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Retracing First Amendment Jurisprudence Under the Free Exercise Clause: Culmination in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah and Resolution in the Religious Freedom Restoration Act

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NOTE

RETRACING FIRST AMENDMENT JURISPRUDENCE UNDER THE FREE EXERCISE CLAUSE: CULMINATION IN *CHURCH OF THE LUKUMI BABALU AYE, INC. V. CITY OF HIALEAH* AND RESOLUTION IN THE RELIGIOUS FREEDOM RESTORATION ACT

> *[T]he guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. In short, I think our Constitution commands the positive protection by government of religious freedom—not only for a minority, however small—not only for a majority, however large—but for each of us.*[1]

I. INTRODUCTION

The above comments of Justice Stewart recognize the myriad of religious beliefs and practices which exist in our nation of diverse people.[2] Protecting them all from government infringement has become an increasingly lofty aim as the number and nature of religions in the United States continue to grow.

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1. Sherbert v. Verner, 374 U.S. 398, 415-16 (1963) (Stewart, J., concurring).

2. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1482 (S.D. Fla. 1989) *aff'd*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993). "Migration has been the lifeblood of this country. As each of the tens of thousands came, they brought with them their unique heritages which were ultimately integrated and woven into the fabric which is America. The strength of that fabric has grown over two centuries." *Id.*

The First Amendment has historically provided a haven for religions by prohibiting laws "respecting the establishment of a religion, or prohibiting the free exercise thereof . . . ."[3] The standard used to review burdens on the right to free exercise has been the subject of decades of jurisprudence by the Supreme Court. The Court's most recent expression on this standard was announced in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[4] which held that ordinances prohibiting the religious practice of animal sacrifice must survive strict scrutiny review to pass constitutional muster. However, in an unusual assertion of authority, Congress voted to preempt the Court's doctrine by passing the Religious Freedom Restoration Act (RFRA)[5] which essentially codifies strict scrutiny review as set forth in prior Supreme Court rulings.[6] This comment retraces the evolution of strict scrutiny review under the Free Exercise Clause beginning with Part II, which discusses the inception and development of the standard. Part III details the decline of strict scrutiny review preceding the *Hialeah* case. As the Court's final stance on strict scrutiny review under the Free Exercise Clause, the ruling in *Hialeah* is discussed in Part VI. Finally, Part V gives a general introduction to RFRA and explores the legislative history preceding its passage. RFRA marks the end of a tumultuous journey for strict scrutiny review and demonstrates the continued high regard for religious freedom as a founding principle of our nation.

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3. U.S. CONST. amend. I.

4. 113 S. Ct. 2217 (1993).

5. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 [hereinafter RFRA].

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

II. EVOLUTION OF STRICT SCRUTINY UNDER THE FREE EXERCISE CLAUSE

A. *Dichotomy Between Religious Beliefs and Conduct*

The Constitution provides that Congress "shall make no law respecting the establishment of a religion, or prohibiting the free exercise thereof . . . ."[7] However, the First Amendment principle of religious freedom does not necessarily extend to the practices and conduct associated with the protected belief. The distinction between belief and action was first articulated in *Reynolds v. United States*.[8] In *Reynolds*, the Supreme Court upheld the conviction of a man under a Utah statute proscribing the practice of bigamy. Reynolds was knowingly married to two different women and believed that such conduct was mandated by his membership in the Mormon Church.[9] In addressing Reynolds' assertion that his right to practice bigamy was protected by the Free Exercise Clause, the Court focused its inquiry on which religious freedoms were actually guaranteed by the First Amendment.[10] The Court looked to the legislative history of the clause and concluded that Congress has no power to restrict religious opinions and beliefs, but is "left free to reach *actions* which [are] in violation of social duties or subversive of good order."[11] The Court then found that the Utah leg-

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7. U.S. CONST. amend. I.

8. 98 U.S. 145 (1878).

9. *Id.* at 161. As a member of the Church of Jesus Christ of Latter-Day Saints, Reynolds believed that he had a duty to practice polygamy and that failure to do so would result in "damnation." *See id.*

10. *Id.* at 162.

11. *Id.* at 164 (emphasis added). The Court was persuaded by the following statement made by Thomas Jefferson in a letter to the Danbury Baptist Association:

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

islature had the authority to enact legislation which proscribed the practice of polygamy in the interests of maintaining social order.[12]

The decision in *Reynolds* clearly stood for the proposition that the freedom to believe is absolute. However, the Court did not determine whether constitutional protection under the Free Exercise Clause extended to religious practices and conduct. In *Cantwell v. Connecticut*,[13] the Court had an opportunity to elaborate on the dichotomy between belief and conduct set forth in *Reynolds*. The case involved the solicitous activities of three members of the Jehovah's Witnesses which resulted in convictions for breaching the peace.[14] The Court explained that the First Amendment "embraces two concepts,—freedom to believe and freedom to act."[15] Although the first is absolute, the Court held that the freedom to act must inevitably be susceptible to government regulation in the interests of society.[16] Although recognizing the state's authority to regulate solicitation where there existed an immediate threat to public safety, peace or order,[17] the Court found that the conduct of the Jehovah's Witnesses did not pose such a danger.[18] In reversing the convictions, the Court held that although the government has the power to regulate religious conduct, that authority "must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[19] The ruling in *Cantwell* estab-

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ties.

