated if the regulation did not interfere with the free

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the Declaration of Rights of the Maryland Constitution, provided in part, "[n]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God . . . ." MD. CONST. art. 37.

113. *Torcaso*, 367 U.S. at 496. The Court rejected the state supreme court's view that the state constitutional provision did not compel religious belief because the appellant was not required to become a Notary Public. *Id.* at 495.

114. *Id.*

115. *Id.* at 496.

116. 374 U.S. 398 (1963).

117. *Sherbert*, 374 U.S. at 399. When appellant was originally hired, her employer did not require Saturday work. *Id.* at 399 n.1. The Court noted that her religion, Seventh-Day Adventism, clearly prohibited working on Saturday, and further noted that whether she sincerely held these religious beliefs was not at issue. *Id.*

118. *Id.* at 399-400.

119. *Id.* at 401. The state supreme court rejected the appellant's argument that the denial of benefits interfered with the free exercise of her religion, holding that the statute in question did not restrict the appellant from exercising and observing her religious beliefs. *Id.*

120. *Id.* at 403.

121. *Id.*

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

exercise of her religion, or if the regulation advanced a compelling state interest.[123]

The Court observed that in determining whether the statute interfered with the free exercise of religion, the purpose as well as the effect of the statute must be examined.[124] Because the statute in essence required the appellant to choose between receiving unemployment benefits and maintaining her religious convictions, the Court concluded that the statute burdened the free exercise of appellant's religion.[125] The Court then determined that the state's interest in maintaining the integrity of the unemployment fund and guarding against fraudulent claims did not constitute a compelling state interest.[126] The Court distinguished *Braunfeld v. Brown*[127] by asserting that in *Braunfeld* the state had a substantial interest in providing a day of rest, and that interest could not be achieved without burdening the free exercise of religion.[128] The Court concluded that the state's qualifications for unemployment benefits were unconstitutional when applied so as to deny benefits to an individual whose inability to work was grounded on religious reasons.[129]

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123. *Id.*

124. *Id.* at 404 (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

125. *Id.* The Court noted that this choice was tantamount to fining the appellant for observing a Saturday Sabbath. *Id.* Further, the Court observed that the state statute precluded an employer from requiring an employee to work on Sunday, if the employee's refusal to work was grounded on reasons of conscience. *Id.* at 406.

126. *Id.* at 405. In order for the possibility of fraudulent claims bringing financial ruin on the unemployment fund to constitute a compelling state interest, the Court held that the state would be required to demonstrate that there was no means to guard against this possibility without burdening the free exercise of religion. *Id.* at 407.

127. See notes 101-110 and accompanying text.

128. *Sherbert*, 374 U.S. at 408. Justice Brennan, who wrote for the dissent in *Braunfeld*, wrote the majority opinion in *Sherbert*.

129. *Id.* at 410. The Court's holding in *Sherbert* was applied in other cases challenging the denial of benefits under the Free Exercise Clause. For example, in Thomas v. Review Bd., 450 U.S. 707 (1981), the employee was denied benefits for refusing to be transferred to a plant that made parts for military tanks. *Thomas*, 450 U.S. at 710. He believed making weapons was contrary to his religion. *Id.* at 711. The referee denied the application for unemployment benefits and the state supreme court held that the employee's refusal to work did not constitute good cause. *Id.* at 712. The Supreme Court found no compelling state interest in excluding religious reasons from good cause and reversed. *Id.* at 719.

In Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987), an employee became a Seventh Day Adventist and told her employer that she could not continue to work on Saturday, now her Sabbath. *Hobbie*, 480 U.S. at 138. The Supreme Court again held that the denial of benefits was not justified by a compelling state interest. *Id.* at 141.

In Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829 (1989), an employee who refused to work on Sunday for religious reasons apart from the doctrine of any organized religion was denied benefits. *Frazee*, 489 U.S. at 830. The Court indicated that its previous

The test developed in *Sherbert* was also employed by the Supreme Court in *Wisconsin v. Yoder*.[130] In *Yoder*, the Court addressed the state's ability to require school attendance until the age of sixteen in the face of a free exercise challenge by practitioners of the Amish religion who believed their children should not attend public schools past the eighth grade.[131] As in *Sherbert*, the Court first noted that the Wisconsin statute would survive the challenge only by demonstrating either that the statute did not burden the free exercise of religion or that the burden was justified by a compelling state interest.[132] In deciding whether the statute burdened the free exercise of religion, the Court indicated that facial neutrality was insufficient.[133] The Court determined that the application of the statute to the respondents did burden the free exercise of religion.[134]

The Court then addressed the issue of whether the state's interest in compulsory secondary education was compelling.[135] The Court asserted that this issue required an examination of the interests advanced by the state, and a determination of whether those interests would be undermined by granting an exemption to the respondents.[136] Because respondents provided an alternative training to their children, the Court concluded that the state's interests in one or two more years of compulsory education were not compelling.[137] Therefore, the Court held that the statute mandating school attendance until the age of sixteen as applied to respon-

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decisions in this area were not based on the employee's conformity to the principles of an organized religion, but rather on the sincerity of the individual's religious beliefs. *Id.*

130. 406 U.S. 205 (1972).

131. *Yoder*, 406 U.S. at 207. The statute in question imposed criminal penalties on parents who failed to send their children to school each year until the children reached the age of sixteen. *Id.*

132. *Id.* at 214.

133. *Id.* at 220.

134. *Id.* at 219. In making this determination, the Court first noted that if the opposition to secondary public education was based on lifestyle differences rather than religious grounds, the Free Exercise Clause would be inapplicable. *Id.* at 216. The Court found that secondary public education was inconsistent with the Amish faith because it impeded the child's growth in that religion. *Id.* at 218. Further, the Court held that the imposition of criminal penalties for violating the statute constituted a burden on the free exercise of religion. *Id.*

135. *Yoder*, 406 U.S. at 221.

136. *Id.* The state asserted two interests in maintaining compulsory secondary education: preparing citizens to take part in the political process and fostering self-reliance. *Id.*

137. *Id.* at 225. The Court emphasized the vocational training provided by the Amish and the fact that the Amish accepted compulsory education through the eighth grade when noting that the state had not demonstrated how the granting of an exemption under these circumstances would contravene the state's interest in compulsory education. *Id.* at 235-36.

dents, who objected to public education past the eighth grade for religious reasons, was unconstitutional.[138]

The analysis set forth in *Sherbert* was also employed to resolve a free exercise challenge to a state statute that precluded ministers from being delegates to a state constitutional convention in *McDaniel v. Paty*.[139] The Court first examined whether the statute burdened the free exercise of religion.[140] In holding that the statute did impose such a burden, the Court observed that in order for the minister to practice his religion, he would be required to forego his right to seek legislative office, and in order to seek office, he must surrender his religious practices.[141] The Court then addressed the issue of whether the burden imposed on religion was justified by a compelling state interest.[142] The Court concluded that the prohibition did not advance the state's interest in preventing the establishment of religion, and therefore could not be considered an interest that would justify a burden on religious practices.[143]

The use of the analysis outlined in *Sherbert* did not always result in a determination that the challenged statute violated the Free Exercise Clause of the First Amendment. For example, in *United States v. Lee*,[144] the Supreme Court was faced with a challenge to the payment of social security taxes on religious grounds.[145] The appellee in this case, a member of the Amish religion, employed several other Amish, but refused to pay social security tax and to withhold the employee's share of the tax.[146] The

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138. *Id.* at 234. Dissenting in part, Justice Douglas urged that the religious views of the children in this case were critical to the determination of whether the right to free exercise of religion had been infringed. *Id.* at 242 (Douglas, J., dissenting). He therefore only joined the majority as to those parents whose children had testified at trial that their own religious beliefs opposed public education past the eighth grade. *Id.* at 243.

139. 435 U.S. 618, 620 (1978). The Tennessee Constitution excluded ministers and priests from the state legislature. *McDaniel*, 435 U.S. at 621. The state later enacted a statute that required a candidate be eligible for service in the state legislature in order to qualify as a delegate to the state constitutional convention. *Id.*

140. *Id.* at 626. The Court first indicated that the statute in question purported to regulate conduct and not belief, because the disqualification was based on status as a minister. *Id.* at 627. The Court further indicated that because statutes regulating belief were *per se* in violation of the Free Exercise Clause, courts should be wary of determining that a statute regulated belief. *Id.* at 627 n.7.

