FREE EXERCISE FIDELITY AND THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993: WHERE WE ARE, WHERE WE HAVE BEEN, AND WHERE WE ARE GOING

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I. INTRODUCTION: WHERE WE ARE

The Religious Freedom Restoration Act of 1993[1] ("RFRA") resolves an important issue raised by recent Supreme Court decisions: when laws interfering with the free exercise of religious conduct go too far.[2] While consistently holding that the right to exercise religious conduct is not absolute,[3] the Court continues to struggle with the related issue of whether so-called "neutral" laws, laws not intended to suppress a particular religious practice,[4] trigger strict scrutiny.[5] Indeed, two of the Court's leading

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[1]Pub. L. No. 103-141, 107 Stat. 1488 (enacted November 16, 1993).

[2]The Supreme Court has traditionally drawn an important distinction between religious beliefs and religious conduct. *See infra* notes 133-43 and accompanying text. The scope of RFRA is expressly limited to religious conduct. *See* 42 U.S.C. § 2000bb-3 (1993).

[3]*See infra* notes 133-43 and accompanying text.

[4]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2227 (1993) (invalidating municipal laws prohibiting ritual animal sacrifice after determining that the laws were intended to suppress the practice of the Santeria faith); Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990) (upholding criminal prohibition against peyote use as neutral because not intended to target particular religious practice); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1213 (5th Cir. 1991) (reasoning that criminal prohibition against peyote use by all except Native Americans was neutral because it was intended to reach socially harmful conduct); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 279-80 (Alaska 1994) (concluding that fair housing law was neutral because it was intended to eliminate discrimination in the rental housing market); Mississippi High Sch. Activities Ass'n, Inc. v. Coleman, 631 So.2d 768, 776 (Miss. 1994) (upholding high school eligibility rule as neutral because it was intended to prevent odious recruiting practices). *See also infra* notes 155-201 and accompanying text.

[5]*See infra* notes 155-201 and accompanying text. Notably, the Court has adopted various formulations of the compelling interest test required by the Free Exercise Clause. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257-58 (1982) ("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 v. Verner, 374 U.S. 398, 406 (1963) (holding that substantial government interference with religious liberty must be justified by a "compelling interest").

decisions in this area, *Employment Division, Department of Human Resources of Oregon v. Smith*[6] and *Wisconsin v. Yoder*,[7] provide conflicting answers.[8]

RFRA resolves this issue by prohibiting substantial interference with the exercise of religious conduct, even if neutral towards religion, unless necessary to further a compelling state interest.[9] It would be a mistake, however, to conclude that RFRA is addressed merely to this concern. While important, Congress is really responding to the Court's controversial *Smith* opinion and to the Court's cramped reading of the Free Exercise Clause[10] in particular.[11] "RFRA," one court has recently observed, "is a clear

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These differences, however, are merely semantic, since the basic two-prong test remains the same: laws imposing a substantial burden on religious exercise which are not neutral toward religion or generally applicable must be "justified by a compelling interest that cannot be served by less restrictive means." *Smith*, 494 U.S. at 907 (Blackmun, J., dissenting).

[6]494 U.S. 872 (1990).

[7]406 U.S. 205 (1972).

[8]*See Hialeah*, 113 S. Ct. at 2242-47 (Souter, J., concurring in part and concurring in the judgment). This conflict is addressed in full *infra* notes 158-205 and accompanying text. Suffice it to say that while *Smith* insulates neutral and generally applicable laws from free exercise review, *Yoder* does not. *Compare Smith*, 494 U.S. at 878-79 *with Yoder*, 406 U.S. at 220.

[9]RFRA provides, in pertinent part:

> 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) of this section.
>
> (b) Exception.
> — Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person —
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> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1 (1993).

[10]The First Amendment commands, in pertinent part, 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 v. Connecticut, 310 U.S. 296, 303 (1940) (applying the First Amendment to the States through the Fourteenth Amendment).

[11]*See* 42 U.S.C. § 2000bb (1993). The Court's free exercise jurisprudence and *Smith* opinion are discussed in *infra* notes 155-201 and accompanying text.

expression of Congressional intent to protect the free exercise of religion against substantial government infringement without compelling justification."[12] To this effect, RFRA is best understood as a message from Congress reiterating our "Nation's fundamental commitment to individual religious liberty."[13]

This Article attempts to explain the significance of RFRA by contrasting statutory and first amendment free exercise. Initially, though, it is important to observe that RFRA does not overrule *Smith*, at least not technically,[14] but instead offers a separate statutory alternative to the First Amendment.[15] Two avenues of relief, in other words, are now available. This is important because, when evaluating RFRA, it is necessary to appreciate the fact that *Smith* will continue to control the Court's analysis under the Free Exercise Clause.

With this in mind, this Article will be structured in the following manner. Section II, "Where We Have Been," reviews today's free exercise law. The main focus of this section is on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[16] the Court's most recent free exercise decision and first Supreme Court case to confront the "*Smith* rule."[17] The Court's *Smith*

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[12]Lawson v. Dugger, 844 F. Supp. 1538, 1541 (S.D. Fla. 1994). *See also* President Bill Clinton, Remarks at Signing Ceremony for the Religious Freedom Restoration Act (Nov. 16, 1993), *in* U.S. NEWSWIRE, Nov. 16, 1993, National Desk (noting that the judicial trend since *Smith* has been against claims for religious liberty and stating that "[t]his act will help reverse that trend — by honoring the principle that our laws and institutions should not impede or hinder, but rather should protect and preserve fundamental religious liberties").

[13]Employment Div. v. Smith, 494 U.S. 872, 891 (1990) (O'Connor, J., concurring in part and concurring in the judgment).

[14]*See infra* notes 267-79 and accompanying text (discussing plaintiffs' increased likelihood of success and freedom from uncertainty under RFRA).

[15]*See* 42 U.S.C. § 2000bb-1 (1993). This is not the place for an extended discussion of Congress's authority to interpret the Constitution. Suffice it to say that the text of the Fourteenth Amendment vests Congress with the authority to enforce its provisions and, thus, also to enforce the First Amendment. *See* Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 709 (1992) [hereinafter McConnell, *Accommodation of Religion*]. For a comprehensive review of the relationship between federal legislative authority and the principle of judicial review, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14 (2d ed. 1988).

[16]113 S. Ct. 2217 (1993).

[17]*See id.* at 2225-31. By the "Smith rule," I mean the rule insulating neutral and generally applicable laws from free exercise review. As Justice Souter explained in a concurring opinion in *Hialeah*, this controversial rule must be distinguished "from the noncontroversial principle, also expressed in *Smith* though established long before, that the Free Exercise Clause is offended when prohibiting religious exercise results from a law that is not neutral or generally applicable." *Id.* at 2240 (Souter, J., concurring in part and concurring in the judgment).

opinion has already received ample attention.[18] Part A reviews the *Hialeah* litigation, Part B the basic framework of free exercise doctrine. Part C then explores the implications of the *Hialeah* opinion.

Observing that the statute offers distinct practical advantages, and thus that plaintiffs are now likely to favor statutory claims,[19] Section III, "Where We Are Going," turns to a discussion of RFRA's significance. In short, I argue that RFRA represents a welcome response to recent Supreme Court and lower court decisions. My argument is essentially as follows. By tolerating the suppression of minority religious practices, the Court's jurisprudence eschews the original purpose of the Free Exercise Clause: fostering religious pluralism.[20] *Hialeah*, though limiting the scope of the *Smith* rule,[21] does not change this result.[22] RFRA, in contrast, is faithful to this original purpose, promoting religious pluralism by mandating special protection for, not indifference to, those religious practices not shared by the majority.[23] I believe that RFRA is a welcome development, because, like Justice Blackmun:

> I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty — and they could not have thought religious intolerance "unavoidable,"

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[18] *See generally* Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 849 (1992) (criticizing *Smith* because the decision "creates the legal framework for persecution") [hereinafter Laycock, *Summary and Synthesis*]; Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672 (1992) (suggesting that *Smith* may be just another drug case); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (arguing in defense of *Smith*); Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329 (1991); James D. Gordon, III, *Free Exercise on the Mountain Top*, 79 CAL. L. REV. 91, 96-97 (1991) (criticizing the Court's legal reasoning and interpretation of the Free Exercise Clause); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) (criticizing the Court's legal analysis in *Smith*) [hereinafter McConnell, *Free Exercise Revisionism*]; Douglas Laycock, *The Supreme Court's Assault On Free Exercise, And The Amicus Brief That Was Never Filed*, 8 L.J. & REL. 102-04 (1990) (arguing that *Smith* is "inconsistent with the original intent . . . , inconsistent with the constitutional text . . . , inconsistent with the doctrine under the constitutional clauses . . . , and inconsistent with precedent").

[19] *See infra* notes 266-79 and accompanying text.

[20] *See infra* notes 280-318 and accompanying text.

[21] *See infra* notes 231-45 and accompanying text.

[22] *See infra* notes 248-57 and accompanying text.

[23] *See infra* notes 310-15 and accompanying text.

for they drafted the Religion Clauses precisely in order to avoid that intolerance.[24]

II. WHERE WE HAVE BEEN

This section reviews the basic framework of contemporary doctrine. We begin, however, with a comprehensive discussion of the Supreme Court's *Hialeah* decision.[25] This is necessary because the remaining portions of this section, Parts B and C, draw heavily on the Court's analysis in *Hialeah.*

A. THE *HIALEAH* LITIGATION

1. SANTERIA

Santeria is a religion incorporating elements of both the African religious traditions of the Yoruba people and Roman Catholicism.[26] The two religions were fused when hundreds and thousands of the Yoruba people were enslaved by the Spanish government and transported to Cuba during the 16th, 17th, and 18th centuries.[27] The Spanish government often justified slavery as the "business of saving souls,"[28] and captured slaves were expected to become Christians.[29] The practice of Santeria only survived because the

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[24]Employment Div. v. Smith, 494 U.S. 872, 909 (1990) (Blackmun, J., dissenting).

[25]For further discussion of the Court's *Hialeah* decision, see Rod M. Fliegel, Comment, *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*, 23 GOLDEN GATE U. L. REV. 599 (1993); Paul L. Bader, Note, *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 44 MERCER L. REV. 1357 (1993); Robert A. Torricella, Jr., Comment, *Babalu Aye Is Not Pleased: Majoritarianism and the Erosion of Free Exercise*, 45 U. MIAMI L. REV. 1061 (1991).

[26]*See generally* MIGENE GONZÀLEZ-WIPPLER, SANTERIA: THE RELIGION — A LEGACY OF FAITH, RITES, AND MAGIC (1989) [hereinafter GONZÀLEZ-WIPPLER, SANTERIA: THE RELIGION] (providing a general overview of the Santeria religion, including its history, tradition, and practitioners); MIGENE GONZÀLEZ-WIPPLER, THE SANTERIA EXPERIENCE (1982) (recounting the author's childhood initiation into the ways and practices of the Santeria religion).

[27]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1469-70 (S.D. Fla. 1989), *aff'd without op.*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993).

[28]*Id.* at 1469 n.3.

[29]*Id.* at 1469.

captured slaves began to express their faith through Catholic Saints and Symbols.[30]

Mainly, Santeria focuses on the relationship between the individual and God and, in turn, on the relationship between the individual and the "orishas,"[31] who help fulfill each individual's destiny from God.[32] Ritual animal sacrifice plays an integral role in this relationship as the principal means whereby each individual nurtures a personal relationship with the orishas, who depend on the sacrifice for survival.[33] These sacrifices include, but are not limited to, goats, sheep, pigs, chickens, doves, and other small fowl.[34]

Priests, trained through oral apprenticeship, perform the sacrificial ceremony.[35] The ceremony, which children are permitted to attend,[36] is as

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[30]*Id.* at 1469-70. "For example," the Court explained, "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 1470 n.4.

[31]In tracing its history, Gonzàlez-Wippler explained that "[t]he term *orisha* is of uncertain origin. Some anthropologists believe it is derived from the word *asha*, meaning 'religious ceremony.' Others claim it is formed of the roots *ri* (to see) and *sha* (to choose)." GONZÀLEZ-WIPPLER, SANTERIA: THE RELIGION, *supra* note 26, at 2.

More specifically, orishas are Yoruban anthropomorphic deities, not dissimilar to Greek mythological figures and range in numbers among cultures and regions. *Id.* at 2, 3, 14-15, 24-75, 226-37. They represent certain functions and powers and are worshipped with icons, food, and other representational objects. *Id.*

[32]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2222 (1993).

[33]*Id.*

[34]*Id.*

[35]Church of Lukumi Babalu Aye, Inc. v. City Hialeah, 723 F. Supp. 1467, 1471 (S.D. Fla. 1989), *aff'd without op.*, 936 F.2d 586 (11th Cir. 1991) *rev'd*, 113 S. Ct. 2217 (1993). Apprentice priests begin learning through observation and eventually graduate to practical training. *Id.* at 1472. Eventually, the apprentice priest assists in these sacrifices, as "[t]he 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. Apprentice priests, however, are not trained to determine whether sacrificial animals are disease free. *Id.* at 1471 n.12. Rather, animals are expected to be clean and healthy. *Id.* at 1471.

[36]The City offered expert testimony showing that exposing children to the sacrificial ceremony would be detrimental to their mental health. *Id.* at 1475. The City's expert testified that observing the sacrificial ceremony "would be likely to increase the probability that the child would behave aggressively and violently, not just against animals, but against humans." *Id.* The expert explained further that "the observation would be likely to produce psychological processes that promote greater tolerance of aggressive violent behavior," specifically desensitization, tolerance, and imitation. *Id.* This testimony was not based on specific examinations or interviews, but rather on the expert's research relating to the

follows. The animal is first placed on a table with its head facing away from the priest.[37] 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.[38] The objective of the procedure is to sever both of the animal's main arteries.[39] Blood from the animal is drained into clay pots placed underneath the animal's head.[40] When the draining is complete, the animal is decapitated and removed from the area.[41] Until the carcass is removed, the blood is placed before the deities.[42] Most animals, but not all, are eventually consumed.[43] The Court described how "between 12,000 and

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development of aggressive and violent behavior in adults and children. *See id.* at 1475-76. The court rejected evidence offered disputing this correlation because children witnessing the sacrificial ceremony are usually prepared for the event. *Id.* at 1476.

[37] *Id.* at 1472.

[38] *Id.* The City offered expert testimony establishing that the sacrificial killing was not humane. *Id.* at 1472-73. Specifically, the City's expert testified that the method of killing was not humane because there was no guarantee that both carotid arteries could be severed simultaneously. *Id.* at 1473. The City's expert testified further that animals would experience pain and fear both before and during the actual sacrifice. *Id.* Based on this testimony, the court concluded that the ceremony was not a "reliable or painless" method for sacrificing animals. *Id.* at 1472.

[39] *Id.*

[40] *Id.* at 1473. Though perhaps a deviant practice, the blood may be placed on the adherents, consumed, or left in the clay pots for long periods of time. *Id.* at 1473 n.21. At trial, at least one witness testified that he had been offered blood to drink as a child, but refused. *Id.*

[41] *Id.* at 1473. There appear to be no special rules governing disposal of animal carcasses. *Id.* at 1471. Animal burial or incineration are similarly not prohibited. *Id.* Prior to trial, discarded carcasses had been discovered in public places, including near rivers and canals, by stop-signs, and on the lawns and door-steps of private homes. *Id.* at 1474 n.29. The district court concluded that improperly discarded animal carcasses present a health hazard. *Id.* at 1474-75. The court explained that animal remains create a health hazard "because the remains attract flies, rats and other animals. Both vectors and reservoirs 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." *Id.* at 1474-75. Significantly though, at the time of trial, no instances of infectious disease originating from animal remains had been documented. *Id.* at 1474.

[42] *Id.* at 1473.

[43] *Id.* at 1471. Animals used in healing rites, usually a single animal, are almost never consumed. *Id.* at 1471 n.11. The illness is apparently assumed 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 disposed of entirely." *Id.* at 1474. In death rites, usually requiring several animals, the animals are similarly not consumed. *Id.* at 1474 n.26.

18,000 animals are sacrificed in initiation rites alone [in Florida] each year."[44]

Though widespread, Santeria is still not socially accepted outside of Africa. To the contrary, "Santeria has remained an underground religion because most practitioners fear that they will be discriminated against."[45] In modern times, the practice of Santeria has thus "taken on a private, personal tone."[46]

2. FACTUAL BACKGROUND

In April 1987, the plaintiffs, the Church of the Lukumi Babalu Aye ("Church") and its president, Ernesto Pichardo, instituted measures necessary to commence operation of a Santeria house of worship on leased property within the City of Hialeah, Florida.[47] The goal was "to bring Santeria into the open as an established and accepted religion."[48]

Upon learning of the Church's announced intentions, the Hialeah City Council held an emergency public session on June 9, 1987.[49] During this meeting, the Council enacted Ordinance 87-40, which incorporated Florida's animal cruelty law into the Hialeah City Code.[50] At the time, Florida law prohibited the "unnecessary" killing, torture, or torment of any animal.[51]

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[44]*Id.* at 1473 n.22. The court's conclusion was based on testimony that anywhere from twenty-four to fifty-six animals are sacrificed in an initiation ceremony, and that as many as 600 initiation ceremonies are performed annually in Southern Florida. *Id.* at 1474, 1473 n.22.