Id. (quoting 8 Jeff. Works, 113).

12. *See id.* at 164-66.

13. 310 U.S. 296 (1940).

14. *Id.* at 301-02.

15. *Id.* at 303.

16. *See id.* at 303-04.

17. *Id.* at 308.

18. *Id.* at 310.

> We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

Id.

19. *Id.* at 304.

lished that religious practices warrant some constitutional protection from the Free Exercise Clause, but left unanswered the reach of the protection.

B. *The Burden Concept*

Although certain that religious practices were not afforded the same constitutional protection as the beliefs from which they originated, the Supreme Court had yet to define a clear standard of review for government regulations which infringed on the conduct of individuals. The first step toward defining such a standard was taken in *Braunfeld v. Brown*.[20]

The *Braunfeld* case involved a Pennsylvania statute prohibiting the sale of certain commodities on Sunday. Violations of the Sunday closing law were subject to criminal penalties.[21] Braunfeld was a merchant in Philadelphia and sold clothing and home furnishings expressly covered by the statute. Braunfeld was also a member of the Orthodox Jewish faith which required that members abstain from work each week from nightfall on Friday until nightfall on Saturday.[22]

Braunfeld challenged the statute as unconstitutional on the grounds that it disallowed him from recovering on Sundays the financial losses incurred as a result of his observance of the Sabbath on Saturdays.[23] Braunfeld asserted that the statute forced members of the Orthodox Jewish faith to choose between forgoing their Sabbath observance or suffering a "serious economic disadvantage."[24]

The Court echoed the principle established in *Reynolds* by holding that Braunfeld's freedom to advocate the Orthodox Jewish religion was absolute.[25] However, the Court noted that the government may restrict "people's actions when they are found to be in violation of important social duties or subversive

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20. 366 U.S. 599 (1961).
21. *See* PA. STAT. ANN. tit. 18, § 4699.10 (1960).
22. *Braunfeld*, 366 U.S. at 601.
23. *Id.*
24. *Id.* at 602.
25. *Id.* at 603 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940); Reynolds v. United States, 98 U.S. 145 (1878)).

of good order, even when the actions are demanded by one's religion."[26] The Court then advanced a means for classifying government regulations which impede religious practices by examining the burden imposed on the religious practice in question. The Court distinguished between direct burdens, which make the conduct unlawful, and indirect or incidental burdens, which serve only to make a particular religious practice less convenient.[27] In applying this distinction to Pennsylvania's closing statute, the Court held that no direct burden was imposed on Orthodox Jews because the regulation did not make the observance of the Sabbath on Saturday unlawful.[28] The Court acknowledged that the statute would indirectly operate to the economic disadvantage of the appellant, but held that the law affected only those members of the Orthodox Jewish faith who felt obliged to work on Sundays.[29] The Court felt that the purpose of the statute in providing a "weekly respite from all labor" was a secular goal within the authority of the state.[30] It would be unreasonable to expect that all regulations enacted by the state would not incidentally burden some religions given the diverse practices of different faiths.[31]

Although the Court held that the Pennsylvania statute did not violate the religious liberties of the appellant, the decision significantly expanded the protection afforded religious conduct under the Free Exercise Clause.[32] First, the Court held that even indirect burdens on religious conduct may be unconstitutional under the Free Exercise Clause where the purpose of the statute is "to impede the observance" of a religion or purpose-

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26. *Id.* at 603-04.

27. *Id.* at 605.

28. *Id.* at 605-06.

29. *Id.* at 605. "[T]he statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." *Id.*

30. *Id.* at 607 (citing McGowan v. Maryland, 366 U.S. 420, 444-45 (1951)).

31. *See id.* at 606.

32. Robert A. Torricella, Jr., Comment, *Babalu Aye Is Not Pleased: Majoritarianism and the Erosion of Free Exercise*, 45 U. MIAMI L. REV. 1061, 1072 (1991).

fully to discriminate between religions.[33] Second, the Court elevated the standard of review by requiring the government to demonstrate that the statute has a secular purpose which cannot be accomplished "by means which do not impose such a burden."[34] The standards announced in *Braunfeld*, notwithstanding the judgment, significantly heightened the constitutional regard for religious practices given by the Court and moved the standard of review further toward strict scrutiny.

