

CONTRADICTIONS WILL OUT: ANIMAL RIGHTS VS. ANIMAL SACRIFICE IN THE SUPREME COURT

BY
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A professor of law at Brooklyn Law School explains why, in the controversial Lukumi case, the Supreme Court ruled that the religious sacrifice of animals falls under the protective umbrella of the Free Exercise Clause. The author criticizes the court for abandoning the belief-action dichotomy in Free Exercise jurisprudence and places blame on the lack of protection given to animals by current laws.

I. INTRODUCTION

In the final days of the Supreme Court of the United States' October 1992 Term it decided a case argued in that Term's first week: Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.¹ It is no wonder that the Court took more than seven months to uphold animal sacrifice:

Kennedy, J., delivered the opinion of the Court with respect to Parts I, III, and IV, in which Rehnquist, C.J., and White, Stevens, Scalia, Souter, and Thomas, JJ., joined, the opinion of the Court with respect to Part II-B, in which Rehnquist, C.J., and White, Stevens, Scalia, and Thomas, JJ., joined, the opinion of the Court with respect to Parts II-A-1 and II-A-3, in which Rehnquist, C.J., and Stevens, Scalia, and Thomas, JJ., joined, and an opinion with respect to Part II-A-2, in which Stevens, J., joined. Scalia, J., filed an opinion concurring in part and concurring in the judgment, in which Rehnquist, C.J., joined. Souter, J., filed an opinion concurring in the judgment. Blackmun, J., filed an opinion concurring in the judgment, in which O'Connor, J., joined.

This diversity of opinion suggests that the Court was not on solid ground in holding that Santeria worshippers could slaughter domestic animals with impunity, in the name of religion, in the City of Hialeah, Florida, or for that matter, anywhere else in the United States.

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¹ 113 S.Ct. 2217 (1993). Professor Holzer and Lance Gotko, Esq., of the New York Bar, filed amicus curiae briefs in the *Lukumi* case on behalf of twelve animal rights organizations. Portions of this article are based on one of those briefs, which are available from the author.

II. THE OPINION

The Kennedy opinion for a more or less unanimous Court began with a thumbnail sketch of the Santeria religion, the basis of which "is the nurture of a personal relation with the *orishas* [spirits], and [in which] one of the principal forms of devotion is an animal sacrifice."² Skimming on the offensive details of what the Santerians actually do to animals,³ Justice Kennedy described the killing ritual as simply involving "the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals."⁴ According to the District Court, Justice Kennedy noted, "there are at least 50,000 practitioners [of Santeria] in South Florida today."⁵ Having thus established an overall context, Justice Kennedy then turned to a description of the Florida Santerians, their move into the city of Hialeah, and the city's legislative response.⁶ This description, especially of the centrally important legislative response, was as sketchy as Justice Kennedy's earlier explanation of the Santerian's bloodletting practices. Therefore, the following description of the City's response is necessary because the nature and scope of the city's ordinances are what made the Court's decision possible.

On June 9, 1987, the city council of Hialeah held an emergency public session and adopted two resolutions.⁷ The first, Resolution 87-66, "noted the 'concern' expressed by residents of the city 'that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety.'"⁸ The second, Resolution 87-40, "incorporated in full, except as to penalty, Florida's animal cruelty laws."⁹

² *Id.* at 2222.

³ The Santerian method of killing involves a puncture motion which differs from the Kosher method, which involves a slicing motion. The District Court ruled that the Santerian method was not humane, relying on testimony that in some cases (especially involving chickens, which have four carotid arteries) the method did not reliably result in instantaneous death. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F.Supp. 1467, 1472-73 (S.D. Fla. 1989).

⁴ *Id.* What happens to the carcasses of the hapless "chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles," *id.*, who fall into the Santerian's hands and are not eaten, is discussed in notes 21 and 28, *infra*.

⁵ *Id.* at 2223. Neither the District Court nor the Supreme Court estimated how many Santeria worshipers there are nationwide.

⁶ *Id.* at 2223-24.

⁷ *Id.* at 2223.

⁸ *Id.*

⁹ *Id.* The relevant sections of Florida's animal cruelty laws are:

828.22 Humane slaughter requirement

(4) Nothing in this act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision in this act, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this act. For the purposes of this action the term "ritual slaughter" means slaughter in accordance with 828.23(7)(b).