[45]*Id.* at 1470.

[46]*Id.* In fact, "for 400 years, Santeria was an underground religion practiced mostly by slaves and descendants of slaves." *Id.*

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

[48]*Id.*

[49]*Id.*

[50]*Id.* HIALEAH, FLA., ORD. 87-40(1) (1987). In pertinent part, Ordinance 87-40 reads:

> Section 1. The Mayor and City Council of the City Hialeah, Florida, hereby adopt Florida Statute, Chapter 828 — "Cruelty To Animals" (copy attached hereto and made a part hereof), in its entirety (relating to animal control or cruelty to animals), except as to penalty.

Id.

[51]FLA. STAT. Ch. 828, § 828.12 (West 1987) ("Statute 828"). Specifically, Statute 828 provides:

The remaining ordinances, Ordinance 87-52,[52] Ordinance 87-71,[53] and Ordinance 87-72,[54] were enacted during September 1987. In substance, the ordinances constituted a criminal prohibition against ritual or ceremonial animal sacrifice.[55] These ordinances were approved unanimously.[56]

Shortly thereafter, 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."[57] According to the district court, the Church

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(1) A person who unnecessarily overloads, overdrives, 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 vehicles, or otherwise, any animal in a cruel or inhumane manner, is guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or by a fine of not more than $5,000, or both.

(2) A person who tortures any animal with intent to inflict intense pain, serious physical injury, or death upon the animal is guilty of a felony of the third degree, punishable as provided in § 775.082 or by a fine of not more than $10,000, or both.

Id.

[52]Ordinance 87-52 prohibited the possession, sacrifice, or slaughter of animals for food consumption purposes. HIALEAH, FLA., ORD. 87-52, § 6-9(1) (1987). Sacrifice was defined as the act of "unnecessarily kill[ing], torment[ing], tortur[ing], or mutilat[ing] an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." HIALEAH, FLA., ORD. 87-52, § 6-8(2) (1987). Application of Ordinance 87-52 was restricted to any individual or group 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." HIALEAH, FLA., ORD. 87-52, § 6-9(2) (1987). The Ordinance exempted the slaughter of animals specifically raised for food purposes by a licensed establishment. HIALEAH, FLA., ORD. 87-52, § 6-9(3) (1987).

[53]Ordinance 87-71 prohibited animal sacrifice within Hialeah's city limits. HIALEAH, FLA., ORD. 87-71 (1987). "Sacrifice" is likewise defined as the "unnecessary" killing of an animal. HIALEAH, FLA., ORD. 87-71, §§ (1) and (2) (1987).

[54]Ordinance 87-72 prohibited animal slaughter on premises within the City, "except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house." HIALEAH, FLA., ORD. 87-72(3) (1987). The Ordinance exempted the slaughter of small numbers of hogs and/or cattle in accordance with state law. HIALEAH, FLA., ORD. 87-72(6) (1987).

[55]A violation of any of the four ordinances was punishable by fines not exceeding $500 or imprisonment not exceeding sixty days, or both. HIALEAH, FLA., ORD. 87-40(1) (1987); HIALEAH, FLA., ORD. 87-52, § 6-9(3) (1987); HIALEAH, FLA., ORD. 87-71(7) (1987); HIALEAH, FLA., ORD. 87-72(8) (1987).

[56]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2224 (1993).

[57]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1469 (S.D. Fla. 1989), *aff'd without op.*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993). In relevant part, 42 U.S.C. § 1983 provides:

was specifically "seeking the right . . . to perform animal sacrifices on Church premises, and for the right of church members to perform sacrifices in their own homes."[58]

3. LEGAL BACKGROUND

a. DISTRICT COURT

The trial court rejected the Church's free exercise claim, reasoning that the ordinances were supported by four compelling interests: (1) safeguarding the health, welfare, and safety of the community; (2) safeguarding the psychological welfare of children; (3) preventing cruelty to animals; and (4) restricting the slaughter or sacrifice of animals to areas zoned for slaughter house use.[59] While observing that "the Church's announcement *triggered* the legislative action,"[60] the court emphasized that the ordinances were "not aimed solely at the [the Church], but were an attempt to address the issue of animal sacrifice as a whole."[61]

The court similarly rejected the Church's argument for a religious exemption. Explaining that "[i]t is often difficult, if not impossible, to tell

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

Id.

[58] *Hialeah*, 723 F. Supp. at 1469.

[59] *Id.* at 1485-87.

[60] *Id.* at 1483 (emphasis added). The Court noted:

> Defendant acknowledges that the challenged ordinances arose in response to the opening of Plaintiff Church in the City; however, that does not necessarily indicate that the purpose of the ordinances was to exclude the Church from the City. Instead, the evidence showed that the Defendant responded to Plaintiffs' announced intention that Plaintiffs planned to conduct animal sacrifices.

Id.

[61] *Id.* By issue of animal sacrifice as a whole, the district court was apparently referring to the health problems posed to the community, the community's children, and the issue of animal cruelty. *See id.* at 1485.

who is responsible for a particular sacrifice," the court concluded that an exception would "defeat the City's valid and compelling interests."[62] The court was concerned that an "exception would, in effect, swallow the rule."[63]

b. COURT OF APPEALS

Whereas the lower court's ruling was rendered prior to the Supreme Court's *Smith* decision, the Court of Appeals decision was not. But, the Court of Appeals for the Eleventh Circuit, in a one-paragraph per curiam opinion, nonetheless affirmed judgment in favor of the City.[64] The Court of Appeals reasoned that interpreting *Smith* was unnecessary because the district court had "employed an arguably stricter standard" than *Smith*.[65]

c. UNITED STATES SUPREME COURT

Looking both to *Smith* and to more traditional free exercise precedent, the Supreme Court reversed.[66] The Court reasoned that the ordinances were not neutral[67] nor generally applicable within the meaning of *Smith*,[68] and that even if surviving *Smith*, the ordinances could not withstand strict scrutiny.[69] Regarding the latter, the Court reasoned specifically that the City had failed to carry its burden to demonstrate that the asserted interests were compelling and that the ordinances were narrowly tailored to advance the asserted interests.[70]

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[62]*Id.* at 1487.

[63]*Id.* In making its decision, the court expressed concern that allowing an exception prohibiting sacrifices would hinder the City's compelling interest because the private nature of the Santeria religion would make it impossible to enforce a more narrow restriction. *Id.*

[64]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2225 (1993) (referring to Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993)).

[65]*Id.* (citing App. to Pet. for Cert. A2). In refusing to address *Smith*, the Court of Appeals merely stated that the ordinances were constitutional. *Id.*

[66]*Id.* at 2225, 2234. Justice Kennedy authored the majority opinion in *Hialeah*. *See id.* at 2217.

[67]*Id.* at 2226-31. In finding that the ordinances were not neutral, the Court explained that a law is not neutral if it seeks to restrict certain activity based on religion. *Id.* The Court then concluded that the animal-sacrifice law, which referred to integral Santerian religious practices, was not neutral for it effectively prohibited specific Santerian religious practices. *Id.*

[68]*Id.* at 2231-33.

[69]*Id.* at 2233-34.

[70]*Id.* at 2234.

i. NEUTRALITY

Neutrality clearly served as the cornerstone for the Court's holding in *Smith*.[71] The *Smith* opinion, however, fails to offer any useful guidance regarding the substance of the distinction between neutral laws and laws targeting a particular religious practice. Indeed, from an evidentiary perspective, the Court's mandate is susceptible to two interpretations. The first is that facial neutrality is dispositive, *i.e.*, that the inquiry is restricted to an analysis of the statutory text.[72] The second is that neutrality can be assessed with reference to extrinsic evidence, meaning that legislative motivation, for example, may properly be considered.[73]

The Court's response in *Hialeah* was that *Smith*, of course, contemplates the admissibility of extrinsic evidence. "There are, many ways," Justice Kennedy remarked, "of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct."[74] The Justice further remarked that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[75]

(A) FACIAL NEUTRALITY

Though rejecting the City's argument that facial neutrality should be dispositive, the Court's analysis nonetheless begins here. "[T]he minimum requirement of neutrality," the Court declared, "is that a law not discriminate

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[71]*See* Employment Div. v. Smith, 494 U.S. 872, 876-82 (1990) (holding that the First Amendment is not violated by a generally applicable law that has the incidental effect of burdening religious exercise).

[72]This argument was raised by the City. *See* Respondent's Brief at 12-20, 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), *rev'd*, 113 S. Ct. 2221 (1993). Specifically, the City argued that a law is neutral on its face if it refers to religion without a secular connotation. *Id.* at 12. The City further asserted that if the text of a law exhibits no discrimination, then the law should not be subjected to the rigors of strict scrutiny. *Id.*

[73]This argument was raised by the Church. *See* Petitioner's Brief at 12-14, 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), *rev'd*, 113 S. Ct. 2221 (1993). The Church contended that using words with strong religious meanings may not be facially neutral and that the Court should also consider the circumstances surrounding the enactment of such laws. *Id.* at 14-27.

[74]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2227 (1993).

[75]*Id.*

on its face."[76] The Court explained further that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context."[77]

The Court rejected the Church's argument that three of the ordinances failed this test. The Court observed that the ordinances were replete with textual references to words with "strong religious connotations," such as "sacrifice" and "ritual."[78] Without discounting the "religious origin" of these terms, however, the Court emphasized that "current use admits also of secular meaning."[79]

But, the Court's textual analysis did not end here. Instead, still focusing on the statutory text, the Court concluded that the challenged ordinances lacked the requisite neutrality.[80] The Court's conclusion was based in part on the City Council's *choice of words*[81] and in part on the text of Ordinance 87-66, adopted at the June 9, 1987 emergency session, which recited the City's commitment to curbing religious practices inconsistent with the public morals, peace, or safety.[82] To this effect, Justice Kennedy proclaimed that, "[n]o one suggests, and on this record it [could not] be maintained, that city officials had in mind a religion other than Santeria."[83]

(B) OPERATION-EFFECT OF THE ORDINANCES

Emphasizing that "the effect of a law in its real operation is strong evidence of its object,"[84] the Court next turned to a discussion of the

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[76] *Id.*

[77] *Id.*

[78] *Id.* The Court noted that "[t]hese words are consistent with the claim of facial discrimination" and "'sacrifice' and 'ritual' have a religious origin". *Id.*

[79] *Id.* The Court did not clarify the secular, as opposed to religious, meaning of these terms. *See id.* Instead, the Court cited the "Encyclopedia of Religion" for this proposition. *Id.* (citing 12 THE ENCYCLOPEDIA OF RELIGION 556 ("[T]he word sacrifice ultimately became very much a secular term in common usage.")).

[80] *Id.* at 2231.

[81] *Id.* at 2227. The Court focused specifically on the Council's use of the words "ritual" and "sacrifice." *See id.*

[82] *Id.* at 2227-28.

[83] *Id.* at 2228.

[84] *Id.* Relying on *Smith*, the Court maintained that the record revealed that the object of the ordinances was the suppression of Santeria. *Id.*

operation of the ordinances. The Court similarly concluded that, based on this evidence, the requisite neutrality was absent.[85]

With regard to Ordinance 87-71, the Court reasoned that, according to its terms, Ordinance 87-71 would operate to target exclusively Santeria. The Court supported its conclusion, drawing mainly from the statutory definition of "sacrifice," as to "unnecessarily kill . . . an animal in a public or private ritual or ceremony not for the primary purpose of food consumption."[86] The Court explained that by excluding all but religious sacrifice, Ordinance 87-71 operated to punish solely Santeria.[87] The Court further supported its conclusion by relying on the statutory exemption for Kosher slaughter.[88]

The Court invalidated Ordinance 87-52 using the same rationale. The Court reasoned that based on the pattern of exemptions permitting the secular possession of animals for slaughter, the primary effect of Ordinance 87-52 was to punish only Santeria.[89]

Under this analysis, the Court also invalidated Ordinance 87-40. Observing that religious, but not secular, killings were subject to the statutory prohibition against the "unnecessary" killing of animals, the Court explained that Ordinance 87-40 improperly singled out religious practices for discriminatory treatment.[90] Emphasizing that Ordinance 87-40 required "an evaluation of the particular justification of the killing," the Court reasoned further that Ordinance 87-40 was invalid under *Smith*.[91] Under *Smith*, the Court explained, regulations requiring an "individualized governmental assessment of the reasons for the relevant conduct" are properly subject to strict scrutiny.[92]

The Court did not invalidate Ordinance 87-72, the zoning ordinance, as discriminatory. However, treating the four ordinances as a group, the Court held that Ordinance 87-72 could not withstand constitutional muster.[93]

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[85] *Id.* at 2228-29. The Court determined that the City drafted the ordinances addressing specific religious practices of Santeria. *Id.* Particularly, the Court opined that each ordinance contributed to discriminatory treatment targeted at Santeria sacrifice. *Id.*

[86] *Id.* at 2228 (quoting HIALEAH, FLA., ORD. 87-71 (1987)).

[87] *Id.*

[88] *Id.* Specifically, the Court focused on the Kosher slaughter exemption resulting in "differential treatment" of the two religions. *Id.* The Court, however, did not conclude that the ordinances were invalid solely based on this ground. *Id.* ("We need not discuss whether this differential treatment of two religions is itself an independent constitutional violation.").

[89] *Id.* at 2228-29.

[90] *Id.* at 2229.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 2230.

Ordinance 87-72, the Court explained, was invalid "because it function[ed] with the rest of the enactments in question, to suppress Santeria religious worship."[94]

(C) OVERBREADTH

With respect to Ordinance 87-40, Ordinance 87-52, and Ordinance 87-71, the Court also based its conclusion that the ordinances were invalid upon its determination that the ordinances were overbroad.[95] The Court reasoned that the City's asserted interests in protecting the public health and preventing cruelty to animals would have been equally served by laws regulating the disposal of "organic garbage,"[96] or, at least with regard to the latter, by laws regulating the treatment of animals.[97]

Ordinance 87-72, however, was not held to be invalid as overbroad. Rather, Ordinance 87-72 was, again, essentially guilty by association.[98]

(D) LEGISLATURE'S SUBJECTIVE MOTIVATION

Maintaining that neutrality could also be examined by looking to direct and circumstantial evidence of the City Council's subjective motivation, Justice Kennedy further concluded that the ordinances were not neutral.[99] Drawing support from the Court's analysis under the Equal Protection Clause,[100] the Justice emphasized both that no action was taken before the

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[94]*Id.*

[95]*Id.* at 2229-30.

[96]The Court explained that the City's interest in preventing cruelty to animals could be served by laws regulating the treatment and methods for killing animals, "regardless of why an animal is kept." *Id.*

[97]*Id.* The Court recognized that the City did not prohibit certain methods of animal killings and even expressly approved others, *e.g.*, fishing, mice or rat extermination within a home, euthanasia of unwanted, stray animals, *see id.* at 2232 (citing FLA., ORD. 87-40 (1987)), and inflicting pain and suffering "in the interest of medical science." *See id.* (citing FLA., STAT. § 828.02 (1987)). Further, the Court noted that the City neither prohibited hunters from bringing their kill to their houses, nor regulated the dead animal's disposal. *Id.* at 2233. Accordingly, the Court concluded that the City did not regulate different methods of animal killings in the same manner. *Id.*

[98]*Id.* at 2230. *See also supra* notes 93-94 and accompanying text (explaining that Ordinance 87-72 was evaluated together with the other ordinances).

[99]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2231 (1993).

[100]Justice Kennedy recognized that the First Amendment Religion Clauses, as well as the Equal Protection Clause, mandate strict scrutiny of the legislative objective underlying the questioned law. *Id.* at 2330.

Church announced its intentions to open a house of worship and that the minutes from the June 9 emergency session revealed significant hostility towards Santeria.[101] This portion of the opinion, however, is not binding, as the only other Justice to join Justice Kennedy was Justice Stevens.

ii. GENERAL APPLICABILITY

Focusing again on the fact that the ordinances prohibited religious, but not secular, conduct, *i.e.*, that the regulations were "underinclusive," the majority similarly concluded that the ordinances were not generally applicable within the meaning of *Smith*.[102] Without devoting any significant discussion to this issue, the Court held that the ordinances failed to meet even the "minimum standard necessary to protect First Amendment rights."[103]

iii. COMPELLING INTEREST TEST

A second important consideration called into question by *Smith* was whether strict scrutiny was properly limited to the context of the Court's unemployment compensation cases.[104] By applying the compelling interest test to the challenged ordinances, the Court answered this question in the negative.[105] Again, though, the Court did not devote any significant discussion to this inquiry. Rather, relying mainly on its conclusion that the

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[101]*Id.* at 2231. The Justice determined that the comments of the city councilpersons precluded a neutral application of the ordinances. *Id.* The councilpersons made statements such as: "in prerevolution Cuba 'people were put in jail for practicing this religion . . .'"; "'why bring [Santeria] to this country'"; and Santeria and its adherents "'are in violation of everything this country stands for.'" *Id.* (citation omitted). The councilpersons and testifying city officials then discussed the religious merits of animal sacrifice, proffering personal opinions of the Bible, morality, and sinful behavior. *Id.*

[102]*Id.* at 2231-33.