C. *Final Realization of Strict Scrutiny Review*

The next phase in the evolution of strict scrutiny review under the Free Exercise Clause was realized in *Sherbert v. Verner*.[35] Adell Sherbert was discharged from employment at a South Carolina textile mill for her refusal to work on Saturdays. As a member of the Seventh-day Adventist Church, Sherbert abstained from work on Saturdays in observance of her Sabbath.[36] After unsuccessful attempts to find alternative employment which would allow her to comply with this aspect of her faith, Sherbert filed for unemployment benefits under the South Carolina Unemployment Compensation Act.[37] The State's Employment Security Commission found that Sherbert was not eligible for the benefits pursuant to language in the Act which disqualified individuals who failed to accept suitable work without good cause.[38] The Commission's findings were ultimately affirmed by the South Carolina Supreme Court.[39]

On review, the United States Supreme Court began its opinion referring to the principle in *Braunfeld* that conduct motivated by religious beliefs is protected by the First Amendment, but not entirely free from government regulation. The government may place legislative restrictions on religious conduct in the

33. *Braunfeld*, 366 U.S. at 607.
34. *See id.*; Torricella, *supra* note 32, at 1072.
35. 374 U.S. 398 (1963).
36. *See id.* at 394-402.
37. *Id.*
38. *Id.* at 400-01 (citing S.C. CODE ANN. §§ 68-113(3), -114(2), (3) (Law Co-op. 1976)).
39. *Id.* at 401.

interests of "public safety, peace or order."[40] The Court then distinguished the South Carolina Act as applied to Sherbert on the grounds that her insistence on observing Saturday as the Sabbath posed no threat which would warrant government regulation.[41] Accordingly, the Court held that

> [i]f . . . the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification . . . represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . "[42]

Having set these parameters, the Court held that the disqualification for unemployment benefits imposed a burden on Sherbert. The Court felt that the ineligibility of Sherbert was discriminatory in that she was excluded from the benefits solely because of her religious beliefs.[43] Furthermore, the Court found that the Commission's ruling forced Sherbert to choose between adhering to her religious principles and accepting gainful employment. The Court likened this choice to a fine assessed against Sherbert for her Sabbath observance stating that the resulting burden inflicted by either is similar.[44]

After concluding that the Act placed an indirect burden on Sherbert's right to free exercise, the Court inquired whether enforcing the Act to disqualify Sherbert could be justified by a compelling state interest.[45] The Commission failed to persuade the Court that the interest behind the ineligibility provisions, to guard against the potential for fraudulent claims by "unscrupu-

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40. *Id.* at 403.

41. *Id.* Although *Braunfeld* also involved observance of the Sabbath on Saturday, the Court seemed to distinguish it based on the existence of a secular goal in *Braunfeld*—a goal in *Sherbert*.

42. *Id.* (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

43. *Id.* at 404.

44. *Id.*

45. *Id.* at 406.

lous claimants," was anything more than a possibility.[46] The Court went on to hold that even if this asserted objective was compelling, the Commission would still be obliged to show that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[47]

The language used by the Court mirrored the essential elements of strict scrutiny review. Requiring the state to demonstrate a "compelling interest," as well as a lack of any less burdensome alternatives, clearly raised the level of review to strict scrutiny.[48] However, in the cases which followed, the Supreme Court continued to recognize strict scrutiny as the appropriate standard and seemed willing to maintain this heightened level of protection for religious conduct and practices.[49] Instead, the Court subsequently disregarded strict scrutiny review in a number of free exercise cases under the guise of *exemptions* to the *Sherbert* ruling based on the absence of government compulsion. The Court's indifference to the established strict scrutiny standard prevented the Free Exercise Clause from serving as meaningful protection to actions motivated by religious conduct.

III. DETERIORATION OF THE STRICT SCRUTINY STANDARD

A. United States v. Lee: *Weakening the Standard*

Although the Supreme Court never rejected the use of strict scrutiny review, the disregard of the standard in subsequent free exercise cases seriously undermined precedent protecting the constitutional freedom to act in accordance with religious beliefs. The first indication of this trend weakening the strict

46. *Id.* at 407. The Court declined to fully assess the state's asserted interest because it had not been previously advanced before the South Carolina Supreme Court. *Id.*

47. *Id.* at 407.

48. *See* Torricella, *supra* note 32, at 1074.

49. *See, e.g.*, Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972). For an analysis of the use of strict scrutiny following the *Sherbert* decision, see Torricella, *supra* note 32, at 1064-72.

scrutiny standard came in *United States v. Lee*.[50] Lee was a member of the Old Order Amish and employed a number of his fellow Amish to work on his farm and in his carpentry shop. As a member of an Amish community, Lee opposed the payment or receipt of social security benefits and failed to file the quarterly social security tax returns required by the legislation.[51]

The Court recognized that the statute mandating compulsory participation in the social security system placed a burden on the religious liberties of members of the Old Order Amish.[52] Rather than analyzing the constitutionality of this burden under the strict scrutiny review instituted in *Sherbert*, the Court applied a diluted version of the "compelling interest" and "least burdensome means" standards. First, the Court saw the appropriate inquiry as whether the state had demonstrated an overriding governmental interest. The Court felt this standard was satisfied by the state's general concern for mandatory and continuous participation and demanded no further articulation as to why Lee must be compelled to pay the tax.[53]

Likewise, the Court did not examine whether the state's interests were fulfilled through the least burdensome means. Instead, the Court simply inquired as to whether accommodating the Amish belief would "unduly interfere" with the achievement of the state's goals.[54] Under this lower standard, the Court held that the nature of a uniform tax system makes it difficult to accommodate the "myriad exceptions flowing from a wide variety of religious beliefs."[55] In addition, the Court noted that Congress had made accommodations of religious objections to the extent possible in the exemption provision of the legislation. Thus, the Court concluded that the system must be uni-

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50. 455 U.S. 252 (1982).