141. *Id.*

142. *Id.* at 628.

143. *Id.* The Court indicated that there was simply no basis in experience for believing that ministers in public office would seek to advance the interests of their religion in contravention of the duties of their office. *Id.* at 628-29.

144. 455 U.S. 252 (1982).

145. *Lee*, 455 U.S. at 254.

146. *Id.*

Court first noted that the payment of social security taxes, in light of the appellee's religious beliefs, constituted a burden on appellee's religion.[147] Thereafter, the Court addressed the issue of whether the burden on appellee's religious practices was justified by a compelling interest.[148] The Court determined that the government's interest in maintaining the integrity and solvency of the social security system was a compelling interest.[149] Further, the Court determined that granting an exemption to the appellee would undermine the government's compelling interest.[150] Therefore, the Court concluded that the burden imposed on religion was justified by a compelling governmental interest, and the social security tax, as applied to appellee, did not violate the Free Exercise Clause.[151]

The Court has also upheld statutes under the *Sherbert* analysis by finding that the laws did not burden the free exercise of religion. For example, in *Jimmy Swaggart Ministries v. Board of Equalization*,[152] a state sales tax was applied to all retailers within the state.[153] The appellant, a religious, nonprofit corporation, failed to pay the tax on its sales of merchandise within the state.[154] The appellant objected to the tax, claiming that the tax interfered with the appellant's free exercise of religion.[155] The Court considered whether the application of the tax to a religious organization for the sale of religious merchandise imposed a burden on the free exercise of religion.[156] The Court found that collecting and paying

147. *Id.* at 257. The Amish religion imposed an obligation upon its members to provide for the welfare of each other. *Id.* While the Government argued that this religious doctrine did not conflict with the payment of social security tax, the Court noted that it was not the function of courts to determine the dictates of religion. *Id.*

148. *Id.*

149. *Id.* at 258-59. The Court noted that the success of the social security system was largely dependent upon mandatory participation. *Id.* at 258.

150. *Lee*, 455 U.S. at 260. The Court opined that the similarities between the social security system and the income tax system would lead to numerous claims of exemption from taxes by religious believers if an exemption were allowed in the instant case. *Id.*

151. *Id.* at 261.

152. 493 U.S. 378 (1990).

153. *Swaggart*, 493 U.S. at 381. The only exception permitted for religious groups was an exemption for religious organizations that served meals. *Id.*

154. *Id.* at 381-82. The state reviewed the corporation's records and determined that the corporation owed over $166,000 in taxes, interest and penalties for sales from 1974 through 1981. *Id.* at 383. The appellant did not object to that part of the tax that represented the sale of nonreligious articles. *Id.*

155. *Id.* The appellant also argued that the tax violated the Establishment Clause of the First Amendment by entangling government and religion. *Id.* at 392. The Court rejected this argument. *Id.* at 397.

156. *Id.* at 388.

the tax did not violate the appellant's religious beliefs.[157] Further, the Court indicated that the costs of administering the collection of the tax and any lost sales due to the tax were not "constitutionally significant" burdens on the free exercise of religion.[158] Because the Court determined that the tax did not impose a burden on appellant's religious practices, the Court held that the tax did not violate the Free Exercise Clause.[159] Therefore, the Court concluded, the appellant was not constitutionally entitled to an exemption from the payment of the state sales tax.[160]

From *Sherbert* to *Swaggart*, the Supreme Court had consistently applied the same framework for analyzing Free Exercise Clause cases. More than twenty-five years after *Sherbert*, the Supreme Court abandoned this analysis in *Employment Division v. Smith*.[161] In *Smith*, two employees were fired after acknowledging that they had taken peyote as part of a religious rite.[162] The employees' claims for unemployment benefits were denied because state law considered peyote use to be criminal, and therefore, the terminations were based on misconduct.[163] The Supreme Court considered the issue of whether the statute criminalizing the use of peyote, as applied to the respondents' religious practice, violated the Free Exercise Clause of the First Amendment.[164]

The Court first asserted that prior decisions involving free exercise challenges to denial of unemployment benefits were inapplicable to this case because the prior decisions did not involve conduct that was illegal.[165] The Court then asserted that it had never ex-

157. *Id.* at 391.