[103]*Id.* at 2232. Again, the Court did not devote any significant discussion to this issue. The Court, however, did focus on the fact that the challenged ordinances were substantially underinclusive. *Id.* at 2232-33. The Court reasoned that the ordinances were underinclusive because the ordinances did not prohibit many types of secular killings, nor the disposal of animals killed for secular reasons. *Id.* The Court reasoned further that the ordinances did not require the inspection of meat from secular killings. *Id.* at 2233.

[104]*Id.* at 2225. *See* Employment Div. v. Smith, 494 U.S. 872, 882-86 (1990). For a detailed discussion of the Court's unemployment compensation cases, see *infra* notes 202-22 and accompanying text.

[105]*See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2233-34 (1993).

ordinances were substantially underinclusive,[106] the Court held that the ordinances were not narrowly tailored to further the City's asserted interests in protecting the public health and preventing cruelty to animals.[107] The Court added, however, that the City had failed to carry its burden to demonstrate that the asserted interests were compelling.[108] The Court reasoned that "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."[109]

Justice Scalia, joined by Chief Justice Rehnquist, concurred in part and concurred in the Court's judgment, invalidating the ordinances because they specifically targeted Santeria.[110] However, Justice Scalia rejected Justice Kennedy's conclusion that facial neutrality was not dispositive on the neutrality issue. "In my view," Justice Scalia stated, "the defect of lack of neutrality applies primarily to those laws that by their terms impose disabilities on the bases of religion . . . ."[111] Justice Scalia also rejected the majority's conclusion that evidence of the legislature's subjective motivation was admissible on the issue of neutrality.[112] The Justice maintained that the First Amendment speaks to the "effect" rather than the "purpose" of legislation and that the challenged ordinances would be deficient regardless of the "evil motives of their authors."[113]

Writing separately, Justice Souter, concurring in part and concurring in the judgment, similarly agreed with the Court's holding that the ordinances were invalid, but used *Hialeah* as an occasion to voice contempt for *Smith*.[114] The Justice explained, however, that using *Hialeah* as an opportunity to re-examine *Smith* would be inappropriate because *Hialeah* involved only the well settled principle that the Free Exercise Clause prohibits intentional religious discrimination, not the more controversial principle articulated in

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[106]*Id.* at 2234. *See also supra* note 103 (explaining why the ordinances were considered "substantially underinclusive").

[107]*Id.* at 2232-34.

[108]*Id.* at 2234.

[109]*Id.*

[110]*Id.* at 2239 (Scalia, J., concurring in part and concurring in the judgment).

[111]*Id.*

[112]*Id.* (citations omitted).

[113]*Id.* at 2239-40 (Scalia, J., concurring in part and concurring in the judgment) (asserting that "it is virtually impossible to determine the singular 'motive' of a collective legislative body").

[114]*Id.* at 2240 (Souter, J., concurring in part and concurring in the judgment).

Smith, namely that neutrality and general applicability alone are sufficient to satisfy constitutional requirements.[115]

Justice Blackmun, joined by Justice O'Connor, concurred only in the Court's holding invalidating the ordinances.[116] Though similarly rejecting *Smith*,[117] Justice Blackmun departed from the majority's analysis. The Justice reasoned that the ordinances were invalid solely because they failed strict scrutiny.[118] More specifically, Justice Blackmun reasoned that the ordinances were invalid because they were both overinclusive and underinclusive and thus, by definition, not "narrowly tailored" within the meaning of the compelling interest test.[119] The Justice maintained that the ordinances were overinclusive in the sense that the City's asserted interests in public health and preventing animal cruelty could be served without imposing a flat prohibition against the practice of animal sacrifice.[120] Justice Blackmun insisted that the ordinances were underinclusive because, though ostensibly intended to prevent animal cruelty, the ordinances prohibited few secular killings.[121]

B. FREE EXERCISE DOCTRINE: AN OVERVIEW

The first point to observe about free exercise doctrine is that the Court continues to draw a meaningful distinction between religious beliefs and religious conduct.[122] Indeed, it is well settled that while the right to

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[115]*Id.* at 2240-41 (Souter, J., concurring in part and concurring in the judgment) ("While general applicability is, for the most part, self-explanatory, free-exercise neutrality is not self-revealing." (citations omitted)).

[116]*Id.* at 2250 (Blackmun, J., concurring).

[117]*Id.* Like Justice Souter, Justice Blackmun criticized *Smith* for disregarding established precedent. *Id.* Justice Blackmun reiterated his belief that *Smith* was wrongly decided because it failed to view religious freedom "as an affirmative individual liberty" and not just "an antidiscrimination principle." *Id.*

[118]*Id.* at 2251 (Blackmun, J., concurring).

[119]*Id.* at 2250-51 (Blackmun, J., concurring).

[120]*Id.* at 2251 (Blackmun, J., concurring). Justice Blackmun did not identify any alternatives, but rather sanctioned the majority's analysis. *Id.*

[121]*Id.*

[122]In Cantwell v. Connecticut, 310 U.S. 296 (1940), 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." *Id.* at 303.

This distinction, of course, is not unique to the Court's free exercise cases. The Court has similarly recognized a meaningful distinction between "pure speech" and "expressive conduct." *Compare* United States v. Eichman, 496 U.S. 310, 313-18 (1990) (holding that flag burning is protected expression) *and* Spence v. Washington, 418 U.S. 405, 409-11 (1974) (holding that

exercise religious beliefs is absolute,[123] the right to exercise religious conduct is not.[124] This facet of contemporary doctrine provides a useful

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affixing a peace symbol to an American flag is protected activity) *with* United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that burning a draft card is not protected activity).

[123]*See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2227 (1993) ("[A] law targeting religious beliefs as such is never permissible. . . ."); Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 877 (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) (plurality opinion) ("[C]ases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not 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) (plurality opinion) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."); Sherbert v. Verner, 374 U.S. 398, 402 (1961) ("The door of the Free Exercise Clause stands tightly closed against any governmental 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 v. Connecticut, 310 U.S. 296, 303 (1940) ("Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may chose cannot be restricted by law."); Reynolds v. United States, 98 U.S. 145, 164 (1878) ("Congress was deprived of all legislative power over mere opinion.").

[124]*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."); *Roy*, 476 U.S. at 699 ("[T]he freedom of individual conduct . . . is not absolute."); 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."); *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."); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 652 (1940) (Frankfurter, J., dissenting) ("The constitutional protection of religious freedom terminated disabilities, 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*, 310 U.S. at 304 (noting that 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 Hialeah*, 113 S. Ct. at 2226 ("[W]e have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); *Bob Jones Univ.*, 461 U.S. at 603 ("Not all burdens on religion are unconstitutional . . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); *Sherbert*, 374 U.S. at 403 ("[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'" (quoting Braunfeld v. Brown, 366 U.S. 599, 603 (1961)); *Reynolds*, 98 U.S. at 166-67 (considering the belief-conduct distinction in its holding). *But see Smith*,

point of departure because, not surprisingly, controversy surrounding the Court's free exercise jurisprudence has focused mainly on the narrow question of when government activity interfering with the right to exercise religious conduct goes too far.[125] In short, contemporary doctrine now looks to the following issues.

First. *Does the challenged government activity implicate religious beliefs or religious conduct?* If the challenged activity burdens religious beliefs, the activity is invalid *per se*. If the challenged activity burdens religious conduct, additional issues must be resolved.

Second. *Does the challenged government activity impose a substantial burden on religious conduct?* If the challenged activity *punishes* religiously inspired conduct or *mandates* conduct proscribed by religious doctrine, the substantial burden requirement is satisfied and additional issues must be resolved. Absent the requisite burden, the inquiry ends here.

Third. *Is the challenged government activity neutral and generally applicable?* If the challenged activity is neutral and generally applicable, the inquiry ends here. This is true regardless of whether the activity imposes a substantial burden on religious conduct. Government activity is neutral where intended to serve a valid secular interest. Government activity is generally applicable where equally regulating secular and religious conduct. If the challenged activity is not neutral and generally applicable, additional issues must be resolved.

Fourth. *Can the challenged government activity withstand constitutional muster?* Government activity imposing a substantial burden on religious conduct which is not neutral and generally applicable is invalid unless necessary to further a compelling interest. However, if the challenged activity involves military or prison regulations, the activity is valid where rationally related to a legitimate government interest.[126]

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494 U.S. at 877-78 ("It would doubtless be unconstitutional . . . to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf.").

[125]There are only four Supreme Court cases involving religious beliefs: Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating state law requiring residents to display slogan "Live Free or Die" on vehicle license plates); Torcaso v. Watkins, 367 U.S. 488 (1961) (invalidating state law requiring candidates for public office to declare belief in existence of God as a test for office); United States v. Ballard, 322 U.S. 78 (1944) (upholding jury instruction precluding consideration of truth or falsity of defendant's religious beliefs); *Barnette*, 319 U.S. 624 (1940) (invalidating ordinance requiring public school students to salute the American flag).

[126]The remainder of Subsection B explores these important issues.

1. THE CONCEPT OF RELIGION

While the First Amendment expressly protects the free exercise of religion, the Court has yet to define the term "religion" with any precision.[127] The Court has explained that religion "has reference to one's views of his relation to his Creator, and to the obligations they impose of reverence for his being and character . . . ."[128] The Court has added further that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[129] But with the exception of these comments, few decisions have addressed this concern.[130]

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[127]*See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982); Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978); Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163 (1977).

For an interesting discussion of whether such an attempt might violate the Establishment Clause, see Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1618 (1993) (suggesting that defining "religion" might raise Establishment Clause problems because to do so would potentially exclude beliefs not commonly considered religious).

[128]*Beason*, 133 U.S. at 342.

[129]Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 715 (1981). *See also* Alabama and Coushatta Tribes of Texas v. Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1329 (E.D. Tex. 1993) (finding of reasonableness is of no consequence); Gallahan v. Hollyfield, 516 F. Supp. 1004, 1006 (E.D. Va. 1981), *aff'd*, 670 F.2d 1345 (4th Cir. 1982) ("[O]rthodoxy is not an issue in determining whether religion qualifies for First Amendment protection."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1417 (1989) [hereinafter McConnell, *Origins of Free Exercise*] (explaining that one's beliefs need not "be consistent, coherent, clearly articulated, or congruent with those of the claimant's religious denomination").

[130]Courts, rather, have focused on the issue of whether putative religious beliefs are sincerely held. *See, e.g.*, *Alabama and Coushatta Tribes of Texas*, 817 F. Supp. at 1328 ("To establish that a state regulation violates the First Amendment Free Exercise Clause, the claimants must show that they have a sincerely held religious belief which conflicts with and is burdened by the regulation."). For further discussion on this topic, see John T. Noonan, *How Sincere Do You Have To Be To Be Religious?*, 1988 U. ILL. L. REV. 713 (1988).

At any rate, secular beliefs, whether sincere or not, will clearly not suffice. Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 833 (1989) ("Purely secular views do not suffice."); *Thomas*, 450 U.S. at 713 ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

Conceivably, the Court could reject putative beliefs as nonreligious. Some claims, the Court has remarked, might be "so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[131] But, this is unlikely. "It is not within the judicial ken," the Court has stated, "to question the centrality of particular religious beliefs or practices to a faith, or the validity of particular litigant's interpretations of those creeds."[132] Therefore, plaintiffs are not likely to encounter difficulty invoking the First Amendment at this initial stage of the analysis.

2. BELIEF-ACTION DISTINCTION

The First Amendment does not distinguish between religious beliefs and religious conduct. As a textual matter, the First Amendment speaks only to the "free exercise of religion."[133] But, as stated above, the Supreme Court continues to differentiate religious conduct from religious beliefs.[134]

The Court first articulated the justification for this distinction in *Reynolds v. United States*,[135] rejecting the defendant's argument that, as a member of the Mormon Church, he could not be convicted under a federal law prohibiting polygamy.[136] Writing for the Court, Chief Justice Waite explained that a contrary result would "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."[137] The Justice reasoned further that "[g]overnment could exist only in name under such circumstances."[138]

At least one commentator, Professor Abner S. Greene, has endeavored to explain why secular beliefs are not protected by the Constitution. Greene, *supra* note 127, at 1640-43. Professor Greene reasoned that secular beliefs do not need special protection because, "[u]nlike religious values, secular values may be the express source of law." *Id.* at 1640.

[131]*Thomas*, 450 U.S. at 715.

[132]Hernandez v. Commissioner, 490 U.S. 680, 699 (1989).

[133]U.S. CONST. amend. I.

[134]*See supra* notes 122-26 and accompanying text (discussing the distinction between religious belief and conduct).

[135]Reynolds v. United States, 98 U.S. 145 (1878).

[136]*Id.* at 162-66.

[137]*Id.* at 166-67. *See also* Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594-95 (1940) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restrictions of religious beliefs.")

[138]*Reynolds*, 98 U.S. at 167.

While widely accepted,[139] the belief-action distinction is not without its critics. Justice O'Connor, for example, has suggested that "[b]ecause the First Amendment does not distinguish between religious beliefs and religious conduct, conduct motivated by sincere religious beliefs, like the belief itself, must be at least presumptively protected by the Free Exercise Clause."[140] The history of the First Amendment would at least appear to support this conclusion. Professor Michael McConnell, perhaps the leading authority in this area, has explained that the First Amendment originally referred to the "*rights of conscience*" rather than the "*free exercise of religion.*"[141] In explaining the significance of differences between these terms, Professor McConnell suggested that the "least ambiguous difference is that the term "free exercise" makes clear that the clause protects religiously motivated conduct as well as belief."[142] Despite this criticism, the distinction remains viable today,[143] and it is highly unlikely that the Court will ever see fit to repudiate it.

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[139]*See supra* notes 123, 124 (observing that while the right to exercise religious belief is absolute, the right to exercise religious conduct is not).

[140]Employment Div. v. Smith, 493 U.S. 872, 893 (1990) (O'Connor, J., concurring in part and concurring in the judgment). *See generally* Marci A. Hamilton, *The Belief-Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 787-96 (1993) (criticizing heavily the belief-conduct distinction because it fails to offer any significant protection for religious freedom); Paul Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1234 ("It appears to be somewhat incongruous to make such a distinction when the first amendment speaks in terms of protecting the *exercise* of the religion, not simply the beliefs held under the religion.").

[141]McConnell, *Origins of Free Exercise*, *supra* note 129, at 1488. Professor McConnell explained that all but one state requesting constitutional protection for religious freedom used the language "free exercise of religion." *Id.* Madison used the term "right of conscience," however, which previously had been employed by the Select Committee and the New Hampshire drafts debated on the floor of the House of Representatives. *Id.* Professor McConnell explained further that the Senate initially voted to protect the "right of conscience," but ultimately agreed upon using the term "free exercise of religion." *Id.* Professor McConnell opined that these changes possibly were without substantive meaning because the concepts embodied in the terms "liberty of conscience" and "free exercise of religion" were frequently interchanged during the pre-constitutional period. *Id.*

[142]*Id.* Professor McConnell noted that in 1879 the *Reynold*'s Court explicitly rejected this reading. *Id.* In 1940, however, the Court began to include religiously motivated conduct under Free Exercise Clause protection. *Id.* Such protection, though, was limited. *See* McDaniel v. Paty, 435 U.S. 618, 626-27 (1978) (plurality opinion); Braunfeld v. Brown, 366 U.S. 599, 603-07 (1961); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[143]*See supra* notes 123, 124 (explaining why the right to exercise religious belief is absolute while the right to exercise religious conduct is not).

3. COGNIZABLE BURDEN

Free exercise review is only required where the plaintiff first demonstrates that the government has imposed a "substantial" burden on his or her right to exercise religious conduct.[144] As a practical matter, the substantial burden requirement thus represents a fundamental threshold inquiry: absent the requisite burden, no further analysis is necessary.

Although few decisions have been addressed specifically to this issue,[145] the Court's opinion in *Lyng v. Northwest Indian Cemetery Protective Ass'n*[146] suggests that this requirement is satisfied only when a law *punishes* religiously inspired conduct or *mandates* conduct proscribed by religious

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[144]Hernandez v. Commissioner, 490 U.S. 680, 699 (1989); United States v. Lee, 455 U.S. 252, 256-57 (1982); Sherbert v. Verner, 374 U.S. 398, 403 (1963). *See also Smith*, 494 U.S. at 895-96 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State . . . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." (quoting Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972)). For a scholarly analysis of the burden requirement, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 40-41 (1989).

[145]Tony & Susan Almo Foundation v. Secretary of Labor, 471 U.S. 290 (1985), is one example of a case where the Court rejected the plaintiff's claim at this stage of the analysis. In *Almo Foundation*, the Court held that the burden imposed by federal wage and hour requirements was insufficient to trigger free exercise review. *Id.* at 304-05. The Court reasoned that employees having religious objections to receiving wages could simply return them to their employer. *Id.* at 304.