51. *Id.* at 254.

52. *Id.* at 257. The Court accepted the appellee's assertion that payment and receipt of social security benefits is forbidden by the Old Order Amish. *Id.*

53. *See id.* at 258-59. *But see* Sherbert v. Verner, 374 U.S. 398, 407 (1963).

54. *Lee*, 455 U.S. at 259.

55. *Id.* at 259-60. "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* at 260.

formly applicable except as otherwise provided by Congress.[56] The looser standard applied in the *Lee* decision paved the way for further erosion of strict scrutiny review in later cases.

B. Bowen v. Roy *and* Lyng v. Northwest Indian Cemetery Protective Ass'n*: Limiting the Scope of Strict Scrutiny Review*

After *United States v. Lee*, the Court continued to detract from the protection of religious practices by virtually abandoning the strict scrutiny test in later cases. In *Bowen v. Roy*,[57] the Court did not apply strict scrutiny review because of the nature of the burden involved. The appellees in *Bowen* challenged a condition under the Aid to Families with Dependent Children program and the Food Stamp program which required that applicants furnish the Social Security number of their daughter in order to receive benefits.[58] In accordance with their Native American religious beliefs, the appellees felt that complying with this condition would rob the spirit of their daughter by destroying her uniqueness with an identifying number.[59] The Court recognized that *Bowen* involved an incidental burden on the appellees' free exercise liberties by prompting them to choose between "securing a governmental benefit and adherence to religious beliefs."[60] However, the Court went on to distinguish this kind of burden from those government actions that criminalized a particular practice or otherwise compelled an individual to violate his religious beliefs.[61] Thus, by holding that incidental burdens did not warrant strict scrutiny review, the Court did not explicitly reject the standard, but dramatically limited the circumstances in which it is applicable.[62] The Court then advanced a less formidable standard for

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56. *Id.* at 260-61.
57. 476 U.S. 693 (1986).
58. *See Bowen*, 476 U.S. at 695.
59. *Id.* at 696.
60. *Id.* at 706.
61. *Id.*
62. *See id.* at 707.

> The test applied in cases like Wisconsin v. Yoder . . . is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude.

neutral, uniformly applicable regulations, holding that a challenged regulation is constitutionally permissible if it is "neutral and uniform in its application, [and] is a reasonable means of promoting a legitimate public interest."[63]

This narrowing of the function of strict scrutiny review under the Free Exercise Clause continued in *Lyng v. Northwest Indian Cemetery Protective Association*.[64] The religious burden at issue in *Lyng* was the adverse effects that road construction through forest land would have on Native Americans who conducted traditional rituals in the area.[65] The Court again distinguished such an indirect burden from those involving compulsion by the government to violate religious beliefs, or denial to "any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[66] In holding that the Government was not required to assert a compelling interest to continue construction, the Court referred to the constitutional text of the First Amendment as critical to its decision: "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[67] These exceptions to the application of strict scrutiny gradually developed into the new standard of review for challenges under the Free Exercise Clause as announced in *Employment Division, Oregon Department of Human Resources v. Smith*.

> The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest.

Id.

63. *Id.*

64. 485 U.S. 439 (1988).

65. *See id.* at 448.

66. *Id.* at 449.

67. *Id.* at 451 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

C. Employment Division, Oregon Department of Human Resources v. Smith: *The Final Curtain Strict Scrutiny Review*

The religious principles of Native Americans again provided the context for implementing a weaker standard of review for challenges under the Free Exercise Clause. The appellees in *Employment Division, Oregon Department of Human Resources v. Smith*[68] had been discharged from their jobs at a drug rehabilitation clinic for ingesting peyote, as was customary, during a ceremony of the Native American Church.[69] When the appellees sought unemployment compensation from the Employment Division, they were considered ineligible because they had been fired for work-related misconduct.[70] The issue before the Court was whether denying these benefits violated the appellees' rights under the Free Exercise Clause.

After a number of cases which lessened or ignored the strict scrutiny standard provided in *Sherbert v. Verner*,[71] the Supreme Court in *Smith* expressly held that strict scrutiny was an inappropriate standard of review for generally applicable criminal laws.[72] First, the Court examined Oregon's law prohibiting the ingestion of peyote and held that regulating such conduct was within the authority of the state. The Court saw no intent to discriminate against a particular religious sect or to regulate spiritual beliefs.[73] The very essence of a law involves the governing of one's actions.[74] Thus, the Court held that an individual is not relieved of his duty to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[75]

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68. 494 U.S. 872 (1990).
69. *See id* at 874.
70. *Id.* at 873.
71. 374 U.S. 398 (1963).
72. *Smith*, 494 U.S. at 884-85.
73. *Id.* at 882.
74. *Id.* at 879.
75. *Id.* (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

The second precept of the Court's decision was that the strict scrutiny level of review was inapplicable to "across-the-board criminal prohibition on a particular form of conduct."[76] Reviewing the Free Exercise Clause in a historical context, the Court noted that a state law had only been invalidated under strict scrutiny in cases involving unemployment compensation.[77] These cases shared the similar focus of determining whether the state refused benefits to an individual because of his religious beliefs. The Court distinguished exemptions under unemployment compensation regulations from cases involving criminal laws that are facially neutral and generally applicable.