828.23 Definitions

Since Florida law prohibited a municipality from enacting animal cruelty legislation that conflicted with state law, Section 828.27(7), Hialeah's city attorney requested an opinion from Florida's Attorney General before undertaking any further legislative action.¹⁰ In mid-July, the Attorney General responded that religious animal sacrifice was not a "necessary" killing and therefore was against state law, so a city ordinance prohibiting it would not conflict.¹¹

The city council then passed four more ordinances prohibiting animal sacrifice.¹² The first enactment, Resolution 87-90 was hortatory; it "declared the city policy 'to oppose the ritual sacrifice of animals' within Hialeah and announced that any person or organization practicing animal sacrifice 'will be prosecuted.'"¹³ The next three ordinances were enacted in September and were substantive in nature.¹⁴ Ordinance 87-52 "defined 'sacrifice' as 'to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.'"¹⁵ Ordinance 87-71 reiterated the definition of "sacrifice" and "then provided that '[i]t shall be unlawful for any person, persons, corporations, or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.'"¹⁶ Finally, Ordinance 87-72 "defined 'slaughter' as 'the killing of animals for food' and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of 'small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.'"¹⁷ All four of the ordinances were passed by a unanimous vote and the penalty for each of the ordinances was a fine "not exceeding \$500 or imprisonment not exceeding 60 days, or both."¹⁸

Not surprisingly, the Santerians sued. Their 42 U.S.C. Section 1983 action, rooted *inter alia* in the Free Exercise Clause, was tried by a judge who found no constitutional violation. The district court ex-

As used in 828.22 to 828.26, the following words shall have the meaning indicated:

(7) "Humane method" means either:

(a) A method whereby the animal is rendered insensible to pain by mechanical, electrical, chemical, or other means that are rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or

(b) A method in accordance with ritual requirements of any religious faith, whereby the animal suffers loss of consciousness by anemia of the brain caused by simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.

1982 Fla. Laws ch. 82-116

¹⁰ 113 S.Ct. at 2223.

¹¹ *Id.*, citing FLA. ATT'Y GEN. ANN. REP. 87-52 at 146, 147, 149.

¹² 113 S.Ct. at 2224.

¹³ *Id.* at 2223-24.

¹⁴ *Id.* at 2224.

¹⁵ *Id.*

¹⁶ 113 S.Ct. at 2224

¹⁷ *Id.*

¹⁸ *Id.*

amined the City's governmental interests to determine whether they were compelling "and, if so, to balance the 'governmental and religious interests.'"¹⁹ The district court found four compelling governmental interests.²⁰

First, animal sacrifices may pose a substantial health risk to both participants and the general public.²¹ Second, animal sacrifices may cause substantial emotional injury to children who witness the sacrifices.²² Third, animal sacrifices violate the city's interest in protecting animals from cruel and unnecessary killing.²³ And fourth, animal sacrifices violate the city's interest in restricting slaughter or sacrifice of animals to areas zoned for slaughterhouse use.²⁴ The Eleventh Circuit Court of Appeals affirmed,²⁵ choosing, however, not to rely on the district court's concern for the emotional welfare of children.²⁶ "[T]he Court of Appeals stated simply that it concluded the ordinances were consistent with the Constitution."²⁷

With this background in place, Justice Kennedy then addressed the six substantive issues confronting the Court. First, the Supreme Court held that Santeria is a "religion" within the ambit of the First Amendment:

Given the historical association between animal sacrifice and religious worship, . . . petitioners' assertion that animal sacrifice is an integral part of their religion "cannot be deemed bizarre or incredible." . . . Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons.²⁸

Second, the Supreme Court noted that neutral laws of general application, even if they incidentally burden a particular religious practice, need not be justified by a compelling governmental interest.²⁹

¹⁹ *Id.* at 2224-25.

²⁰ 113 S.Ct. at 2225.