The Court reached a similar result in Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990). In *Swaggart Ministries*, a suit was filed by the State Board of Equalization ("Board") against the plaintiff religious organization only after the Board informed the plaintiff that the religious materials it was selling were not exempt from sales tax. *Id.* at 382-84. Emphasizing that the tax "merely decrease[d] the amount of money the plaintiff ha[d] to spend on its religious activities," the Court held that the burden on the plaintiff's free exercise was not "constitutionally significant." *Id.* at 391.

In two recent cases, lower courts held that high school athletic eligibility restrictions did not impose a substantial burden on the plaintiff's free exercise of religion. *See generally* Mississippi High Sch. Activities Ass'n, Inc. v. Coleman, 631 So.2d 768, 778 (Miss. 1994) (upholding a bona fide high school athletic school district eligibility restriction); Beck v. Missouri State High Sch. Activities Ass'n, 837 F. Supp. 998, 1006 (E.D. Mo. 1993) (upholding a bylaw restricting student's high school athletic eligibility for 365 days following transfer from one school to another).

[146]485 U.S. 439 (1988).

doctrine.[147] At issue in *Lyng* was whether the U.S. Forest Service's plan to build a road on government land used to perform sacred Indian rituals violated the Free Exercise Clause.[148] Though observing the plan would likely have "devastating effects on traditional Indian practices," the Court rejected the challenge.[149] The Court reasoned that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[150] In other words, under *Lyng*, even where the burden on religious exercise is severe, free exercise review may not be required.

The municipal ordinances at issue in *Hialeah* are classic examples of government activity punishing religious conduct.[151] *Bowen v. Roy*,[152] in contrast, is an example of government activity mandating conduct proscribed by religious doctrine. In *Bowen*, the plaintiff, a Native American, challenged a federal law requiring participants in a food stamp program to furnish Social Security numbers for each household member receiving benefits. The plaintiff argued that the regulation was unconstitutional because it required him to violate his Native American religious beliefs. The plaintiff argued specifically that furnishing the requisite information on behalf of his minor daughter, Little Bird of the Snow, would rob her spirit and "prevent her from attaining greater spiritual power."[153] The Court rejected this challenge, reasoning that "[t]he Federal Government's use of a Social Security number for Little Bird of the Snow does not itself in any degree impair [the plaintiff's] 'freedom to believe, express and exercise' his religion."[154]

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[147] *Id.* at 449. Although the Court has discussed the distinction between *direct* and *indirect* burdens, *see id.* at 450; Braunfeld v. Brown, 366 U.S. 599, 605-07 (1961), the Court has expressly rejected the distinction as immaterial. *Sherbert*, 374 U.S. at 404 (concluding that discriminatory regulations may be invalid even though the burden may be characterized as indirect).

[148] *Lyng*, 485 U.S. at 441-42.

[149] *Id.* at 451-52 (defining "devastating effects" by adopting the Ninth Circuit's view that the road project would "destroy the . . . Indians' ability to practice their religion" and by recognizing that their rituals were "intimately and inextricably bound up with the unique features" of the land, rituals which would lose their efficacy if conducted elsewhere (internal quotations omitted) (citation omitted)).

[150] *Id.* at 448 (citing Bowen v. Roy, 476 U.S. 693, 699 (1986) (plurality opinion)).

[151] *See supra* note 55 (describing what fines could be levied against religions).

[152] 476 U.S. 693 (1986) (plurality opinion).

[153] *Id.* at 696.

[154] *Id.* at 700-01. Supporting its conclusion, the Court quoted the 1978 Congressional Joint Resolution, which reads:

4. NEUTRALITY AND GENERAL APPLICABILITY

A second threshold inquiry is required under *Smith* which asserts that even where the cognizable burden requirement is satisfied, no further analysis is necessary if the challenged activity is neutral and generally applicable.[155] Briefly, in *Smith*, two Native Americans brought suit against the Oregon Department of Human Resources after the State denied their claim for unemployment benefits.[156] The plaintiffs' employer, a private drug rehabilitation clinic, fired them for ingesting the hallucinogen peyote at a Native American Church ceremony.[157] The State denied their claim for unemployment benefits under a law disqualifying employees discharged for work-related misconduct.[158] The majority determined that the precise issue before the Court was whether Oregon's prohibition against the use of peyote was constitutional and, in turn, whether the state could properly deny unemployment benefits based on its religiously inspired use.[159]

Emphasizing that the law, an "across-the-board criminal prohibition on a particular form of conduct," did not specifically target religion, the Court held that the Free Exercise Clause had not been offended.[160] Relying on *Reynolds*, the Court reasoned that the plaintiffs' religious beliefs would not serve to excuse their failure to comply with Oregon's neutral and generally

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> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites.

Id. at 700 (citing 42 U.S.C. § 1996 (1978)).

[155]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2226 (1993); Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990); Kissinger v. Board of Trustees, 5 F.3d 177, 179-80 (6th Cir. 1993); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1213 (5th Cir. 1991); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991); American Friends Serv. Comm. v. Thornburgh, 951 F.2d 957, 960-61 (9th Cir. 1991), *amended*, American Friends Serv. Comm. v. Thornburgh, 961 F.2d 1405, 1407-08 (9th Cir. 1992); Intercommunity Ctr. for Justice and Peace v. INS, 910 F.2d 42, 44 (2nd. Cir. 1990); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 279 (Alaska 1994); Mississippi High Sch. Activities Ass'n, Inc. v. Coleman, 631 So. 2d 768, 776 (Miss. 1994).

[156]*Smith*, 494 U.S. at 874-75.

[157]*Id.* at 874.

[158]*Id.*

[159]*Id.* at 876.

[160]*Id.* at 884.

applicable prohibition against the use of peyote.[161] Accordingly, *Smith* stands for the proposition that neutral and generally applicable laws interfering with religious conduct do not trigger free exercise review.[162] Like the substantial burden requirement, neutrality and general applicability thus represent important threshold concerns.

a. POSSIBLE EXCEPTIONS

In *Smith*, Justice Scalia argued that the compelling interest test was not controlling both because: (1) the plaintiffs' claim involved the Free Exercise Clause alone, not the Free Exercise Clause in conjunction with other fundamental rights;[163] and (2) the challenged regulation did not require

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[161] *Id.* at 885 ("To 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." (footnote omitted) (citing Reynolds v. United States, 98 U.S. 145, 167(1878))). The *Smith* Court did not explain why the law was neutral and generally applicable. *See infra* note 225 and accompanying text.

[162] *See supra* note 4. *Smith* involved a criminal law prohibiting the use of peyote. Employment Div. v. Smith, 494 U.S. 872, 874 (1990). *Smith*, therefore, did not resolve, or even address, the issue of whether the Court's holding extends to civil cases. The Court has not yet addressed this issue, *see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993) (involving, like *Smith*, criminal prohibitions), but several lower courts have. Not surprisingly, there is a split of authority regarding this issue. For a thorough review of the conflicting authority, see Alabama and Coushatta Tribes of Texas v. Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1330-32 (E.D. Tex. 1993) (reasoning that *Smith* should not extend to civil cases because "[a] finding that *Smith* is generally applicable to every free exercise challenge, whether in the civil or criminal context, would be a gross aberration from decades of established Supreme Court precedent in the First Amendment arena").

[163] *Smith*, 494 U.S. at 881-82. Justice Scalia stressed this point to distinguish *Smith* from the Court's cases applying strict scrutiny outside of the unemployment benefit context, such as Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (reversing conviction of Amish parents under compulsory school attendance law), and Cantwell v. Connecticut, 310 U.S. 296 (1940) (reversing conviction of persons disseminating religious literature). *Smith*, 494 U.S. at 881-82. Justice Scalia reasoned that:

> The only decisions in which [the Court has] held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children.

Id. at 881 (citations omitted).

Justice O'Connor was highly critical of this distinction. The Justice maintained rather that there was "no denying that both [*Cantwell* and *Yoder*] expressly relied on the Free Exercise

consideration of the facts peculiar to the dispute.[164] Lower courts have interpreted this language as creating two possible exceptions to the *Smith* rule: the "hybrid claim" exception and the "individualized exemption" exception.

i. THE HYBRID CLAIM EXCEPTION

Under the hybrid claim exception, claims involving free exercise rights in conjunction with other protected rights, such as free speech, due process, or equal protection, trigger strict scrutiny regardless of whether the challenged government activity is neutral and generally applicable.[165] A recent case

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Clause." *Id.* at 896 (O'Conner, J., concurring in part and concurring in the judgement) (citations omitted). *See also Hialeah*, 113 S. Ct. at 2244 (Souter, J., concurring in part and concurring in the judgment) (making this same point).

[164]*Smith*, 494 U.S. at 882-85. *Cf. Hialeah*, 113 S. Ct. at 2245 (Souter, J., concurring in part and concurring in the judgment) (arguing that the regulation at issue in *Smith* actually required such a consideration).

Justice Scalia similarly emphasized this point to distinguish *Smith* from the Court's unemployment compensation cases. *Smith*, 494 U.S. at 882-85 (declaring that the *Sherbert* test was applicable only in unemployment compensation cases where consideration of specific facts regarding the applicant's cause of unemployment is required in assessing the compensation eligibility criteria's constitutionality). This was necessary because unemployment benefit regulations have invariably triggered strict scrutiny. *See, e.g.*, Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829, 835 (1989) (holding that the state lacked "interests sufficiently compelling to override a legitimate claim to the free exercise of religion" which caused the petitioner to refuse employment on Sundays); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987) (rejecting Justice Burger's less rigorous reasonable promotion of legitimate public interests test, while adopting the strict scrutiny approach) (quoting Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 717-18 (1981))); *Thomas*, 450 U.S. at 718 (declaring that the state may justify any burden placed upon the free exercise of religion by showing that the regulation imposed is the "least restrictive means of achieving some compelling state interest," such as widespread unemployment); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (asserting the same). *See also 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." (citing Bowen v. Roy, 476 U.S. 693, 708 (1986))).

[165]*Alabama and Coushatta Tribes of Texas*, 817 F. Supp. at 1332 ("When some other constitutional right is combined with a free exercise claim in a so called 'hybrid' claim, the state must demonstrate more than merely a reasonable relation to a valid, secular state purpose to sustain the validity of the regulation over First Amendment concerns." (citing *Yoder*, 406 U.S. at 233; *Smith*, 494 U.S. at 881)); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280 (Alaska 1994) ("A court may exempt an individual from a law where the facts present a hybrid situation where an additional constitutionally protected right is implicated."). *See generally* Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833, 835 (1993) ("[A] free exercise claim evidences a hybrid situation if the free exercise

provides a useful illustration. In *Alabama and Coushatta Tribes of Texas v. Big Sandy Independent School District*,[166] the plaintiffs, Native Americans, challenged a school dress code restricting the hair length of male students.[167] Characterizing the plaintiffs' claim as a "hybrid claim of free exercise, free speech, due process and equal protection rights,"[168] the court ruled for the plaintiffs.[169] The court reasoned that the State failed to carry its burden to demonstrate that the restriction was narrowly tailored to further its asserted interest in "maintaining discipline, fostering respect for authority, and projecting a good public image."[170]

Though recognized by several other courts, no other reported case to date has invalidated a law under the hybrid exception.[171] Thus, the hybrid

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claim is joined with another fundamental constitutional right.").

The hybrid exception, however, is not without its critics. Justice Souter, for example, has suggested that the distinction between free exercise claims and free exercise claims stated in conjunction with other protected rights is "ultimately untenable." *Hialeah*, 113 S. Ct. at 2244 (Souter, J., concurring in part and concurring in the judgment). Justice Souter explained that:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote-smoking ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Id. at 2244-45 (Souter, J., concurring in part and concurring in the judgment). *See also* Kissinger v. Board of Trustees, 5 F.3d 171, 180 (6th Cir. 1993) (stating that the hybrid exception is "completely illogical").

[166]817 F. Supp. 1319 (E.D. Tex. 1993).

[167]*Id.* at 1323. The regulation provided that "[b]oys' hair should be of reasonable length and style so as not to interfere with the instructional program. Boys' hair should be no longer than the top of standard dress collar." *Id.*

[168]*Id.* at 1332. The court noted that "when some other constitutional right is combined with a free exercise claim, in a so called 'hybrid claim,' the state must demonstrate more than merely a reasonable relation to a valid, secular state purpose to sustain the validity of the regulation over First Amendment concerns." *Id.*

[169]*Id.* at 1332-33.

[170]*Id.* at 1333 (finding a "complete lack of evidence on less restrictive alternative means of achieving these goals").

[171]*See, e.g.*, American Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991), *amended*, American Friends Serv. Comm. v. Thornburgh, 961 F.2d 1405 (9th Cir. 1992) (finding no hybrid claim stated); Intercommunity Ctr. for Justice and Peace v. INS, 910 F.2d 42, 44-45 (2nd. Cir. 1990) (same).

exception arguably has limited practical significance. In any event, unless the exception is to swallow the rule, it is likely that it will be construed narrowly.[172]

ii. THE INDIVIDUALIZED EXEMPTION EXCEPTION

Under the individualized exemption exception, strict scrutiny is required where the challenge "arises 'in a context that len[ds] itself to individualized governmental assessment of the reasons for the relevant conduct . . . [*e.g.*, where] a 'good cause' standard create[s] a mechanism for individualized exemptions.'"[173] Although the exception has been mentioned in at least three recent decisions,[174] no plaintiff has successfully invoked it.[175] For example, in *American Friends Service Committee Corporation*,[176] the court rejected the plaintiff's argument that the Immigration Reform and Control Act

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[172]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2244-45 (1993) (Souter, J., concurring in part and concurring in the judgment). *See also American Friends Serv. Comm. Corp.*, 951 F.2d at 960-61 (rejecting the argument that the hybrid exception applied where the plaintiff's claim combined the "right to employ" with a free exercise claim because "[t]here would be little left to the *Smith* decision if an additional interest of such slight constitutional weight as the 'right to hire' were sufficient to qualify . . . .").

[173]*American Friends Serv. Comm. Corp.*, 951 F.2d at 961 (alterations and omission in original) (quoting Employment Div. v. Smith, 494 U.S. 872, 884 (1990)).

[174]*See, e.g.*, Kissinger v. Board of Trustees, College of Veterinary Medicine, 5 F.3d 177, 180 (6th Cir. 1993) (holding that Ohio State did not violate plaintiff's right to freely exercise her religion because the school's curriculum was applicable to all veterinary students, was not aimed at particular religious practices, and did not contain a system of particularized exemptions); *American Friends Serv. Comm. Corp.*, 951 F.2d at 961 (finding that the Immigration Reform and Control Act did not contain a procedure for granting individualized exemptions); *Intercommunity Ctr. for Justice and Peace*, 910 F.2d at 45 (noting that without compelling reasons, states cannot refuse to extend their systems of individual exemptions to cases of religious hardship).

[175]*See, e.g.*, *Kissinger*, 5 F.3d at 180 (upholding the district court's refusal to award attorney's fees since the university was not required by federal law to alter the curriculum to accommodate the students' religious beliefs); *American Friends Serv. Comm. Corp.*, 951 F.2d at 961 (holding that a religious organization was not exempt from sanctions because its employment practices did not fall within "objectively-defined categories"); *Intercommunity Ctr. for Justice and Peace*, 910 F.2d at 45 (rejecting a claim of Catholic nuns that a law interfered with the religious organization's purpose to hire persons in need, despite their immigration status).

[176]951 F.2d 957 (9th Cir. 1991), *amended*, American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405 (9th Cir. 1992).

("IRCA"),[177] requiring employers to verify the legal immigration status of their employees, fell within this exception.[178] The court reasoned that IRCA contained exceptions for household employees, independent contractors, and employees hired prior to 1986, but not for individualized exemptions.[179] Given its success rate here, the individualized exemption exception, like the hybrid claim exception, arguably has limited practical significance.

b. INTERPRETATION

The *Smith* opinion is noteworthy in several respects, not the least of which is that the Court departs dramatically from settled doctrine by effectively abandoning the compelling interest test.[180] A comprehensive review of the Court's decision, or for that matter the considerable body of scholarship generated in response to the decision,[181] is well beyond the limited scope

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[177]IMMIGRATION AND NATIONALITY ACT, 8 U.S.C.A. § 1324(a)(1)(A) (Supp. 1994) ("It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment . . . .").

[178]*American Friends Serv. Comm. Corp.*, 951 F.2d at 961.

[179]*Id.* The court reasoned further that the exceptions were "objectively-defined categories . . . not individualized exemptions within the meaning of *Smith*." *Id.*

[180]Employment Div. v. Smith, 494 U.S. 872, 908 (1990) (Blackmun, J., dissenting) ("In short, [*Smith*] effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."); *American Friends Serv. Comm. Corp.*, 951 F.2d at 960 (asserting that *Smith* "dramatically altered the manner in which [courts] evaluate free exercise complaints . . . ."). *But see* Hamilton, *supra* note 140, at 749 ("*Smith* is not radically different from its forerunners; the single change made is a downward adjustment of the level of scrutiny to be applied to regulations of conduct.").