The Court held that the state's ability to enforce criminal laws for the protection of society warranted a looser standard of review because the government's authority to regulate action cannot be obstructed by the potential effect on an individual's spiritual development.[78] "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."[79] The Court cautioned against improper borrowing of the "compelling interest test" from other constitutional fields such as racial discrimination and the suppression of free speech.[80] The Court held that the First Amendment did not require strict scrutiny for religious burdens stemming from generally applicable, nondiscriminatory laws.

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76. *Id.* at 884.

77. *Id.* at 883. The Court noted that all the cases which have used strict scrutiny to invalidate a government action involved entitlement to unemployment compensation. *Id.* (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963)).

78. *Id.* at 885.

79. *Id.* (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878) (upholding a law prohibiting the religious practice of polygamy)).

80. *Id.* at 885-86. "What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly." *Id.*

The Court determined that whether or not to accommodate a religious practice was an issue to be resolved in the political process of the legislature.[81] Such an "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."[82] The *Smith* decision officially banished strict scrutiny review in circumstances where a criminal law was being challenged and forwarded a less potent standard requiring only that the law be facially neutral and generally applicable. "At best, the Supreme Court's holding in *Smith* signals a 'cutback on the scope of protection afforded by the First Amendment's Free Exercise Clause.' At its worst, '*Smith* reduces the free-exercise clause [sic] to a cautious redundancy.'"[83]

What *Smith* did not do was clearly define what circumstances, if any, warranted the application of strict scrutiny review under the Free Exercise Clause.

IV. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*

A. *Background*

The Church of the Lukumi Babalu Aye practices the Santeria religion which was brought to the United States by Cuban exiles who fled the Castro regime in the late 1950's and early 1960's. Historically, the Church was an underground religion, not socially accepted by the majority in Cuba. In the United States, the religion continues to be practiced privately in homes by extended family groups.[84] An integral part of the religion is sacrificing animals including "chickens, pigeons, doves, ducks,

81. *See id.* at 890.

82. *Id.*

83. Torricella, *supra* note 32, at 1094 (citing *Religious Liberty Claims in Minnesota Subject to Compelling State Interest Test*, 59 U.S.L.W. 1082 (1990); Douglas Laycock, *Watering Down the Free Exercise Clause*, 107 CHRISTIAN CENTURY 518, 519 (1990)).

84. *Id.* at 1470.

guinea fowl, goats, sheep, and turtles . . . ."[85] The sacrifices are made on a variety of occasions including healing and the initiation of priests. In the initiation rite, as many as fifty-six small animals may be sacrificed in one day.[86]

Ernest Picardo, the president and priest of the Church of the Lukumi Babalu Aye, was the appellant. In 1987, the Church leased a plot of land in Hialeah, Florida with the objective of establishing a church which would bring the Santeria faith, as well as its animal sacrifice practices, into the open.[87] The plans for the new church distressed many residents of the Hialeah community. These concerns prompted the city council to hold an emergency public session on June 9, 1987.[88] At the meeting, a number of ordinances and resolutions were adopted.[89] The first resolution pronounced the commitment of the city council to prohibit the acts of any religious group found to be inconsistent with public morals.[90] Subsequent resolutions combined to prohibit the sacrificing of animals in a private or public ceremony not for the primary purpose of food consumption. The prohibition was limited 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.'"[91]

The Church and Picardo filed an action in the Southern District of Florida against the city of Hialeah, its mayor, and the individual members of city council. The complaint, alleging that the resolutions violated the appellants' rights under the Free Exercise Clause, sought declaratory judgment, and injunctive and monetary relief.[92]

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85. *Id.* at 1471.

86. *Id.* at 1474.

87. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2223 (1993).

88. *Id.*

89. *See id.*; *see also* 113 S. Ct. at 2234.

90. *Id.*

91. *Id.* at 2224 (citations omitted). Exemptions were expressly made for slaughterhouses and other licensed establishments. *Id.*

92. *Id.*

B. *District Court Decision*

The district court granted summary judgment in favor of the individual defendants. In determining whether the appellants guarantee of free exercise was violated, the court imposed two threshold tests on the government's action before balancing the competing interests of the parties. First, the law must regulate religious conduct as opposed to belief; second, the law must have both a secular purpose and effect.[93] The court found that the resolutions affected only the conduct of the church. In spite of the fact that the resolutions were enacted in direct response to actions taken by the Church of the Lukumi Babalu Aye, the court found that the laws had the secular purpose of providing "notice that the state exemption for ritual slaughter only applied to commercial ritual slaughter, done in slaughterhouses."[94] The court held that any effects the ordinances imposed on the religious practices of the Santeria religion were merely incidental.[95]

The court then went on to balance the interests of the government and the Santeria religion.[96] The court conceded that the resolutions will place a clear burden on the church's ability to practice its religion.[97] However, the court also found that the city had three compelling interests in enacting the legislation: "public health and the control of disease, the risk to children, and animal welfare."[98] Applying the standard set forth in *United States v. Lee*,[99] the court then examined whether an exception from the resolutions should be made for the church.