²¹ *Id.* Potential health risks include the spread of disease due to the consumption of sacrificed animals, which have not been prepared in a sanitary manner, and the spread of disease due to the unregulated disposal of animal carcasses.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Justice Kennedy pointedly noted that the Court of Appeals affirmance was "in a one-paragraph per curiam opinion." 113 S.Ct. at 2225.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 2225-26 (citation omitted). Courts are reluctant, even unwilling, to look too closely at what is or is not a religious practice. *See, e.g.*, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). However, on occasion they have done so. *See, e.g.*, *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968). One wonders what better case there could be for judicial scrutiny than one where cultists slaughter animals in the name of god and dispose of those not eaten hither and yon in a modern American city.

²⁹ 113 S.Ct. at 2226, *citing* *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (*Smith II*).

Third, if a law is not neutral and of general application, it must not only satisfy a compelling governmental interest, but also must be narrowly tailored to advance that interest.³⁰

Fourth, as to the question of neutrality, the Court was convinced that “[t]he record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances The design of these laws accomplishes . . . a ‘religious gerrymander,’ . . . an impermissible attempt to target petitioners and their religious practices.”³¹ Therefore, the Court held the ordinances were not neutral because:

The ordinances had as their object the suppression of religion. The pattern . . . discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killing of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary to achieve the legitimate ends asserted in their defense.³²

Fifth, as to the question of whether the challenged ordinances were of “general applicability,” the Court concluded:

[E]ach of Hialeah’s ordinances pursues the city’s governmental interests only against conduct motivated by religious belief. The ordinances “ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself” This precise evil is what the requirement of general applicability is designed to prevent.³³

And last, the Court also held:

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.³⁴

Even without the concurring opinions of the Chief Justice and Justices Scalia, Souter and Blackmun,³⁵ Justice Kennedy’s opinion

³⁰ 113 S.Ct. at 2226.

³¹ *Id.* at 2227, 2228.

³² *Id.* at 2231.

³³ *Id.* at 2233 (citation omitted).

³⁴ 113 S.Ct. at 2233.

³⁵ The thrust of Justice Scalia’s concurrence was that “neutrality” and “general applicability” substantially overlap, but that for purposes of the Santeria case it made no difference because he agreed “with most of the invalidating factors set forth in . . . the Court’s opinion, and because it seem[ed] to [him] a matter of no consequence under which rubric . . . each invalidating factor is discussed” *Id.* at 2239. Justice Scalia did disagree, however, with Justice Kennedy’s focus on the subjective motivation of the lawmakers. Justice Souter, while agreeing that the Hialeah ordinances violated the Santerians’ Free Exercise rights, had “doubts about whether the *Smith* rule merits adherence” and wrote “separately to explain why the *Smith* rule is not germane to this case and to express [his] view that, in a case presenting the issue, the Court should re-

elaborating the above points appeared, on the surface at least, to soundly dispose of the thorny Free Exercise problem that confronted the Court. Unfortunately, however, every opinion that was rendered, save one, failed to focus on a compelling state interest argument (in this case protecting against cruelty to animals) which should have allowed the Court to limit the actions of the Santerians. This argument had been presented to the Court and could have changed, if not the result, then at least the unanimity of the decision.³⁶

III. THE WASTED ARGUMENT

For good reasons, the Supreme Court has almost always been un-receptive to Free Exercise challenges where the claimed right of a party to act in the name of religion has clashed with an important and legitimate governmental interest.³⁷ In the *Lukumi* case, the City of Hialeah had an important and legitimate governmental interest in protecting against cruelty to animals. Unfortunately, the Supreme Court in *Lukumi* skimmed over the belief-action dichotomy—one of the most well established and commonsensical distinctions in Free Exercise jurisprudence. From the very beginning of its Free Exercise jurisprudence, the Supreme Court has apparently realized that to permit citizens to do in the name of religion that which is proscribed by the legitimate laws of the state is to invite anarchy. It has realized that to permit each person to be a floating island of private law governed only by the dictates of real or supposed religiously-motivated conscience is unwise.³⁸ Conversely, however, the Court also apparently recognized early that the existence of the Free Exercise Clause and its history means, at the very least, that there must be no governmental intrusion whatsoever upon religious belief.³⁹ “Laws,” the Court has written, “are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with

examine the rule *Smith* declared.” *Id.* at 2240. Justice Blackmun, also quarreling with Justice Kennedy’s use of *Smith*, wrote “separately to emphasize that the First Amendment’s protection of religion extends beyond those rare occasions on which the government explicitly targets religion or a particular religion for disfavored treatment, as is done in this case. In [his] view, a statute that burdens the free exercise of religion ‘may stand only if the law in general, and the State’s refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.’” *Id.* at 2250 (citation omitted).