Though dramatic, the Court's departure from traditional doctrine was not entirely unexpected, as the Court was already discussing the concepts of neutrality and general applicability when Wisconsin v. Yoder was decided in 1972. *See* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (rejecting the talisman of neutrality). Further, while the Court ultimately embraced these concepts in *Smith*, the neutrality argument was clearly beginning to gather support when Bowen v. Roy was decided in 1986. In *Bowen*, the plurality 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. 693, 704 (1986) (plurality opinion). *See also* United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring) (stating that 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"); Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 723 (1981) (Rehnquist, J., dissenting) (noting that 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 the State to conform that statute to the dictates of religious conscience of any group").

[181]*See supra* note 18 (listing relevant commentary).

of this article. But because *Smith* "sets the stage" for RFRA,[182] several points are worth observing here.

i. UNRESOLVED ISSUES

To begin with, the *Smith* opinion leaves two fundamental questions unresolved. First, whether courts may look to extrinsic evidence in attempting to evaluate whether challenged government activity is neutral.[183] Second, whether strict scrutiny, when appropriate, is properly limited to the context of unemployment compensation regulations.[184] These two questions serve, in large measure, to define the scope of *Smith*. In turn, because *Smith* failed to resolve these questions, it left this area of the law in a precarious state. Put simply, the legacy of the *Smith* opinion was uncertainty.[185] This is important because it is the climate in which RFRA was conceived and *Hialeah* decided.

ii. INTOLERABLE TENSION

A second important point to observe about *Smith* is that by abandoning the compelling interest test without expressly overruling conflicting precedent,[186] the Court created what Justice Souter has referred to as an "intolerable tension" between traditional and contemporary doctrine.[187]

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[182]*See* 42 U.S.C. § 2000bb (1993). *See also supra* note 9 (discussing relevant statutory text).

[183]*See supra* notes 59-120 and accompanying text.

[184]*See id.*

[185]*See also supra* note 162 (discussing lower court split on the issue of whether the Court's holding is properly limited to criminal laws).

[186]In Wisconsin v. Yoder, 406 U.S. 205, 220 (1972), the Court expressly stated 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." *See also* Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987) (rejecting the argument that "neutral and uniform" laws are subject only to a reasonableness test, because "[s]uch a test has no basis in precedent") (referring to Bowen v. Roy, 476 U.S. 693 (9186)); McDaniel v. Paty, 435 U.S. 618, 639 (1978) (plurality opinion) (Brennan, J., concurring) ("[G]overnment [may] take religion into account . . . to exempt, when possible, from generally applicable governmental 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.").

[187]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2248 (1993) (Souter, J., concurring in part and concurring in the judgment) (rejecting the majority's attempt to distinguish *Smith* from traditional precedent as disingenuous). *See also* Employment Div. v. Smith, 494 U.S. 872, 892 (1990) (O'Connor, J., concurring in part and concurring in

Indeed, while a vast majority of the Court's decisions stand for the proposition that laws imposing a substantial burden on religious conduct trigger strict scrutiny,[188] *Smith* asserts "that the Court did not really mean what it said . . . ."[189] This aspect of the *Smith* decision is important because, following *Hialeah*, the tension persists.[190]

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the judgment) (criticizing the majority's "strained reading of the First Amendment" and its attempt to "disregard [the Court's] consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct"); *id.* at 908 (Blackmun, J., dissenting) (characterizing the majority's view of precedent as "distorted").

[188]*See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling government interest justifies the burden."); *Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (holding that substantial interference with religious exercise must be justified by a "compelling interest"). *See also* United States v. Lee, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on a religious liberty by showing that it is essential to accomplish an overriding governmental interest."); *Hobbie*, 480 U.S. at 141 (stating that infringements upon free exercise must be subjected to strict scrutiny).

[189]*Hialeah*, 113 S. Ct. at 2246 (Souter, J., concurring in part and concurring in the judgment).

[190]*Id.* at 2243.

iii. THE COURT'S THEORETICAL ARGUMENT

Finally, it is important to observe that the Court's *Smith* opinion is premised on a particularly narrow conception of the Free Exercise Clause.[191] Put succinctly:

> Although not stated explicitly, the Court's theory of democratic politics recognizes that there will be winners and losers in the political marketplace, where value competes against value for adoption as law. So long as one is able to participate in that competition, one cannot claim a constitutional right to avoid obedience merely because one's values were defeated by a competing set of values that one finds objectionable. Losers as well as winners are bound by the outcome of an open democratic political process.[192]

Observing this is important because the new Act, and to some extent *Hialeah*, reject this view.[193]

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[191]*Id.* at 2240. The pitiful success rate of free exercise plaintiffs following *Smith* firmly supports this conclusion. *See, e.g*, Hedges v. Wauconda Community Unit Sch. Dist., 9 F.3d 1295, 1297-98 (7th Cir. 1993) (upholding a school policy prohibiting distribution of religious literature on campus); Kissinger v. Board of Trustees, 5 F.3d 177, 179-81 (6th Cir. 1993) (upholding the College's decision not to exempt plaintiff from surgical requirement despite her religious beliefs); American Friends Serv. Comm. v. Thornburgh, 951 F.2d 957, 959-61 (9th Cir. 1991), *amended*, American Friends Serv. Comm. v. Thornburgh, 961 F.2d 1405 (9th Cir. 1992) (upholding a law requiring employers to verify legal immigration status of their employees despite the plaintiff Quaker organization's religious beliefs); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1213 (5th Cir. 1991) (upholding a law prohibiting peyote use by all except Native Americans); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472-73 (8th Cir. 1991) (upholding a zoning law restricting churches from central business district); Intercommunity Ctr. for Justice and Peace v. INS, 910 F.2d 42, 44-46 (2nd. Cir. 1990) (upholding a law requiring employers to verify legal immigration status of their employees); Ryncarz v. Eikenberry, 824 F. Supp. 1493, 1499-1500 (E.D. Wash. 1993) (upholding a law requiring convicted felony sex offenders to provide blood sample); Yang v. Sturner, 750 F. Supp. 558 (D. R.I. 1990) (upholding summary judgment denying plaintiffs emotional distress damages against defendant medical examiner who performed autopsy on their son despite plaintiffs' religious beliefs prohibiting autopsies); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280 (Alaska 1994) (upholding state equal rights commission's order determining that plaintiff landlord's policy of not renting to unmarried couples constituted unlawful discrimination); Mississippi High Sch. Activities Ass'n, Inc. v. Coleman, 631 So. 2d 768, 776-777 (Miss. 1994) (upholding a high school athletic bona fide residence eligibility restriction).

[192]Greene, *supra* note 127, at 1611.

[193]*See infra* notes 236-45 and accompanying text.

In short, the Court has never entertained a single definitive interpretation of the Free Exercise Clause. Instead, two leading interpretations have emerged, one broad and one narrow. The former, commonly known as "accommodation," posits that courts should protect, and even facilitate, the exercise of religion by crafting exemptions from government activity interfering with religious exercise.[194] The latter, frequently referred to as "formal neutrality," teaches that religion-specific policy is inappropriate absent invidious discrimination.[195] The *Smith* opinion reflects the tension between these competing interpretations.[196] Therefore, we necessarily digress to consider these views here.

Formal neutrality and accommodation are separated by, *inter alia*, fundamentally different conceptions of the place religious liberty occupies in

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[194]*See generally* McConnell, *Accommodation of Religion*, *supra* note 15, at 687-95 (explaining that accommodation allows the practice of religion uninhibited by government interference and undue burdens); Douglas Laycock, *Formal, Substantive, and Desegregated Neutrality Towards Religion*, 39 DEPAUL L. REV. 993 (1990) (referring to accommodation as "substantive neutrality," which stands for the belief that religion should remain a private choice, unaffected by government intervention); Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146 (1986) (stating that exceptions are most often created when a government standard effectively curtails a religious practice). Accommodation is also known as "substantive neutrality." See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2241 (1993) (Souter, J., concurring in part and concurring in judgment) ("[I]n addition to demanding a secular object, [substantive neutrality] would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws.").

[195]*See generally* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992) (rejecting permissive accommodations); Mark Tushnet, *Of Church and State and the Supreme Court: Kurland Revisited*, 1989 SUP. CT. REV. 373 (1989) (same); Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. WASH. L.J. 1691 (1988) (same); 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) (noting that the meaning of the religion clauses is to guarantee equal treatment); PHILIP B. KURLAND, RELIGION AND THE LAW (1962) ("[G]overnment cannot utilize religion as a standard for action or inaction because [the religion] clauses . . . prohibit classification in terms of religion either to confer a benefit or to impose a burden").

As Justice Souter noted, "formal neutrality" must be distinguished from "facial neutrality." *Hialeah*, 113 S. Ct. at 2242 (Souter, J., concurring in part and concurring in the judgment). The Justice explained that "[w]hile facial neutrality would permit discovery of a law's object or purpose only by analysis of the law's words, structure and operation, formal neutrality would permit enquiry into the intentions of those who enacted the law." *Id.*

[196]*Compare* Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990) *with id.* at 891-907 (O'Connor, J., concurring in part and concurring in the judgment) *and id.* at 907-921 (Blackmun, J., dissenting).

our political system.[197] Formal neutrality is premised on the idea that religion should be treated like any other institution or activity.[198] Thus, formal neutrality accepts the idea that a narrow interpretation of the Free Exercise Clause will generally serve to protect religious liberty and, failing this, that a degree of religious or denominational inequity must be tolerated.[199] Accommodation, on the other hand, is premised on the idea that religion is a *preferred* activity and, thus, that even incidental interference is prohibited.[200]

Resolving this debate is not necessary here. Suffice it to say that there is credence to both positions. However, it is important to note that *Smith* firmly embraced the doctrine of formal neutrality. As stated by Justice Scalia, writing for the majority in *Smith*:

> It may fairly be said that leaving accommodation of religion to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[201]

Again, this is important because RFRA, and to some extent *Hialeah*, reject formal neutrality's underlying assumption that interference with religious exercise is an acceptable byproduct of our democratic system.

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[197]Laycock, *Summary and Synthesis*, *supra* note 18, at 848; McConnell, *Accommodation of Religion*, *supra* note 15, at 689. Accommodation and formal neutrality are also separated by different views concerning the threat government poses to religious liberty. McConnell, *Origins of Free Exercise*, *supra* note 129, at 1418. Whereas formal neutrality assumes that religious exercise will receive adequate protection in the political arena, accommodation does not. *See id.* at 1418-20.

[198]Laycock, *Summary and Synthesis*, *supra* note 18, at 848. The concept behind formal neutrality or formal equality is that religious freedom is fostered when there is no discrimination against religion. *Id.*

[199]*See Smith*, 494 U.S. at 890.

[200]McConnell, *Origins of Free Exercise*, *supra* note 129, at 1418; Laycock, *Summary and Synthesis*, *supra* note 18, at 848. Accommodation provides protection of religious freedom, allowing exemptions to be carved out when government action limits religious practice. *Id.* These exemptions provide not only for legislation that directly attacks religion, but also for majoritarian indifference and ignorance. *Id.*

[201]*Smith*, 494 U.S. at 890. Professor McConnell explained that the rise of formal neutrality has profound implications, because "[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." McConnell, *Accommodation of Religion*, *supra* note 15, at 689.

5. FREE EXERCISE REVIEW

Since *Reynolds v. United States*,[202] it has been well settled that the right to exercise religious conduct is not absolute.[203] As a more fundamental question, however, the Court was left to determine whether religious conduct would *ever* be protected. This question was eventually answered in the affirmative when, in *Cantwell v. Connecticut*,[204] Justice Roberts, writing for the majority, 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."[205] While consistently embracing Justice Robert's conclusion that religious conduct is a protected activity,[206] the Court has nonetheless struggled with the related question of when laws interfering with the exercise of religious conduct offend the Free Exercise Clause.

The Court initially addressed this issue in its landmark decision, *Sherbert v. Verner*,[207] holding that laws interfering with exercising religious conduct are invalid unless necessary to further a compelling interest.[208] In *Sherbert*, the plaintiff, a member of the Seventh-day Adventist Church, was fired after refusing to work on Saturdays, the Seventh-day Adventist Sabbath.[209] When the plaintiff later filed for unemployment benefits, the State denied her claim under a provision of the South Carolina Unemployment Compensation Act,[210] disqualifying the individuals who, "without good cause" failed "to accept available suitable work."[211] The United States Supreme Court sustained the plaintiff's challenge, reasoning that the State's asserted interest

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[202]98 U.S. 145 (1878).

[203]*See supra* note 130 (asserting that to provide an arena where people freely embrace their religious beliefs, certain religious practices must yield to the welfare of the community).

[204]310 U.S. 296 (1940).

[205]*Id.* at 304.

[206]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2222 (1993) ("The principle that government may not enact laws that suppress religious belief *or practice* is so well understood that few violations are recorded in our opinions." (emphasis added) (citations omitted)).

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

[208]*Id.* at 406.

[209]Before filing suit, the plaintiff also rejected alternative employment because she refused to work on Saturdays. *Id.* at 399.

[210]S.C. CODE, tit. 68, §§ 68-1 to 68-404 (1976).

[211]*Id.* at 401 (quoting S.C. CODE, tit. 68, §§ 68-1 to 68-404 (1976)).

in preventing fraudulent claims would not justify the severe burden on the plaintiff's right to religious exercise.[212]

Within the context of unemployment compensation regulations, the Court has remained faithful to the principle articulated in *Sherbert*.[213] The same cannot be said, however, for the Court's decisions outside of this narrow context, where the Court, purportedly applying strict scrutiny (with some exceptions[214] and at least until *Smith* was decided in 1990),[215] has actually

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[212]*Id.* at 408-09 ("Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits.").

[213]*See, e.g.*, Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 835 (1989) (holding that the state of Illinois could not deny benefits based on the plaintiff's admission that he was not a member of any particular religious sect); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987) (holding that the state could not deny benefits based on the fact that the plaintiff had converted to the Seventh-day Adventist Church after commencing her employment); Thomas v. Review Bd. of the Indiana Employment Security Div., 450 U.S. 707, 718 (1981) (holding that the State could not deny benefits based on its determination that the plaintiff Jehovah's Witness's decision to quit his job following transfer to a division responsible for producing weapons was a personal, philosophical decision rather than a religious one).

[214]Prior to *Smith*, the Court already had insulated military and prison regulations from strict scrutiny. Goldman v. Weinberger, 475 U.S. 503 (1986), was the first case to exempt military regulations from the compelling interest test. In *Goldman*, the plaintiff, an Orthodox Jew and ordained rabbi, challenged a military regulation effectively prohibiting him from wearing his yarmulke while indoors. *Id.* at 505-06. Chief Justice Rehnquist, writing for the Court denied plaintiff's claim, announcing the rule that the Court's "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." *Id.* at 507. Chief Justice Rehnquist explained that "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Id.*

In the following year, the Court decided O'Lone v. Shabazz, 482 U.S. 342 (1987), and similarly rejected a free exercise challenge brought by Islamic prison inmates against a prison policy prohibiting their attendance of Jumu'ah, a Muslim congregational service which was held on Friday afternoons. *Id.* at 345. Again writing for the Court, Chief Justice Rehnquist held that deferential review was appropriate. The Chief Justice asserted that "prison regulations are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *Id.* at 349. Chief Justice Rehnquist explained further that deferential review 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." *Id.* at 349-50 (citations omitted).

applied a much less discriminating standard of review.[216] In *Braunfeld v. Brown*,[217] for example, the Court went so far as to rule that the State's interest in providing a general day of rest was compelling.[218] The point here is the unremarkable one that prior to *Hialeah*, there was general agreement, but not certainty, as to the correct standard of free exercise review.

Albeit in dicta, *Hialeah* offers some useful guidance. Because the *Hialeah* Court implicitly rejected Justice Scalia's argument in *Smith* that the compelling interest test is properly confined to cases involving unemployment benefits,[219] strict scrutiny would appear to extend to all other cases, with the exception, of course, of military and prison regulations.[220] Therefore, the law would now appear to be as follows: laws imposing a substantial burden on religious conduct which are not neutral and generally applicable are

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[215]The last case decided before *Smith* was Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989). Notably, that decision counsels that "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Id.* at 699.

[216]McConnell, *Free Exercise Revisionism*, *supra* note 18, at 1109 ("The Court generally found either that the free exercise right was not burdened or that the government interest was compelling.").

[217]366 U.S. 599 (1961).

[218]*Id.* at 607 ("[W]e cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation, and tranquility. . . .").

The reason the Court's decision in *Braunfeld* is surprising becomes clear when considered against its later decision in *Yoder*, holding that Wisconsin's interest in universal education was not compelling. Wisconsin v. Yoder, 406 U.S. 205, 224 (1972). When compared to Wisconsin's interest in promoting universal education, the state's interest in providing a day of rest would seem to be quite insignificant, education being perhaps the most important function of state and local governments. San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 15 (1973) (quoting Brown v. Board of Educ., 347 U.S. 483, 495 (1954)). *See also* Plyler v. Doe, 457 U.S. 202, 225 (1982) (observing that education plays a fundamental role in maintaining the fabric of our society). Thus, in a separate opinion in *Braunfeld*, Justice Brennan remarked that "the Court seems to [have said], without so much as a deferential nod towards that high place which we have accorded religious freedom in the past, that any substantial state interest will justify encroachments on religious practice, at least if those encroachments are cloaked in the guise of some nonreligious public purpose." *Braunfeld*, 366 U.S. at 613 (Brennan, J., concurring in part and dissenting in part).