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93. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1483 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993); *see* Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827, (1984). The court cited this Eleventh Circuit case as providing the framework for analyzing challenges under the Free Exercise Clause.

94. *Church of the Lukumi Babalu Aye, Inc.*, 723 F. Supp. at 1484.

95. *Id.*

96. *Id.*

97. *Id.* at 1485.

98. *Id.* at 1486. The interest in animal welfare is apparent. The risks to children stemmed from the potential for psychological side effects from witnessing animal sacrifices. The health concerns involved carcass disposal as well as the potential for disease in the sacrificed animals to be consumed. *Id.* at 1471, 1475-76.

99. 455 U.S. 252 (1982).

The court found that enforcement problems would unduly interfere with the city's compelling interests.[100] "A religious exemption for Santeria practitioners is simply unworkable because it is unenforceable."[101] The court concluded that, because the interests of the government fully justified the burden imposed on the Santeria religion, the ordinances passed "constitutional muster."[102] The decision was affirmed by the Eleventh Circuit[103] and the church's writ of certiorari was ultimately granted by the Supreme Court.[104]

C. *Supreme Court Decision*

In an opinion by Justice Kennedy, the Supreme Court voted to reverse the lower courts' holdings that the Hialeah ordinances were constitutionally valid.[105] The Court's opinion represents an attempt to clarify the ruling in *Employment Division, Oregon Department of Human Resources v. Smith*[106] by reintroducing strict scrutiny into the constitutional review. In determining whether the practice of animal sacrifice warranted First Amendment protection, the Court began by referring to the *Smith* holding that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[107] However, the Court added that where a law does not satisfy the requirements of neutrality and general applicability, it must overcome strict scrutiny re-

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100. *See id.* at 1487.

101. *Id.*

102. *Id.*

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

104. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 112 S. Ct. 1472 (1992) (granting certiorari), 113 S. Ct. 2217 (1993) (reversing the Eleventh Circuit's decision).

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

106. 494 U.S. 872 (1990).

107. *Church of the Lukumi Babalu Aye, Inc.*, 113 S. Ct. at 2226 (citing Employment Div., Ore. Dept. of Human Res. v. Smith, 494 U.S. 872 (1990)).

view.[108] The Court stated that the Hialeah ordinances failed to fulfill the threshold requirements of *Smith* and failed to withstand strict scrutiny where the laws were not narrowly tailored to accomplish their objectives.[109]

The bulk of the Court's opinion focused on the criteria set forth in *Smith*. First examining the neutrality issue, the Court rejected the city's contention that the ordinances were neutral, i.e. they did not facially discriminate against religion.[110] Although the Court found that the text of the laws included secular terms, that did not end the facial neutrality inquiry.[111] The Court found that the ordinances collectively operated to suppress a central practice of the Santeria religion.[112] Despite the concerns asserted by the city,[113] the Court held that the objective of the city council was a "religious gerrymander" targeted impermissibly at the Santeria religion and its practices.[114]

In addition to evidence that the ordinances resulted in a discriminatory effect on the church, the Court was also persuaded by evidence that the absolute prohibition of Santeria sacrifice went well beyond what was necessary to achieve the city's goals of public health and animal welfare.[115] The city did not entertain less restrictive regulatory measures that would achieve their objectives. Rather, the only option considered was to ban ritualistic animal sacrifices, an integral part of

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108. *Id.* "A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.*

109. *Id.*

110. *Id.* at 2227.

111. *Id.*

112. *Id.* at 2228.

113. Resolution 87-66, adopted June 9, 1987, recited that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose practices which are inconsistent with public morals, peace, or safety' . . . ." *Id.* at 2227-28 (citations omitted).

114. *Church of the Lukumi Babalu Aye, Inc.*, 113 S. Ct. at 2228 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

115. *Id.* at 2229-30. For example, the Court pointed out that animal sacrifices would be illegal even if conducted in a "licensed, inspected, and zoned" slaughterhouse. *Id.* at 2230. "[T]hese broad ordinances prohibit [the] Santeria sacrifice even when it does not threaten the city's interest in the public health." *Id.*

the Santeria religion.[116] Finally, the Court examined the historical background of the ordinances as evidence that the laws were not neutral. The Court concluded that the comments and concerns, voiced at a meeting held before the church was scheduled to open, demonstrated clear animosity toward the Santeria faith.[117] Based on this circumstantial evidence, the Court deduced that "the object of the ordinances was to target animal sacrifice by Santeria worshippers because of its religious motivation."[118]