³⁶ *Id.* at 2248, Part II-B n.6.

³⁷ See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878); *Mormon Church v. United States*, 136 U.S. 1 (1890); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Gillette v. United States*, 401 U.S. 437 (1971); *United States v. Lee*, 455 U.S. 252 (1982); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985); *Bowen v. Roy*, 476 U.S. 639 (1986); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990) (*Smith II*); *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749 (June 26, 1992).

³⁸ See *Reynolds*, 98 U.S. at 167.

³⁹ See *id.* at 163.

practices."⁴⁰ This commonsensical—and necessary—belief-action dichotomy has been stressed repeatedly. Accordingly, the cases in which religious claims were subordinated to a law prohibiting actions⁴¹ can be contrasted to the cases which involved government compulsion of belief.⁴²

Where the state has attempted to interfere with, or even force, belief, the religious claimant has always won handily.⁴³ In all of these cases, the threatened belief was vindicated and the threatening law was struck down. In *West Virginia State Board of Education v. Barnette*,⁴⁴ Justice Jackson wrote for the Court, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein,"⁴⁵ and, as the Court reiterated in a somewhat different context, under the Free Exercise Clause "freedom to believe . . . is absolute."⁴⁶ Hence, analysis reveals that the belief-action dichotomy of the Supreme Court's Free Exercise jurisprudence has long been clear: religiously inspired action—sometimes, at least—can be regulated; religious belief cannot.⁴⁷

Before turning to the "tests" used by the Court to determine when religious action may be regulated, it is important first to linger upon the actual nature of religious belief, examining why its protection has

⁴⁰ *Id.* at 166.

⁴¹ *See, e.g.,* note 37, *supra*.

⁴² *See, e.g.,* note 41, *supra*.

⁴³ *See, e.g.,* *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925) (the inculcation of religious belief through parochial education was threatened by state-mandated secular education); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (the religious belief of Jehovah's Witnesses that it is a sin to worship "graven images" such as a flag, was threatened by a board of education resolution requiring school children to salute the U.S. flag daily); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (a notary public's freedom of belief and religion was threatened when he was denied a commission because of his refusal to declare his belief in God); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (a state statute compelling children to attend school until age 16 threatened the Amish belief that remaining unworlly is essential to the maintenance of their religiously-mandated simple way of life).

⁴⁴ 319 U.S. 624 (1943). As noted by the Court in *Smith*, 494 U.S. at 882, *Barnette* was decided exclusively on free speech grounds, even though it involved freedom of religion. *Cf. Stromberg v. California*, 283 U.S. 359 (1931).

⁴⁵ *Barnette*, 319 U.S. at 642.

⁴⁶ *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

⁴⁷ *See, e.g., Smith II*, 494 U.S. at 877 (religiously inspired use of peyote is subject to a state's drug laws); *Bowen v. Roy*, 476 U.S. 639, 699 (1986) ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute."); *Prince v. Massachusetts*, 321 U.S. 158 (per curiam) (parents claimed right to forbid blood transfusions for their children based on religious belief is not protected by the First Amendment); *Braunfeld v. Brown*, 366 U.S. 599, 603-04 (1961) ("legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion") (Warren, C.J., for plurality).

been held so absolute.⁴⁸ The policy behind the First Amendment, and thus freedom of religious belief, appears to be the "marketplace of ideas" theory. This theory involves the fostering and protection of the expression of ideas, which are seen not only as desirable in themselves, but also as necessary to the very preservation of free government.