[219]*See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2233 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

[220]*See id. See also supra* note 218 (explaining the exception the Court has carved out for military and prison regulations).

invalid unless necessary to further a compelling interest, with the exception of military and prison regulations, which enjoy a presumption of constitutionality and are valid where rationally related to a legitimate government interest.[221]

In summary, while the basic framework of free exercise doctrine was once "easily stated,"[222] this is clearly no longer the case. The same can be said for the Court's sympathetic attitude towards claims for religious liberty.

C. INTERPRETING *HIALEAH*

The animal-sacrifice laws at issue in *Hialeah* present a rare example of government activity intended to suppress a particular religious practice.[223] In a narrow sense, *Hialeah* was thus a simple case. As Justice Souter explained in a concurring opinion, *Hialeah* involved the noncontroversial principle that the Free Exercise Clause requires neutrality and general applicability, not the controversial principle that neutrality and general applicability, without more, will satisfy the First Amendment.[224]

But because *Hialeah* is the first case to confront *Smith* directly, and more specifically to develop the principles of neutrality and general applicability given voice there,[225] *Hialeah* is nonetheless one of the Court's most important free exercise decisions.[226] This is so all the more, since, again, *Smith* departs dramatically from traditional doctrine. We necessarily explore that decision here.

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[221]Again, though, because *Hialeah*, like *Smith*, involved criminal laws, the issue of whether *Smith* extends to civil laws remains unresolved. *See supra* note 162 (discussing the lower court split on this issue).

[222]McConnell, *Origins of Free Exercise*, *supra* note 129, at 1416 (discussing the Court's pre-*Smith* free exercise jurisprudence).

[223]*Hialeah*, 113 S. Ct. at 2243 (Souter, J., concurring in part and concurring in the judgment). Generally, Justice Souter noted, the cases involve neutral and generally applicable laws whose effect is the suppression of religious exercise. *Id.*

[224]*Id.* at 2242 (Souter, J., concurring in part and concurring in the judgment).

[225]*See also* Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 876-82 (1990) (discussing principles of neutrality and general applicability).

[226]*See generally* Fliegel, *supra* note 25, at 639-48 (discussing *Hialeah* while the case was pending before the Supreme Court and suggesting that *Hialeah* is an important case because the Court had to decide whether disadvantaging minority religious practices is truly an unavoidable consequence of democratic government).

At first blush, *Hialeah* appears to be a triumph for religious liberty. After all, with the exception of cases involving unemployment benefits,[227] *Hialeah* is the first Supreme Court case in more than twenty years decided in the plaintiff's favor.[228] However, a careful reading of the opinion reveals that any celebration would clearly be premature.[229] There are, of course, aspects of the opinion favorable to religion, in the sense that they increase protection for religious liberty. For example, the Court limits the scope of *Smith* by adopting a narrow definition of neutrality.[230] But, there are aspects of the opinion which do not favor free exercise as well, *i.e.*, which

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[227]*See* Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n. of Florida, 480 U.S. 136 (1987); Frazee v. Illinois Dep't. of Employment Sec., 489 U.S. 829 (1989).

[228]The last free exercise victory was in 1972, when the Court held that Amish parents could not be convicted for violating a state law requiring them to send their children to school until the age of 16. *See* Wisconsin v. Yoder, 406 U.S. 205, 224 (1972).

[229]Any celebration would be premature because only one First Amendment free exercise victory has been recorded to date since *Hialeah* was decided. That case was Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703 (4th Cir. 1994), wherein the Fourth Circuit addressed the constitutionality of a school board regulation singling out churches for a progressively higher rental rate for using school facilities. *Id.* at 704. Concluding that the regulation was not neutral and generally applicable (because the School Board "freely acknowledge[d]" singling out churches for discriminatory treatment), the court invalidated the regulation. *Id.* at 705,709. Specifically, the court reasoned that the regulation was invalid because it was not justified by a compelling state interest. *Id* at 708-09. *See also* Stephen L. Carter, The Resurrection of Religious Freedom?, 107 HARV. L. REV. 118, 119 (1993) (cautioning that the *Hialeah* opinion was written narrowly).

In contrast, the government has prevailed in a number of cases. *See, e.g.*, Hedges v. Wauconda Community Unit Sch. Dist., 9 F.3d 1295, 1301 (7th Cir. 1993) (upholding as neutral a school district policy prohibiting the distribution of literature primarily prepared for non-students use on school grounds because it intended to serve the school's "educational mission"); Kissinger v. Board of Trustees of the Ohio State Univ., College of Veterinary Medicine, 5 F.3d 177, 179-80 (6th Cir. 1993) (upholding as neutral a decision not to exempt the plaintiff from the school's surgical requirement because it was intended to serve "purely pedagogical purposes"); Ryncarz v. Eikenberry, 824 F. Supp. 1493, 1502 (E.D. Wash. 1993) (upholding as neutral a statute requiring convicted sex offenders to provide a blood sample because it was intended to further "the strong interest the government has in maintaining a permanent record of a violent sex offender's DNA to assist in solving past and future crimes"); Swanner v. Anchorage Equal Rights Comm'n, 631 So.2d 768, 776 (Miss. 1994) (upholding as neutral an order finding a landlord's policy against renting to unmarried couples unconstitutional because it was intended to prevent discrimination in rental housing market); Mississippi High Sch. Activities Ass'n, Inc. v. Coleman, 631 So. 2d 768, 776 (Miss. 1994) (upholding as neutral a state high school anti-recruiting rule because it was intended to promote "fair competition in interscholastic athletics" and to prevent "overzealous recruiting tactics").

[230]*See infra* notes 235-37 and accompanying text (suggesting that by narrowing *Smith*'s neutrality principle, *Hialeah* increased protection for religious liberty).

diminish protection for religious liberty. Both aspects are obviously important.

1. IN FAVOR OF RELIGION

a. *HIALEAH* MITIGATES *SMITH* BY LIMITING THE SCOPE OF THE *SMITH* RULE AND THEREBY RESTORING, AT LEAST IN PART, THE COMPELLING INTEREST TEST

Despite its shortcomings, *Hialeah* arguably offers increased protection for the right to exercise religious conduct. To begin with, the decision should mitigate *Smith*'s impact. As stated above, though turning on the neutrality principle, *Smith* failed to define it.[231] Following *Smith*, the scope of the rule was thus unclear. The significance of this ambiguity, largely an evidentiary matter, can best be understood in terms of the following analysis. If a law is neutral, then the law does not trigger free exercise review. Therefore, if the neutrality inquiry is confined to the statutory text, the scope of the rule would be expansive. Under this definition, most laws would fall within the ambit of the *Smith* decision. "[F]ew States," Justice O'Connor observed in *Smith*, "would be so naive as to enact a law directly prohibiting or burdening a religious practice as such."[232] Conversely, if *Smith* contemplates the admissibility of extrinsic evidence, then the scope of the rule would be narrow. Under this definition, a law would have more difficulty avoiding meaningful review.

In *Hialeah*, the Court adopted the latter interpretation of *Smith*, sanctioning a broad range of extrinsic evidence, including evidence of the challenged government activity's scope, design, and effect.[233] *Hialeah* thus operates to limit the scope of the *Smith* rule and, in turn, to mitigate *Smith*'s impact by restoring, at least in part, the compelling interest test.

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[231]*See supra* notes 71-101 and accompanying text.

[232]Employment Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in part and concurring in the judgment). *See also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2251 (1993) (Blackmun, J., concurring) ("It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such.").

[233]*See supra* notes 59-121 and accompanying text. *See also* Phelps v. Hamilton, 840 F. Supp. 1442, 1462 ("The neutrality test requires more than facial neutrality . . . ."); *Swanner*, 874 P.2d at 280 ("Even when a law is facially neutral . . . it may not be neutral if it is crafted to impede particular religious conduct."). *See also* Beck v. Missouri State High Sch. Activities Ass'n, 837 F. Supp. 998 (E.D. Mo. 1993) (rejecting facial neutrality as dispositive); Grumet v. Board of Educ., 618 N.E.2d 94, 104-05 (N.Y. 1993) (Kaye, C.J., concurring) (same).

b. *HIALEAH* EXTENDS THE COMPELLING INTEREST TEST BEYOND THE CONTEXT OF THE UNEMPLOYMENT BENEFIT CASES

Prior to *Smith*, there was at least general agreement as to the appropriate standard of free exercise review: with the exception of military and prison regulations, laws imposing a substantial burden on religious conduct were invalid unless necessary to further a compelling state interest.[234] But, *Smith* confused this issue, Justice Scalia strongly suggesting that strict scrutiny was properly confined to cases involving unemployment benefits.[235] Because heightened review acts as an important restriction on the government's ability to interfere with the exercise of religious conduct,[236] *Smith* thus called the fate of free exercise into question. *Hialeah*, like *Smith*, involving a criminal prohibition, raised this second important issue.

Hialeah addressed this question without any significant discussion and without responding to Justice Scalia's commentary in *Smith*. Concluding that the ordinances were not neutral and generally applicable,[237] the *Hialeah* Court essentially stated the compelling interest test as a general proposition.[238] Yet, while this aspect of *Hialeah* is somewhat understated, it is highly significant. Again, heightened scrutiny plays an important role in protecting religious freedom. Recognizing this, it becomes clear that a contrary result would have crippled the Free Exercise Clause by depriving it of any practical significance.

It would, of course, have been difficult for the Court to avoid applying strict scrutiny. Established precedent aside, *Smith* itself compels this conclusion. The *Smith* majority emphasized that the *Sherbert* compelling interest test was developed in a context where consideration of the "particular circumstances" was necessary.[239] Indeed, the majority distinguished *Smith* from *Sherbert* and its progeny based expressly on this distinctive feature of

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[234]*See supra* notes 202-22.

[235]*Smith*, 494 U.S. at 883-84 (noting that the Court has "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation").

[236]*Smith*, 494 U.S. at 903 (O'Connor, J., concurring in part and concurring in the judgment) ("The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the *fullest extent possible* in a pluralistic society." (emphasis added)).

[237]*Hialeah*, 113 S. Ct. at 2225-33 (1993).

[238]*Id.* at 2233 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny").

[239]Employment Div. v. Smith, 494 U.S. 872, 884 (1990) ("The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct.").

the unemployment benefit programs.[240] Similar considerations serve to distinguish *Smith* from *Hialeah*. Ordinance 87-40 incorporated Florida's animal cruelty statute.[241] At the time, the Florida law prohibited the "unnecessary" killing of animals.[242] Ordinance 87-52 and Ordinance 87-71 used this same necessity standard.[243] Like the analysis required in the unemployment benefit cases, a fact-intensive inquiry into the circumstances peculiar to the killing is thus seemingly required. Assuming this analysis is correct, and it would be difficult to maintain that it is not, arguing that the rationale justifying strict scrutiny in *Sherbert* does not apply equally to *Hialeah* would be nothing short of absurd.

c. FROM A JURISPRUDENTIAL PERSPECTIVE, *HIALEAH* APPEARS TO MARK AT LEAST A PARTIAL RETREAT FROM FORMAL NEUTRALITY

As explained above, *Hialeah* tempers *Smith*'s impact by adopting a narrow definition of neutrality and by refusing to limit the compelling interest test to cases involving unemployment benefits. In turn, *Hialeah* appears to signal at least a partial retreat from the modern trend towards formal neutrality.[244] Considering the full significance of this aspect of *Hialeah* is momentarily postponed; however, it is important to observe that a much different result *was* possible. By limiting the scope of the neutrality inquiry to facial neutrality, the Court could have concluded that the City of Hialeah's animal-sacrifice laws were neutral. Then, the Court could have upheld the laws simply by refusing to extend the compelling interest test to criminal prohibitions.

The point here is that while presented with an opportunity to continue narrowing the Free Exercise Clause, the Court did not do so. This is not to say that *Hialeah* marks the Court's return to a sympathetic jurisprudence,

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[240] *See id.*

[241] HIALEAH, FLA., ORD. 87-40(1) (1987). *See also supra* note 9 (setting forth relevant statutory text).

[242] FLA. STAT. Ch. 828, § 828.12 (West 1987).

[243] *See* HIALEAH, FLA., ORD. 87-52, § 6-8(2) (1987) (defining sacrifice as the unnecessary killing of an animal); HIALEAH, FLA., ORD. 87-71 §§ (1) and (2) (1987) (employing the same definition of sacrifice).

[244] *See* Carter, *supra* note 229, at 119-20. Professor Carter noted that *Hialeah* raised the "possibility of fashioning a jurisprudence of the religion clauses that will eliminate the two most depressing elements of the Court's decisions over the past decades: the embarrassing tendency to cabin the Free Exercise Clause until the rights it conveys are essentially the same as those protected by other sections of the First Amendment, and the insensitive tendency to treat religion as itself an evil with which the Constitution is concerned." *Id.* at 119.

because, as explained below, the decision clearly does not go that far.[245] Neglecting to appreciate this jurisprudential aspect of the opinion, however, would nonetheless be a mistake. This is not necessarily because *Hialeah* represents a victory for religious liberty, but rather because *Hialeah* suggests that the Court's struggle to define the Free Exercise Clause is not over. To this effect, *Hialeah* offers some hope that future free exercise cases will take the right to exercise religious conduct more seriously.

2. NOT IN FAVOR OF RELIGION

Again, *Hialeah* raised a noncontroversial issue: whether Hialeah's animal-sacrifice laws were neutral and generally applicable within the meaning of the First Amendment.[246] Therefore, because *Hialeah* fails to resolve, or even address, the more important issue of whether these conditions alone will satisfy the Free Exercise Clause, it arguably has limited practical significance.[247] This, however, is only the beginning of problems with *Hialeah*, and it is by far the least disturbing problem at that.

a. *HIALEAH* TREATS *SMITH* AS ESTABLISHED PRECEDENT AND WILL, THEREFORE, STILL RARELY REQUIRE STRICT SCRUTINY

While *Smith* was a sharply divided opinion, with Justices O'Connor, Blackmun, Brennan, and Marshall strenuously objecting to the majority's departure from traditional doctrine, *Hialeah* nonetheless embraced *Smith* as established precedent. *Hialeah* makes this perfectly clear, Justice Kennedy explaining that "[i]n addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling interest even if the law has the incidental effect of burdening a particular religious practice."[248] This aspect of *Hialeah* is troubling because, by

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[245]*See infra* notes 246-57 and accompanying text.

[246]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2242 (1993) (Souter, J., concurring in part and concurring in the judgment) ("This case, rather, involves the noncontroversial principle repeated in *Smith*, that formal neutrality and general applicability are necessary conditions for free-exercise constitutionality . . . . In applying that principle the Court does not tread on troublesome ground.").

[247]*Id.* at 2240. *See also infra* notes 250-57 and accompanying text (discussing *Hialeah*'s practical effect upon the Court's current Free Exercise Clause jurisprudence).

[248]*Hialeah*, 113 S. Ct. at 2226.

embracing *Smith*, the opinion ratifies the otherwise controversial principles of neutrality and general applicability.[249]

b. BY FAILING TO RECONCILE *SMITH* WITH CONFLICTING PRECEDENT, *HIALEAH* PERPETUATES THE CONFUSION CREATED BY *SMITH*

Since there was little doubt about the neutrality of *Hialeah*'s animal-sacrifice laws,[250] the *Hialeah* Court was not required to address *Smith's* controversial holding.[251] However, because the animal-sacrifice laws in question were criminal, the issue of whether strict scrutiny was properly confined to its unemployment benefit cases was squarely before the *Hialeah* Court. To this effect, while not technically required, *Hialeah* presented an ideal opportunity for the Court to reconcile *Smith* with conflicting precedent. Unfortunately, this is an opportunity the Court ignored.[252]

It is not that the Court fails to resolve this issue. To the contrary, as explained above, *Hialeah* arguably extends the compelling interest to cases involving criminal laws. Unfortunate, though, this is the way in which the Court arrives at this conclusion. Part III of the opinion is addressed to the compelling interest test.[253] No attempt is made there to explain why the test extended to the City of Hialeah's animal-sacrifice laws. Instead, the Court's reasoning is found in Part II of the opinion,[254] dealing with the neutrality issue, where the Court explained that strict scrutiny is appropriate because, *inter alia*, consideration of the peculiar facts would be required to

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[249]*See, e.g.*, Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1213 (5th Cir. 1991) (citing *Smith* for the proposition that neutral and generally applicable laws need not be justified by a compelling state interest); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 279 (Alaska 1994) (same); Mississippi High Sch. Activities Ass'n, Inc. v. Coleman, 631 So.2d 768, 776 (Miss. 1994) (same).

[250]*Hialeah*, 113 S. Ct. at 2231.

[251]*Id.* at 2240 (Souter, J., concurring in part and concurring in the judgment) ("Because prohibiting religious exercise is the object of the laws at hand, this case does not present the more difficult issue addressed in our last free-exercise case. . . ." (citing Employment Div. v. Smith, 494 U.S. 872 (1990))).