158. *Swaggart*, 493 U.S. at 391. The Court did note that if the tax rate was substantially increased so that it prevented appellant's religious practices, then the tax could constitute a burden on the free exercise of religion. *Id.* at 392.

159. *Id.*

160. *Id.*

161. 494 U.S. 872 (1990).

162. *Smith*, 494 U.S. at 874. The employees were members of the Native American Church, and had used peyote as part of a ceremony there. *Id.* This case had been before the Supreme Court previously. In Employment Div. v. Smith, 485 U.S. 660 (1988), [hereinafter *Smith I*] the Court remanded the case to the state supreme court for a determination of whether the use of peyote was criminal in all circumstances, including religious uses. *Smith I*, 485 U.S. at 674. The Oregon Supreme Court held there were no exceptions for religious uses of peyote. *Smith*, 494 U.S. at 876. The Oregon Supreme Court then determined that the state's interest in the solvency of its unemployment fund in this instance was not compelling and therefore did not justify the burden that the denial of benefits placed on the employees' religious practices. *Id.*

163. *Id.* at 874-75. Respondents worked for a drug rehabilitation program. *Id.* at 874.

164. *Id.* at 876.

165. *Id.*

empted a religious believer from compliance with a valid state prohibition.[166] In reviewing its previous decisions, the Court explained that only when the claim of freedom of religion had been combined with some other freedom guaranteed under the United States Constitution, had a neutral and generally applicable state law been invalidated as applied to religious conduct.[167]

The Court held that because the state law in question was neutral and generally applicable, did not regulate religious belief, and did not interfere with any other constitutional freedom, it did not violate the Free Exercise Clause.[168] Further, the Court held that the state law need not be justified by a compelling interest in order to deny respondents an exemption from the application of that law.[169]

In a concurring opinion, Justice O'Connor urged the Court not to abandon its previous free exercise jurisprudence.[170] Applying the Court's pre-*Smith* free exercise analysis, Justice O'Connor noted that the statute did burden the free exercise of religion.[171] She then indicated that the state had a compelling interest in both prohibiting the possession and use of peyote and in not exempting respondents from that prohibition.[172] Thus, in Justice O'Connor's view, the same result could have been reached by employing the Court's traditional free exercise analysis in this case.[173]

In a dissenting opinion, Justice Blackmun also urged the Court to apply its traditional free exercise analysis.[174] With regard to the instant case, Justice Blackmun concluded that the state did not have a compelling interest that justified refusal to exempt religious use of peyote from the state prohibition.[175]

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166. *Id.* at 878-79.

167. *Smith*, 494 U.S. at 881. The Court cited Cantwell v. Connecticut, 310 U.S. 296 (1940) (see notes 64-72 and accompanying text), as an example of a case invalidating a state law because the law impeded both freedom of religion and freedom of speech. *Smith*, 494 U.S. at 881 n.1. The Court also cited Wisconsin v. Yoder, 406 U.S. 205 (1972) (see notes 130-138 and accompanying text), asserting that its decision in *Yoder* was based on the combination of freedom of religion and the rights of parents. *Smith*, 494 U.S. at 881 n.1.

168. *Id.* at 882.

169. *Id.* at 885. The Court opined that if religious exemptions were granted unless the statute was justified by a compelling state interest, anarchy would soon follow as exemptions would be sought from virtually every societal obligation. *Id.* at 888.

170. *Id.* at 896 (O'Connor, J., concurring).

171. *Id.* at 903.

172. *Id.* at 905.

173. *Id.* at 907.

174. *Smith*, 494 U.S. at 909 (Blackmun, J., dissenting). Justice Brennan and Justice Marshall joined in Justice Blackmun's dissent. *Id.* at 907.

175. *Id.* at 921. In holding that the state did not have a compelling interest in prohib-

In response to the Court's decision in *Smith*, Congress enacted the Religious Freedom Restoration Act ("Act").[176] The stated purpose of the Act is to require courts to use the pre-*Smith* compel-

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iting the religious use of peyote, Justice Blackmun focused on the absence of prosecutions of religious users of peyote and on the lack of evidence that anyone had been harmed by such use. *Id.* at 911-12.