The Court then briefly addressed whether the ordinances were generally applicable as required by the *Smith* test. The Court concluded that the ordinances were severely underinclusive and did not satisfy the requirement of general applicability.[119] The Court noted that although the city's objective was to prevent the unnecessary killing of animals, fishing and extermination were not within the ambit of the laws.[120] Likewise, restaurants are outside the scope of the ordinances, even though the disposal of animal carcasses was alleged to be a primary concern underlying the public health objective of the laws.[121] The Court concluded that because the city's ordinances imposed prohibitions on the Santeria religion, while leaving many other activities unregulated, the ordinances clearly failed the second part of the *Smith* test.[122]

The Court turned to the strict scrutiny standard historically used under the Free Exercise Clause only after completing the *Smith* analysis. The Court stated that the "compelling interest standard" was to be applied "once a law fails to meet the *Smith* requirements."[123] The Court emphasized that the ordinances

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116. *Id.* at 2230.
117. *Id.* at 2231.
118. *Id.* at 2231.
119. *Id.* at 2232.
120. *Id.*
121. *Id.* at 2232-33. The Court was felt that religion alone must bear the burden of the ordinances, while a number of secular practices within the scope of the city's objectives were not affected. *See id.* at 2232.
122. *Id.* at 2233.
123. *Church of the Lukumi Babalu Aye, Inc.*, 113 S. Ct. at 2233 (citing McDaniel

were overbroad or underinclusive.[124] "The proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree."[125] Although the absence of narrow tailoring was enough to invalidate the ordinances, the Court also examined the objectives of the city and found them to be uncompelling. Where "appreciable damage" to the interests of public health and animal welfare is left unprohibited by the ordinances, those objectives cannot be said to be compelling interests.[126] The Court concluded that the laws failed strict scrutiny and reversed the Eleventh Circuit's decision.

V. THE IMPACT OF THE *Hialeah* DECISION ON THE STANDARD OF REVIEW UNDER THE FREE EXERCISE CLAUSE

The Supreme Court's analysis in the *Hialeah* case reintroduced the standard of strict scrutiny review after a seemingly permanent exile by *Smith*. Although strict scrutiny has reappeared in the constitutional jurisprudence of challenges under the Free Exercise Clause, the Supreme Court did nothing more than clarify strict scrutiny review as a secondary test to be triggered only when a government action fails to satisfy the *Smith* test at a threshold level. Under *Hialeah*, a law which passes the "neutral and generally applicable" requirements of *Smith* would escape strict scrutiny entirely. While the *Hialeah* decision represented a reversion toward the strict scrutiny founded in *Sherbert v. Verner*,[127] the *Smith* test was not displaced by the reemergence of strict scrutiny. Under *Smith*, if a law was found to be neutral and generally applicable, the Court would assume that the First Amendment had not been offend-

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v. Paty, 435 U.S. 618, 628 (1978), quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

Quoting the *Smith* opinion, the Court stated that the standard was not "water[ed] . . . down" but "really means what it says." *Id.*

124. *Id.* at 2234.

125. *Id.*

126. *See id.* (quoting Florida Star v. B.J.F., 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring)).

127. 374 U.S. 398 (1963).

ed.[128] In *Smith*, the issue of accommodating a religion by exemption to such a law was a matter better left for the "political process."[129] Without any contrary indication in the *Hialeah* case, these aspects of free exercise analysis were not affected. The *Hialeah* Court resorted to strict scrutiny only after a lengthy analysis of the factors instituted in *Smith*.[130]

The Court's implementation of a new two-tiered approach in *Hialeah* was an exercise in redundancy. The ordinances prohibiting animal sacrifice failed the *Smith* test for the same reasons that they failed strict scrutiny. The Court held that the ordinances were not neutral in the face of evidence of "improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends."[131] Furthermore, the Court also held that the ordinances were not generally applicable because they were underinclusive in light of the city's interests in public health and animal welfare.[132] This reasoning echoed the "narrowly tailored" component under strict scrutiny review where focus is likewise on the breadth of the law, as compared to the objective to be achieved.

It was only logical that the Court would reiterate the same reasoning when analyzing the city's ordinances under strict scrutiny. Before even engaging in strict scrutiny review, the majority conceded that "[i]t follows from what we have *already* said that these ordinances cannot withstand this scrutiny."[133] The Court went on to repeat its rationale as to why the overbroad and underinclusive aspects of the ordinances render them unconstitutional. The redundancy in the majority's opinion was

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128. *See* Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 878 (1990).

129. *See id.* at 890.

130. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2226-33 (1993). The Court stated that "[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 2226.

131. *Id.* at 2229.

132. *See id.* at 2232-33.