[252]As one commentator observed: "Justice Kennedy's majority opinion . . . took the simplest path. Eschewing either a full-scale retreat from the *Smith* approach or a further restriction of the chances for a religious freedom plaintiff to prevail, [the Court] explained that, even if the Hialeah ordinances burdened the practice of Santeria, the city had no need to justify them with a compelling interest as long as the laws were 'neutral and of general applicability.'" Carter, *supra* note 216, at 125.

[253]*See supra* notes 104-21 and accompanying text.

[254]*See supra* notes 71-101 and accompanying text.

determine whether a killing was "necessary."[255] In other words, while effectively embracing both *Smith* and traditional free exercise precedent, the *Hialeah* Court made no effort whatsoever to reconcile them.

This is unfortunate for two reasons. First, because the Court's superficial analysis raises concern for the opinion's merit. Second, because it leaves this conflict on the books, thereby weakening the foundations of today's free exercise law. Both are unfortunate, but since *Hialeah* is such a rare example of a case involving overt discrimination, the latter is more fundamental.

c. FROM A JURISPRUDENTIAL PERSPECTIVE, *HIALEAH* SUGGESTS THAT THE FATE OF FIRST AMENDMENT FREE EXERCISE REMAINS UNSETTLED

The fact that *Hialeah* offers some hope for the future of religious free exercise, while "falling far short of the mark," is significant in its own right. From a jurisprudential perspective, *Hialeah* reveals that the fate of free exercise adjudication remains unsettled. In contrast to *Smith*, *Hialeah* was a unanimous decision. But, this does not mean that the current members of the Court are in complete agreement. Again, because there was overwhelming evidence that the animal-sacrifice laws were intended to suppress the practice of Santeria, *Hialeah* was an easy case.[256] It follows that the struggle to define the right to exercise religious conduct is not over and that the future of free exercise remains uncertain.[257]

3. UNRESOLVED ISSUES

The Court's *Hialeah* opinion raises two issues, both relating to the neutrality inquiry. We stop briefly to identify them here.

The first issue is procedural, involving the burden of proving anti-religious intent. More specifically, the issue is whether, like the substantial burden requirement, the plaintiff must proffer such evidence to trigger free exercise review or, alternatively, whether this burden shifts to the government once the plaintiff has met the substantial burden requirement. The *Hialeah* Court did not address this issue, but looking to the Court's equal protection decisions, it would be reasonable to assume that the burden would be imposed on the

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[255]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2229 (1993).

[256]*Id.* at 2251 (Blackmun, J., concurring).

[257]Carter, *supra* note 229, at 142 (observing that "religious freedom is still terribly ill").

plaintiff.[258] Generally speaking, equal protection plaintiffs are required to offer evidence of discriminatory intent in order to trigger strict or intermediate scrutiny.[259]

The second issue involves mixed-purpose laws, namely, laws intended in-part to suppress religious exercise and in-part to further a legitimate secular purpose. Here, useful guidance can similarly be drawn from the Court's equal protection decisions, where the presence of a secular purpose will not insulate an otherwise invalid law from meaningful review.[260] It is reasonable to assume that the Court would employ the same analysis under the Free Exercise Clause, for a law intended to suppress religious exercise would arguably be invalid under *Smith*, regardless of whether it was also intended to serve a secular purpose, because the discrimination would still be intentional.

Although these are important issues, it is unlikely that the Court will resolve them at any time in the near future.[261] Because most free exercise

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[258]For an interesting discussion of whether this burden should be imposed on free exercise plaintiffs, see *id.* at 128-34 (asserting that "the problems of proof are will-nigh insurmountable"). Both the free exercise analysis and equal protection analysis run parallel to one another. *Id.* at 128-29. *See also supra* note 100 (explaining the similarity between an equal protection analysis and a free exercise analysis). Unlike tort-style actions where a private actor is held responsible for foreseeable consequences, the Court permits the government actor to suppress the rights of the equal protection litigant. Carter, *supra* note 229, at 129. Moreover, the Court's now allow for the suppression of the rights of the free exercise litigant, paying little regard to the consequences when their actions are negligent and unintentional. *Id.* This provides a disincentive to assess potential impact on racial groups and requires the litigant to prove discriminatory intent, thus placing the litigant at a greater disadvantage. *Id.* at 129-30.

[259]*See generally* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (holding that a town's refusal to rezone did not violate the Equal Protection Clause because there was no evidence of proof of discriminatory intent or purpose); Washington v. Davis, 426 U.S. 229, 238-41 (1976) (holding that police department's recruiting procedures, which resulted in disproportionate impact, did not violate the Equal Protection Clause because a law accused of being racially discriminatory must be "traced to a racially discriminatory purpose").

[260]*See generally Village of Arlington Heights*, 429 U.S. at 242 (maintaining that, alone, disproportionate impact will not support a finding of racial discrimination).

[261]A related question the Court failed to address is whether the government is required to furnish evidence "showing that the challenged policy is necessary to effectuate a compelling state interest." Carter, *The Resurrection of Religious Freedom?*, *supra* note 229, at 130. Several decisions suggest that such evidence is required. In Wisconsin v. Yoder, 406 U.S. 205, 224 (1972), for example, the Court sustained the plaintiffs' free exercise claim reasoning specifically that the State's evidence was insufficient. Additionally, the unemployment benefit cases were similarly sensitive to this concern. *See, e.g.*, Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 835 (1989) (upholding employee's free exercise claim because the state offered no justification in denying employment compensation for employee's

claims will now be brought under RFRA,[262] few significant cases are likely to come before the Court.

III. WHERE WE ARE GOING

Thus far, this article has made two very important points. The first point is that there is a meaningful distinction between statutory and first amendment free exercise, because whereas RFRA generally requires strict scrutiny, the Court has virtually abandoned it.[263] The second point is that this distinction remains intact following *Hialeah*.[264] The question remains, however, whether RFRA is a welcome development. This is a question which assumes additional importance in light of the fact that, as explained below, plaintiffs are now likely to favor statutory rather than constitutional claims. Here, I finally present my argument that RFRA is a welcome development, reasoning that the Free Exercise Clause contemplates special judicial protection for, not indifference to, religious practices not shared by the majority. It is this conclusion, I submit, which is consistent with the original purpose of the First

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refusal to work Sunday); Thomas v. Review Bd., 450 U.S. 707, 719 (1981) (rejecting a state's assertion of "widespread unemployment" in accommodating an employee's free exercise claim since no evidence in the record supported this finding); Sherbert v. Verner, 374 U.S. 398, 407 (1963) (finding no proof in the record that an employee's right to observe a Saturday sabbath would unduly burden unemployment compensation funds or hinder employer's rescheduling). *See* Employment Div. v. Smith, 494 U.S. 872, 911-12 (1990) (Blackmun, J., dissenting) (emphasizing that "evidence that the religious use of peyote has ever harmed anyone" was absent in *Smith*). *See also* Goldman v. Weinberger, 475 U.S. 503, 527 (1986) (emphasizing that the state failed to show that religious exemption to military regulation prohibiting a Rabbi from wearing yarmulke would "impair the overall image" of the Air Force). The Court has also sanctioned this concern in the related context of the equal protection clause. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (asserting that the state failed to show that its policy excluding men from the nursing program was justified by the fact that women were deprived of opportunities in the field).

Elsewhere, however, specific evidence has not been required. Thus, in Prince v. Massachusetts, 321 U.S. 158 (1944), the Court sustained 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 and welfare of the child." *Id.* at 174 (Murphy, J., dissenting).

Following *Hialeah*, this issue remains unresolved. This is unfortunate because, as Justice Murphy explained, "[r]eligious freedom 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." *Id.* at 176 (Murphy, J., dissenting).

[262]*See infra* notes 281-318 and accompanying text (explaining that RFRA offers plaintiffs distict practical advantages).

[263]*See supra* notes 122-222 and accompanying text.

[264]*See supra* notes 223-62 and accompanying text.

Amendment, "to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."[265]

A. THE STATUTORY FUTURE OF FREE EXERCISE

While RFRA does not technically overrule *Smith*,[266] it will effectively do so. This is because plaintiffs are now likely to favor statutory claims, which offer two distinct practical advantages: an increased likelihood of success and freedom from uncertainty.

1. INCREASED LIKELIHOOD OF SUCCESS

This first advantage, and the more obvious of the two, is easily explained. Under *Smith*, few constitutional claims will continue to trigger strict, or even minimal, scrutiny.[267] Again, this is true notwithstanding the *Hialeah* Court's attempt to mitigate *Smith*.[268] In contrast, *all* statutory claims will trigger strict scrutiny, assuming, that is, the substantial burden requirement has first been met.[269] The distinction is significant: while plaintiffs face

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[265]Employment Div. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring in part and concurring in the judgment).

[266]*See supra* note 15 and accompanying text (explaining that RFRA offers an additional, separate action and does not foreclose a constitutional action).

[267]*See supra* notes 202-22 and accompanying text.

[268]*See supra* notes 250-57 and accompanying text.

[269]42 U.S.C. § 2000bb-1 (1993); S. Rep. No. 103-111. *See also* Minister Michael Malik Allah v. Father Francis Menei, 844 F. Supp. 1056, 1062 (E.D. Pa. 1994) ("The Senate Report makes clear Congress's intent that there be one standard for examining claims of substantial government infringement on religious practice."). Like contemporary doctrine, RFRA requires plaintiffs to demonstrate that the burden on religious exercise is substantial. *See* 42 U.S.C. § 2000bb-1 (1993). *See also* Riley v. Reno, No. CIV-94-1058-PHX, 1994 U.S. Dist. LEXIS 11463, at *51-52 (D. Ariz. Aug. 12, 1994) (analyzing whether the burden on the plaintiff's free exercise rights was substantial within the meaning of RFRA); Powell v. Stafford, No. 93-B-2240, 1994 U.S. Dist. LEXIS 11108, at *6-11 (D. Colo. Aug. 8, 1994) (same); Prins v. Coughlin, No. CIV-94-2053, 1994 U.S. Dist. LEXIS 10564, at *3-6 (S.D.N.Y. Aug. 3, 1994) (same); Fordham Univ. v. Brown, 856 F. Supp. 684, 696-97 (D.C. 1994) (same); Campos v. Coughlin, 854 F. Supp. 194, 205-06 (S.D.N.Y. 1994) (same). For the full text of RFRA, see *supra* note 9.

For an example of a recent case in the prison context highlighting the absolute necessity of pleading, at a minimum, free exercise claims under both the First Amendment and RFRA, see Brown-El v. Harris, 26 F.3d 68 (8th Cir. 1994), *reh'g denied*, 15 F.3d 179 (8th Cir. 1994) (analyzing the plaintiff inmate's claim that the defendant prison violated his free exercise rights by removing him form a list of prisoners given evening meals during the Muslim holy month of Ramadam under the First Amendment and rejecting his claim).

the prospect of marginal success under the Constitution, they are likely, at least in theory, to prevail under RFRA.

A recent decision in the prison context provides a useful illustration. In *Lawson v. Dugger*,[270] the issue before the court was whether Florida prison officials violated the Free Exercise Clause by restricting inmate access to religious literature. After initially determining that RFRA was controlling,[271] the court held that the restriction was invalid.[272] The Court reasoned that the outright ban was not the least restrictive means of furthering the State's compelling interest in maintaining order and security in the prison system.[273] If the case had been decided before RFRA was enacted, however, this result would have been different. Because prison regulations enjoy a presumption of constitutionality under the First Amendment,[274] there is little doubt, if any, that the inmates would have lost.[275]

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[270]844 F. Supp. 1538 (S.D. Fla. 1994).

[271]*Id.* at 1542 (concluding that the stated purpose of RFRA was to apply the revised standard of law retroactively, despite Congress's failure to use the term "retroactive" in the statute).

[272]*Id.*

[273]*Id.*

[274]*See supra* note 214 (discussing pertinent case law).

[275]Further support for the conclusion that RFRA offers plaintiffs an increased likelihood of success can be drawn from two other recent cases in the prison context: Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994) and Allah v. Menei, 844 F. Supp. 1056 (E. D. Pa. 1994).

In *Campos*, two inmates brought suit under RFRA to enjoin the defendant prison from enforcing a directive prohibiting prisoners from wearing religious artifacts, including religious beads. *Campos*, 854 F. Supp. at 197. The inmates, Santeria adherents, wanted to wear beads representing their patron and daily orishas. *Id.* at 202. The prison countered by asserting that the directive was justified as a security measure. *Id.* The court granted the injunction, reasoning that the defendant's interest in prison security could be served by a ban against wearing religious beads *over* clothing and, thus, that it was not the least restrictive alternative within the meaning of RFRA. *Id.* 204-10.

In *Allah*, the plaintiff challenged a decision by prison officials denying his request for permission to practice his faith separate from other religious communities in the prison. *Allah*, 844 F. Supp. at 1059. The court denied the State's renewed motion for summary judgment, reasoning that the State failed to carry its burden under the Religious Freedom Restoration Act to demonstrate that its decision served a compelling state interest. *Id.* at 1064. If decided before RFRA was enacted, the plaintiff similarly would have lost. *See* O'Lone v. Shabazz, 482 U.S. 342, 349 (1987).

If decided before RFRA was enacted, the result in both cases would have been different. *See id. See also Campos*, 854 F. Supp. at 204-05 ("[RFRA] is . . . notable for its application of the compelling governmental interest test to inmates' cases which, prior to the passage of [RFRA], were subject to a less onerous standard of review, favoring prison administrators so long as the prison regulation was reasonably related to a legitimate penological interest."). *But*

2. FREEDOM FROM UNCERTAINTY

The second advantage reinforces the first. Simply put, constitutional claims are "risky." For one thing, the Court is sharply divided on the neutrality issue.[276] For another, contemporary doctrine may not be stable, the Court's jurisprudence arguably at odds with the history and purpose of the Free Exercise Clause's history and purpose.[277] There is a risk, in other words, of being caught in the middle of the Court's continuing struggle to define the Free Exercise Clause.[278]

In comparison, statutory claims are virtually "risk-free." Because RFRA rejects *Smith*,[279] it should produce consistent results. In turn, consistency will free this area of the law from uncertainty, thereby eliminating the risk-factor identified above, and increasing the likelihood that claims will be successful. Though less concrete, this second advantage is clearly no less important.

B. ASSESSING THE IMPACT

With this in mind, we now turn to the question of whether this result, increasing judicial protection for the right to exercise religious conduct, is consistent with the original purpose of the Free Exercise Clause.[280]

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see Prins v. Coughlin, No. CIV-94-2053, 1994 U.S. Dist. LEXIS 10564, at *3-6 (S.D.N.Y. Aug. 3, 1994) (holding that the defendant prison did *not* impose a substantial burden on the free exercise rights of a Jewish inmate by transferring him from a prison with hot kosher food to a prison with cold kosher food).

[276] *Compare* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993) *and* Employment Div. v. Smith, 494 U.S. 872 (1990) *with Hialeah*, 113 S. Ct. at 2240 (Souter, J., concurring in part and concurring in the judgment) *and Smith*, 494 U.S. at 891 (O'Connor, J., concurring in part and concurring in the judgment).

[277] *See infra* notes 280-318 and accompanying text (analyzing whether the resulting impact of *Hialeah* was consistent with the original purpose of the Free Exercise Clause).

[278] *See supra* notes 250-62 and accompanying text.

[279] 42 U.S.C. § 2000bb (1993). For the text of RFRA, see *supra* note 9.

[280] "Originalism" is only one mode of constitutional adjudication. However, "even those Justices and commentators who believe that the historical meaning is not dispositive ordinarily agree that it is a relevant consideration." McConnell, *Free Exercise Revisionism*, *supra* note 16, at 1117. For further discussion of the Court's free exercise doctrine on originalist grounds, see MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (American Enterprise Institute, 1978); WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (Basic, 1976).

1. THE INDIFFERENCE ARGUMENT

One need not look very far to find authority for what can be termed the "indifference argument": the idea that because the suppression of religious practices not shared by the majority is an inevitable, and even an acceptable, byproduct of our democratic political system, judicial intervention on behalf of minority religious practices is unnecessary.[281] Indeed, it is not necessary to look beyond the Court's *Smith* decision, which, as explained above, firmly embraced the doctrine of formal neutrality.

Identifying support for the argument, however, is not so easy. Consider, for example, the Court's *Smith* opinion. In *Smith*, Justice Scalia failed to cite any authority for his theoretical argument that the Free Exercise Clause will tolerate the suppression of minority religious practices[282] nor, for that matter, his sweeping statement that "[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."[283] In lieu of authority, Justice Scalia explained that the Court's holding was simply a "permissible reading" of the text of the Free Exercise Clause.[284]

Given the nature of the indifference argument, this conspicuous absence of authority is not surprising. After all, *Smith* does not turn on an analysis of the Free Exercise Clause's historical purpose, but rather on the majority's normative judgment that because religious liberty is a "luxury,"[285] it must be secondary to government autonomy.[286] The *Smith* majority, of course, does not state this expressly, but its analysis implies as much.[287] Thus, while arguing on one hand that decisions regarding religious exemptions are best left to the legislature, the Court acknowledges on the other that the legislature will likely favor mainstream religions.[288] It is with this central

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[281]*See supra* notes 71, 248-49 and accompanying text (noting that the *Smith* Court embraced the doctrine of formal neutrality).