176. The Religious Freedom Restoration Act, provides, in part:

Sec. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) Findings. — The Congress finds that —

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes.—The purposes of this Act are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Sec. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) In General.— Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the lease restrictive means of furthering that compelling governmental interest.

(c) Judicial relief.—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing arising under article III of the Constitution . . . .

Sec. 6. APPLICABILITY.

(a) In General.—This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act . . . .

Sec. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion. . . .

Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 197 Stat. 1488 (1993).

ling interest test in free exercise cases.[177] The findings set forth in the Act indicate that Congress believed the *Smith* decision eviscerated the First Amendment guarantee of free exercise of religion.[178]

In reviewing the history of the Court's decisions in cases arising under the Free Exercise Clause of the First Amendment, the evolution of the Court's analysis is clear. From the earliest cases, the Court has always maintained that the Free Exercise Clause protects absolutely an individual's freedom of belief. There does not appear to be any state interest that would justify any restriction on belief. However, until the Free Exercise Clause was understood to protect conduct as well as belief, in practice, its protections were minimal.[179] Indeed, in light of the protection afforded by virtue of the other First Amendment freedoms of speech and the press, as well as the prohibition against the establishment of religion, the Free Exercise Clause would seem superfluous if it were not intended to protect religious conduct.

From its earliest cases, the Court has also consistently held that conduct is subject to regulation. Beginning with its decision in *Cantwell v. Connecticut*,[180] the Court recognized that conduct that flowed from religious beliefs could be protected under the Free Exercise Clause. Later, the Court developed a cogent analysis for determining whether a statute regulating conduct violated the Free Exercise Clause. First, the Court would determine whether the statute imposed a burden on the free exercise of religion. This required a showing by the religious believer that some statutory requirement or prohibition was contrary to the believer's religious practices. If the statute imposed a burden on religion, the Court would then consider whether the statute advanced a compelling state interest and whether granting exemptions from compliance with the statute would undermine that compelling interest. By requiring the state to justify a burden on religion with a compelling interest, the Court demonstrated its commitment to upholding the First Amendment ban on laws prohibiting the free exercise of religion.

Surprisingly, the Supreme Court abandoned this analysis in *Em-*

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177. *Id.*

178. *Id.*

179. For example in Davis v. Beason, 133 U.S. 333 (1890), freedom of belief was insufficient to protect a member of the Mormon church from being disqualified from voting because Mormons believed in and advocated polygamy. *Davis*, 133 U.S. at 342 (see notes 59-63 and accompanying text).

180. See notes 64-72 and accompanying text.

ployment Division v. Smith.[181] Instead of resolving the issue of whether the statute imposed a burden on religious conduct and whether that burden was justified by a compelling interest, the Court declared that neutral, generally applicable laws were beyond the reach of the Free Exercise Clause. In announcing this decision, the Court attempted to explain away and distinguish decades of free exercise jurisprudence.

The difficulties with the Court's decision in *Smith* cannot be fully appreciated in the instant case, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.* Because *Lukumi* involved that rare case in which a law was enacted to prohibit the free exercise of religion, the outcome would likely have been the same under either the pre-*Smith* or the *Smith* analysis. However, the Court's reasoning in *Lukumi* demonstrates the narrowing of the Court's focus in cases invoking the Free Exercise Clause.

Under the pre-*Smith* analysis, the Court first would have determined that the City's ordinances imposed a burden on the free exercise of the Church's religion. Then, the Court would have examined whether there was a compelling state interest to justify the ordinances and to justify the refusal to exempt the Church from compliance with the ordinances. Certainly, the number of exemptions included in the ordinances[182] would have been a sufficient basis to determine that the City did not have a compelling interest in refusing to grant the Church an exemption. Therefore, using the pre-*Smith* analysis, the Court would likely have concluded that the ordinances violated the Free Exercise Clause.

This conclusion was also reached in *Lukumi* by using the standard set forth in *Smith.* The Court discussed at length the issue of whether the ordinances were neutral and generally applicable. Finding the ordinances to be neither, the Court then examined whether they were justified by a compelling governmental interest. In this part of the analysis the rest of the *Smith* "test" is revealed: if a law is not neutral and generally applicable, it will not be justified by a compelling interest, because compelling interests are neutral and generally applicable.[183] Therefore, the *Smith* test, as explained and applied by the Court in *Lukumi,* is a mere pronouncement that neutral and generally applicable laws will be upheld and those that are not neutral and generally applicable will

181. See notes 161-175 and accompanying text.
182. See note 35 for a list of exemptions.
183. *Lukumi,* 113 S. Ct. at 2234.

be struck down.