133. *Id.* at 2233 (emphasis added).

not unnoticed by Justices Blackmun and O'Connor in their concurrence.[134]

> Thus, unlike the majority, I do not believe that "[a] law burdening religious practice that is not neutral or of general application must undergo the most rigorous of scrutiny." In my view, regulation that targets religion in this way, *ipso facto*, fails strict scrutiny. It is for this reason that a statute that explicitly restricts religious practices violates the First Amendment.[135]

As Justice Blackmun noted, it was curious that the majority engaged in strict scrutiny review after it had already been demonstrated that the city's ordinances would fail an existing test. Although strict scrutiny resurfaced in the *Hialeah* case, its coupling with the determinative factors set forth in *Smith* assured that it was not restored to the stature it commanded in earlier free exercise doctrine. The *Hialeah* decision was merely a small step toward the reinstatement of strict scrutiny review. The process of reinstating the standard was accelerated for the Court by Congress in its passage of the Religious Freedom Restoration Act.

IV. THE RELIGIOUS FREEDOM RESTORATION ACT: RESURRECTION OF STRICT SCRUTINY REVIEW BY CONGRESS

Congress introduced the RFRA bill in direct response to the Supreme Court's renunciation of strict scrutiny review in *Employment Division, Oregon Department of Human Resources v. Smith*.[136] The new law mandates that substantial burdens imposed by the government on an individual's right to free exercise be the "least restrictive means of furthering . . . [a]

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134. *Id.* at 2250 (Blackmun, J., concurring).

135. *Id.* at 2251 (quoting *id.* at 2233).

136. 494 U.S. 872 (1990). *See* H.R. REP. NO. 88, 103rd Cong., 1st Sess. at 6 (1993). "To reach its decision in the *Smith* case, the majority had to strain its reading of the First Amendment and ignore years of precedent in which the compelling governmental interest test was applied in a variety of circumstances." *Id.* at 4; *see also* Mary A. Schmabel, *The Religious Freedom Restoration Act: A Prison's Dilemma*, 29 WILLIAMETTE L. REV. 323, 323 (1993).

compelling governmental interest."[137] Sponsors of RFRA felt that the *Smith* test placed a heavy burden on a claimant to show an unconstitutional legislative motive behind seemingly neutral, generally applicable laws. Determining the true legislative purpose of a law is difficult and courts have been unwilling to engage in such speculation.[138] Another criticism of the *Smith* decision was the Court's deference to the political process as the appropriate medium for enacting religious exemptions to generally applicable statutes. The right to freely exercise one's religion should not be submitted to a vote or subject to majorities.[139]

Thus, when President Clinton signed the RFRA bill into law on November 16, 1993, the Supreme Court's holding in *Smith* that strict scrutiny review was not appropriate for generally applicable laws was overruled.[140] Proponents of the bill emphasized that the passage of RFRA would not serve to invalidate remaining free exercise jurisprudence. In particular, the holdings in *Bowen v. Roy*[141] and *Lyng v. Northwest Indian Cemetery Protective Ass'n*[142] were distinguished on the grounds that the burdens in each were found to be incidental.[143] RFRA also has no effect on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[144] in which the Court found that the ordinances in question were targeted at a particular religious sect.[145] The impact of RFRA is the resurrection of the strict

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137. RFRA, Pub. L. No. 103-141, 107 Stat. 1488.

138. *Id. See also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. CT. 2217, 2239-40 (1993) (Scalia, J., concurring). "[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body, and this Court has a long tradition of refraining from such inquiries." *Id.* (citing Edwards v. Aguillard, 482 U.S. 578, 636-39 (1987); United States v. O'Brien, 391 U.S. 367, 383-84 (1968); Fletcher v. Peck, 6 Cranch 87, 130-31 (1810)).

139. *See* RFRA, H.R. REP. NO. 88, 103rd Cong., 1st Sess. at 5-6 (1993).

140. For a discussion of Congressional authority to reverse a ruling of the Supreme Court, see Rex E. Lee, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 73, 90-95 (1993).

141. 476 U.S. 673 (1986).

142. 485 U.S. 439 (1987).

143. 139 CONG. REC. S14470 (daily ed. Oct. 27, 1993) (statement from Sen. Hatch).

144. 113 S. CT. 2217 (1993).

145. 139 CONG. REC. S14467 (daily ed. Oct. 27, 1993) (statement from Sen. Ken-

scrutiny standard set forth in *Sherbert v. Verner*[146] as the appropriate level of review for *substantial* burdens imposed by generally applicable laws.

V. CONCLUSION

In his strong dissent in *Employment Division, Oregon Department of Human Resources v. Smith*, Justice Blackmun may have unwittingly foretold of the eventual preemption of the Supreme Court by Congress regarding the judicial standard of review afforded to challenges under the Free Exercise Clause.

> This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. . . . Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence.[147]

Although the Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* demonstrated a move toward heightened protection of religious practices under the Free Exercise Clause, the full restoration of strict scrutiny review may have taken as many years as it took to establish the standard in the first place. By the intervention of Congress in enacting RFRA, there can be no doubt that burdens on the right to free exercise will not survive without the highest justification. An era in First Amendment jurisprudence has come to an untimely end.

Laura A. Colombell

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nedy).

146. 374 U.S. 398 (1963).

147. *Employment Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. at 907-08 (Blackmun, J., dissenting).