[282]Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[283]*Id.*

[284]*Id.* at 878 (rejecting the argument that the Free Exercise Clause prohibits laws regulating religious conduct regardless of whether the law is directed at a specific religious practice).

[285]*Id.* at 888.

[286]McConnell, *Free Exercise Revisionism*, *supra* note 18, at 1130-33 (discussing the Court's implied view that denominational neutrality is distinctly subordinate).

[287]Greene, *supra* note 127, at 1611-12 ("By applying this theory of democratic politics . . . the Court revealed that it does not take religious values seriously as a special source of conscientious objection.").

[288]*See* Employment Div. v. Smith, 494 U.S. 872, 888-90 (1990). *See also supra* notes 285-86 and accompanying text.

tenet, the idea that the judicial system is to remain merely *indifferent* to the suppression of minority religious practices, that I take issue, because this hollow Free Exercise Clause interpretation contradicts the very purpose of the Bill of Rights.

2. REFUTING THE INDIFFERENCE ARGUMENT

The Court, for reasons unknown, has never seen fit to carefully identify the original purpose of the Free Exercise Clause.[289] However, definitive scholarship in this area by Professor McConnell suggests that the Free Exercise Clause is not just symbolic. Professor McConnell's conclusion, based on a thorough review of the historical evidence, is that the Free Exercise Clause was originally intended to foster religious pluralism.[290] Professor McConnell explained that religious pluralism played a vital role in the system of religious checks and balances envisioned by the framers.[291] I take issue with the indifference argument because it eschews religious pluralism, hence the original purpose of the Free Exercise Clause.

a. EVIDENCE OF ORIGINAL INTENT

James Madison and Thomas Jefferson were the two most influential figures behind the enactment of the religion clauses.[292] In turn, the Free Exercise Clause was shaped largely by their contrasting views of the proper relationship between the right to religious autonomy and the obligation to obey the laws of the state. Of the two, Jefferson held the more narrow view of religious liberty. Jefferson maintained that religious liberty did not take precedence over social duty.[293] Madison, on the other hand, held a more

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[289]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2248 (1993) (Souter, J., concurring in part and concurring in the judgment) (remarking that the Court has not explored the history of the Free Exercise Clause since its early attempts in *Reynolds* and *Beason*).

[290]McConnell, *Origins of Free Exercise*, *supra* note 129, at 1512-17.

[291]*Id.*

[292]*Id.* at 1455. Fisher Ames of Massachusetts, the author of numerous letters and essays on several public issues, acted as a major political peacemaker with respect to the enactment of the religious clauses, however, Jefferson and Madison were exponents of a particular vision of religious freedom. *Id.* n.236.

[293]*Id.* at 1451. To a large extent, Jefferson's view reflected the rationalist premises of Locke, and it is these premises that the modern courts and commentators have relied upon in arguing for a no-exemption interpretation of the Free Exercise Clause. *Id.* at 1449-51.

sympathetic view towards religion.[294] Madison insisted that social duty was subordinate to religious faith.[295] The evidence strongly suggests that it is Madison's view which ultimately prevailed.[296]

By 1789, virtually every state constitution contained a provision protecting religious freedom.[297] Significantly, these provisions, while treating rights, such as the right to a jury trial, as "derivative of civil society," characterized religious freedom as an "unalienable" right.[298] Moreover, while these early state constitutions limited religious freedom, mainly where conflicting with the public peace and safety,[299] these limitations further support this conclusion. As Professor McConnell explained, these exceptions "would not be necessary if the concept of free exercise had been understood as nothing more than a requirement of nondiscrimination against religion."[300] Finally, this conclusion follows from the early history of the federal religion clauses. "Most states," Professor McConnell observed, "ratified the proposed amendments quickly, with little debate or controversy."[301] It is reasonable

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[294]*Id.* at 1452 ("Indeed, the sight of '5 or 6 well meaning men' — Baptist preachers imprisoned in Culpepper, Virginia 'for publishing their religious sentiments which in main are very orthodox' — sparked his concern for religious freedom.").

[295]*Id.* at 1453. Madison, with his more generous vision of religious liberty, more faithfully reflected the popular understanding of the free exercise provision that was to emerge in both the state constitution and the Bill of Rights. *Id.*

[296]*Id.* at 1455 ("The evidence indicates . . . that Madison, with his more generous vision of religious liberty, more faithfully reflected the popular understanding of the free exercise provision that was to emerge both in state constitutions and the Bill of Rights.").

[297]*Id.* While the states accepted the concept of religious freedom, the extent of protection varied from state to state: Maryland and Delaware explicitly limited their free exercise protection to Christians; New Hampshire, Massachusetts, New Jersey, North Carolina, and Pennsylvania limited their free exercise protection to theists; New York, Georgia, Rhode Island, and South Carolina extended their protection to all religions; and Virginia, via the Virginia Bill of Rights, provided religious protection based upon a theistic definition, however, the language could have been broadly interpreted. *Id.* n.237.

[298]*Id.* at 1455-56. The state constitutions recognized that among the natural rights there were some that, through their very nature, were unalienable because no equivalent right could be given or received for them, such as rights of the conscience. *Id.* Each state defined free exercise in terms of the individual believer's conscience and the actions that flow there from. *Id.* at 1558-59.

[299]*Id.* at 1461-66. The peace and safety provisions incorporated into the state constitutions were designed to protect the free exercise right, provided that the exercise of such rights did not invade other individuals' rights or disrupt the public peace. *Id.* at 1464.

[300]*Id.* at 1512.

[301]*Id.* at 1485. Virginia raised the only opposition which was attributed to political maneuvering rather than serious substantive opposition to the amendment's language. *Id.* Only Georgia, Massachusetts, and Connecticut failed to ratify the First Amendment, but these

to conclude that there would have been debate or controversy if Madison's view was not widely accepted.

b. INTERPRETATION

To say that the historical evidence supports a broad interpretation of the Free Exercise Clause is one thing; to say that the principle courts should intervene on behalf of minority religion follows from this evidence is quite another. But, when examined in light of Madison's theoretical argument, or more specifically his theory of religious checks and balances, the historical evidence indeed compels this conclusion.[302]

Like Jefferson, Madison's views were influenced by the colonists' bitter experience with religious rivalry and sectarian intolerance. Madison was, therefore, similarly concerned with resolving the conflict between government autonomy and religious liberty, a conflict arising where the state forces a choice between obeying the law and obeying one's faith. But, Madison's solution was different: while Jefferson's solution was to limit religious freedom, Madison's solution was to exalt it.[303] Madison reasoned that by exalting religious liberty, the Free Exercise Clause would foster the religious pluralism which would guarantee peace and stability.[304] Put succinctly, Madison reasoned that "[i]f there are enough factions, they will check and balance one another and frustrate attempts to monopolize or oppress, no matter how intolerant or fanatical any particular sect may be."[305]

Returning to the main point here, the idea that courts must intervene on behalf of minority religions is implicit in, if not indispensable to, this analysis. Madison's theory assumes that all religious factions will have an equal voice in the political process.[306] Otherwise, Madison's system of religious checks and balances fails. But, given the nature of a democratic system, this is not the case, at least not to the extent that the political branches of government are concerned. "Because laws in a democratic republic are based on the presuppositions of the majority, they will not infrequently conflict with the religious scruples of those holding different world views, even in the absence of a deliberate intent to interfere with

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refusals seemingly were unrelated to religious freedom issues. *Id.*

[302]*See id.* at 1454-55.

[303]*Id.* at 1451-55. Therefore, Madison's view should be distinguished from the narrower conception fathered by Locke. *Id.* at 1449.

[304]*Id.* at 1515-16.

[305]*Id.* at 1515. Madison wished to protect religious minority interests in conflict with the greater society and, therefore, encourage the growth of religious factions. *Id.*

[306]*Id.* at 1515-16.

religious practices."[307] Observing this, it becomes clear that Madison's theory presupposes that courts will play an active role in protecting minority religious practices.[308] Without judicial intervention, this important voice is lost.[309]

3. A STATUTORY CONTRAST

In contrast to the Court's free exercise jurisprudence, RFRA promotes religious pluralism by embracing an interpretation of the Free Exercise Clause sympathetic to claims for religious liberty.[310] Of course, this is not to say that the right to exercise religious conduct is now absolute, because this is

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[307]*See* McConnell, *Accommodation of Religion*, *supra* note 15, at 693.

[308]McConnell, *Origins of Free Exercise*, *supra* note 129, at 1515-16. As Justice O'Connor noted, "[t]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Employment Div. v. Smith, 494 U.S. 872, 903 (1990) (O'Connor, J., concurring in part and concurring in the judgment) (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1940)). *See also* Goldman v. Weinberger, 475 U.S. 503, 523 (1986) (Brennan, J., dissenting) ("Our Nation has preserved freedom of religion, not through trusting to the good faith of individual agencies of government alone, but through the constitutionally mandated vigilant oversight and checking authority of the judiciary."); McConnell, *Free Exercise Revisionism*, *supra* note 18, at 1129 ("The 'disadvantaging' of minority religions is not 'unavoidable' if courts are doing their job. Avoiding certain 'consequences' of democratic government is ordinarily thought to be the very purpose of the Bill of Rights.").

[309]This interpretation of the Free Exercise Clause is arguably compatible with the Establishment Clause. Under the Court's contemporary Establishment clause jurisprudence, governmental assistance which does not have the effect of "inducing" religious belief, but instead merely "accommodates" or implements an independent religious choice does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause of the First Amendment. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989) (plurality opinion). As Professor McConnell noted, "[i]t is absurd to say that the government 'promotes' [religious] practices when it decides not to penalize them." McConnell, *Accommodation of Religion*, *supra* note 15, at 717. *See also* Sherbert v. Verner, 374 U.S. 398, 409 (1963) (explaining that the Court's extension of unemployment benefits to the plaintiff Seventh-day Adventist who refused Saturday work did not run afoul of the Establishment Clause because it "reflect[ed] nothing more than the governmental obligation of neutrality in the face of religious differences"). For further discussion of accommodation under the Establishment Clause, see McConnell, *Accommodation of Religion*, *supra* note 15, at 698-708; Greene, *supra* note 127, at 1614-33. Notably, the scope of RFRA is expressly limited to the free exercise of religion. 42 U.S.C. § 2000bb-4 (1993) (mandating that the Establishment Clause is unaffected by RFRA).

[310]*See* 42 U.S.C. § 2000bb-1 (1993). For the complete text of RFRA, see *supra* note 9.

certainly not the case. Indeed, while presumptively invalid,[311] RFRA still reserves strict scrutiny for laws which impose a substantial burden on religious exercise,[312] presumably as defined in *Lyng v. Northwest Indian Cemetery Protective Ass'n.*[313] Moreover, plaintiffs still face the possibility of confronting a "compelling" state interest.[314] Assuming, however, that

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[311]*See* 42 U.S.C. § 2000bb-1 (1993). Additionally, RFRA places limits on religious free exercise:

> (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 least restrictive means of furthering that compelling governmental interest.

Id.

[312]*Id. See also* Riley v. Reno, No. CIV-94-1058-PHX, 1994 U.S. Dist. LEXIS 11463, at *52 (D. Ariz. Aug. 12, 1994) (concluding that the plaintiff failed to meet the substantial burden requirement and rejecting plaintiff's RFRA claim); Prins v. Coughlin, No. CIV-94-2053, 1994 U.S. Dist. LEXIS 10564, at *3-6 (S.D.N.Y. Aug. 3, 1994) (same); Fordham Univ. v. Brown, 856 F. Supp. 684, 696-97 (D.C. 1994) (same).

[313]485 U.S. 439, 452 (1988) (explaining that the First Amendment "must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion"). *See also Reno*, 1994 U.S. Dist. LEXIS 11463, at *52 (following the *Lyng* Court's substantial burden analysis); Powell v. Stafford, No. 93-B-2240, 1994 U.S. Dist. LEXIS 11108, at *10-11 (same); *Prins*, 1994 U.S. Dist. LEXIS 10564, at *3-6 (same); *Brown*, 856 F. Supp. at 696-97 (same); Campos v. Coughlin, 854 F. Supp. 194, 209-10 (S.D.N.Y. 1994) (same).

A survey of recent case law makes clear that this requirement should not be underestimated. *See, e.g., Reno*, 1994 U.S. Dist. LEXIS 11463, at *52 (holding that the Freedom of Access to Clinic Entrances Act of 1994 did not impose a substantial burden on the plaintiffs' free exercise rights because plaintiffs "failed to allege that their religion advocates the use of force or threats of force or the use of physical obstruction to make passage to a facility unreasonably difficult or hazardous"); *Prins*, 1994 U.S. Dist. LEXIS 10564, at *3-6 (holding that the defendant prison did *not* impose a substantial burden on the free exercise rights of a Jewish inmate by transferring him from a prison with hot kosher food to a prison with cold kosher food); *Brown*, 856 F. Supp. at 696-97 (holding that the Federal Government did not impose a substantial burden on the plaintiff University's free exercise rights by refusing to subsidize new facilities for the University's radio station).

[314]This is a likelihood which will turn on just how "strict" statutory strict scrutiny really is. Recall that strict scrutiny has not been all that "strict" in the past. *See supra* notes 206-26 and accompanying text.

Significantly, recent case law suggests that courts may put some "teeth" into statutory strict scrutiny. *See, e.g., Powell*, 1994 U.S. Dist. LEXIS 11108, at *11-13 (holding that the

courts heed Congress's clear message,[315] there is no question but that RFRA will lead to increased protection for religious liberty.[316] Given our rich heritage of religious diversity, RFRA thus represents a welcome response to recent Supreme Court decisions and to the Court's *Smith* decision in particular.[317]

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government's interest in eradicating age discrimination was *not* compelling in light of the fundamental right of a church to determine who may be trusted with the spiritual function of teaching its ecclesiastical doctrine). *Cf. Campos*, 854 F. Supp. at 204-10 (holding that a flat ban against inmates wearing religious artifacts failed the least restrictive alternative prong of the compelling interest test and granting the plaintiff inmates' request for an injunction to enjoin the same). *But see Reno*, 1994 U.S. Dist. LEXIS 11463, at *52 (holding that the government *has* a compelling interest in "proscribing conduct that harms individuals, damages property and burdens interstate commerce"); *Brown*, 856 F. Supp. at 696-97 (holding that the government *has* a compelling interest in attempting to comply with the Establishment Clause).

[315]*See* 42 U.S.C. § 2000bb (1993). *See also* Lawson v. Dugger, 844 F. Supp. 1538, 1541-42 (S.D. Fla. 1994)("Thus, while RFRA does not specifically address *Thornburgh*, it is clear that Congress does not agree with the reasonableness standard to be applied in '*all* cases where free exercise of religion is substantially burdened,' by 'restor[ing] the compelling interest test.'"(citing Religious Freedom Restoration Act of 1993, 42 U.S.C. at § 2(b))).

[316]*See supra* notes 270-88 and accompanying text (suggesting that the Free Exercise Clause contemplates special judicial protection for religious practices not shared by the majority).

[317]As Justice Souter observed:

> The fact that the Framers were concerned about victims of religious persecution by no means demonstrates that the Framers intended the Free Exercise Clause to forbid only persecution, the inference the *Smith* rule requires. On the contrary, the eradication of persecution would mean precious little to a member of a formerly persecuted sect who was nevertheless prevented from practicing his religion by the enforcement of "neutral, generally applicable" laws. If what drove the Framers was a desire to protect an activity they deemed special, and if "the [Framers] were well aware of potential conflicts between religious conviction and social duties," . . . they may well have hoped to bar not only prohibitions of religious exercise fueled by the hostility of the majority, but prohibitions flowing from indifference or ignorance of the majority as well.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2249-50 n.8 (1993) (Souter, J., concurring in part and concurring in the judgment) (alteration and omission in original) (citation omitted). *See also* Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (noting that "abhorrence of religious persecution and intolerance is a basic part of our heritage"); Bowen v. Roy, 476 U.S. 693, 703 (1986) (plurality opinion) (explaining that "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 fashioned a charter of government which envisaged the widest possible toleration of conflicting view.").

IV. CONCLUSION

When discussing the Free Exercise Clause, we frequently use terms like "formal neutrality" and "individual religious autonomy." In a sense, while these sophisticated legal terms are sometimes useful (mostly because they *sound* important), this language is unfortunate. It is unfortunate because these terms make it easy to forget that what we are really talking about is the basic right to express one's religious beliefs without having to go to court, whether involving the use of sacramental wine or peyote, or even ritual animal sacrifice.[318] Decisions like *Smith*, and to a certain extent *Hialeah*, serve to remind us that we should not take this right, nor RFRA, for granted.

[318] *See* Carter, *supra* note 229, at 136 (suggesting that the fact the Church had to bring suit in the first place is a sign of how far religion has been "forced from the autonomous and independent role that the First Amendment tradition contemplates and democracy desperately needs").