In *Lukumi*, the Court was compelled to reach the conclusion that there was no interest sufficient to justify the ordinances by virtue of the Court's determination that the ordinances were enacted to suppress religion, out of hostility to the religion's followers, and that the ordinances targeted religious practices and prohibited more conduct than necessary to achieve their goals.[184] However, as Justice Souter noted in his concurring opinion, the Court's typical cases involving the Free Exercise Clause concern neutral and generally applicable laws, rather than laws designed to prohibit religious practices.[185]

Thus, while the application of *Smith* to this case did not appear to affect the result, the same may not hold true in future cases where seemingly neutral and generally applicable laws impose serious burdens on the free exercise of religion. Under *Smith*, the severity of the burden and the interest of the state are irrelevant, provided the law satisfies neutrality and general applicability.

The Religious Freedom Restoration Act[186] ("Act") attempts to reinstate pre-*Smith* jurisprudence; however, the Act may exceed the scope of congressional legislative power. The Act attempts to impose an interpretation of the United States Constitution on the courts. From the time of *Marbury v. Madison*,[187] it has been a settled principle that the Supreme Court is the ultimate authority on the meaning of the United States Constitution. Thus, any congressional intrusion into the Court's sphere must have constitutional justification.

Arguably, such justification might lie in congressional power to enforce the provisions of the Fourteenth Amendment.[188] In *Katzenbach v. Morgan*,[189] the Supreme Court held that Congress had broad power under Section 5 of the Fourteenth Amendment to enforce the provisions of the Fourteenth Amendment.[190] The question before the Court was whether Congress could prohibit the en-

184. *Id.* at 2231.

185. *Id.* at 2243 (Souter, J., concurring).

186. See notes 176-178 and accompanying text.

187. 5 U.S. (1 Cranch) 137 (1803).

188. Section 5 of the Fourteenth Amendment provides, "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV.

189. 384 U.S. 641 (1966).

190. *Katzenbach*, 384 U.S. at 650. At issue in *Katzenbach* was a provision of the Voting Rights Act that prohibited enforcement of certain state literacy requirements for voting. *Id.* at 643-44.

forcement of state laws even if the Court did not find those laws to be in violation of the Equal Protection Clause of the Fourteenth Amendment.[191] The Court held that congressional power under Section 5 of the Fourteenth Amendment is akin to the Article I power under the Necessary and Proper Clause and is, therefore, very broad.[192]

While there appears to be a common justification for congressional power to enact legislation to ensure equal protection and free exercise of religion, there are significant differences. Both the Equal Protection Clause and the First Amendment are enforceable against the states by virtue of the Fourteenth Amendment; the Equal Protection Clause is part of the Fourteenth Amendment, and the Supreme Court has held that First Amendment protections apply to the states by virtue of the Due Process Clause of the Fourteenth Amendment. However, while the Voting Rights Act would flow directly from Congress' ability to enforce the Equal Protection Clause, the Religious Freedom Restoration Act purports to alter the Supreme Court's interpretation of the First Amendment through Congress' power to enforce the Fourteenth Amendment. Such congressional legislation is unprecedented.

If the Act does exceed Congress' legislative authority, *Smith* will remain the standard by which cases invoking the Free Exercise Clause of the First Amendment will be decided. Sadly, that standard provides precious little protection for individuals whose religious conduct is burdened by neutral governmental enactments. In the wake of *Smith*, the only statutes that will be struck down are those which, like the ordinances in *Lukumi*, target religious practices. *Lukumi* demonstrates the Supreme Court's limited view of the scope of the Free Exercise Clause—if the ordinances in question had been written in a more neutral and generally applicable fashion, the fact that the ordinances outlawed the central religious practice of the Church would have been of no moment.

Kimberly A. Taylor

191. *Id.* at 649. See note 26 for the text of the Equal Protection Clause of the Fourteenth Amendment.

192. *Id.* at 650.