Furthermore, the Court has stressed that freedom of conscience (belief) and freedom of the mind (thought) are equally protected by the First Amendment because they are inseparable. In *Prince v. Massachusetts*,⁴⁹ Justice Rutledge astutely wrote for the Court:

All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functions. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.⁵⁰

And in *Cantwell v. Connecticut*,⁵¹ the Court stated:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.⁵²

Furthermore, in *Wooley v. Maynard*,⁵³ Chief Justice Burger noted that the First Amendment secures the right to proselytize for religious,

⁴⁸ Some have suggested that since belief is the very predicate for the "exercise" of religion, it is expressly protected by the Constitution. But to say that freedom of religious belief is expressly protected by the Constitution is nothing more than to state a conclusion, shedding no light on why it is protected. *See, e.g., Prince*, 321 U.S. at 174 (freedom of religious belief is "of the very essence of a scheme of ordered liberty") (Murphy, J., dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Indeed, virtually all other rights expressly (and impliedly) protected or recognized by the Constitution can hardly claim the absolute protection from governmental interference routinely enjoyed by freedom of religious belief. Another rationale posited for this absolute freedom is that the "belief" prong of the Free Exercise Clause is the result of the long catalogue of human folly wherein governments have attempted to homogenize religious belief by law. *See Davis v. Beacon*, 133 U.S. 333, 342 (1890). This problem, however, is undoubtedly covered by the Establishment Clause and the jurisprudence that has emerged from it.

⁴⁹ 321 U.S. 158 (per curiam).

⁵⁰ *Id.* at 164-65.

⁵¹ 310 U.S. 296 (1940).

⁵² *Id.* at 310. The court also stated that the essential characteristic of First Amendment liberties is that "many types of life, character, opinion and belief can develop unmolested and unobstructed." *Id.*

⁵³ *Wooley v. Maynard*, 430 U.S. 705 (1977).

political, and ideological causes against the state's attempted invasion of the sphere of intellect and spirit.⁵⁴

The reason, of course, for the importance of freedom of thought, denominated the "marketplace of ideas"—together with the rights to free speech, to free press, to freedom of association, to freedom of peaceable assembly, and, in our fifty-state federalist system, to the freedom of travel—is that the unimpeded exercise of these freedoms is the foundation upon which the existence of all our other rights depend.⁵⁵ Indeed, the freedom of thought and speech, together occupy the preferred position in the Constitution, for "[o]f that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."⁵⁶ Therefore, it is not surprising that it is in cases dealing with religious speech that one finds not only the initial applications of the First Amendment to the states, but an all but absolute protection (like that accorded to religious belief) through employment of the compelling state interest test. However, this laudable effort to protect religious speech led to the lamentable result that the compelling state interest test was indiscriminately, and erroneously, applied to the realm of religious action.

The application of the compelling state interest test to religious action cases grew from cases in which religious speech was equated with religious belief. For example, in *Schneider v. State*,⁵⁷ the Supreme Court, *inter alia*, invalidated an ordinance that forbade unlicensed door-to-door solicitation and distribution of circulars as applied to a Jehovah's Witness attempting profession and propagation of their faith. Justice Roberts wrote "the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion, [are rights that lie] at the foundation of free government by free men, [and are] vital to the maintenance of democratic institutions."⁵⁸ Furthermore, the Court referred to the liberty to "impart information through speech or the distribution of literature,"⁵⁹ and to "the dissemination of information and opinion."⁶⁰ This factual

⁵⁴ *Id.* at 714-15, (citing and quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J. concurring)). See also *Lee v. Weisman*, 60 U.S.L.W. 4723, 4726 (June 24, 1992) ("[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment . . . [for t]o endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry.").

⁵⁵ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). See also *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969); *Wesberry v. Sanders*, 376 U.S. 1, 6-7, 17 (1964); *United States v. Ballard*, 322 U.S. 78, 86 (1944); *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Palko v. Connecticut*, 302 U.S. 319, 325, 326-27 (1937) *overruled on other grounds* by *Benton v. Maryland*, 395 U.S. 784 (1969).

⁵⁶ *Palko*, 302 U.S. at 327.

⁵⁷ 308 U.S. 147 (1939).

⁵⁸ *Id.* at 160-61.

⁵⁹ *Schneider*, 308 U.S. at 160.

⁶⁰ *Id.* at 163.

situation—involving witnessing of religious beliefs—resulted in the Court applying a balancing test “[i]n every case . . . where legislative abridgment of the rights [to freedom of speech] is asserted, the courts should be astute to examine the effect of the challenged legislation [T]he courts [must] weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.”⁶¹

The next decisive religious speech opinion, also written by Justice Roberts, was *Cantwell v. Connecticut*.⁶² Citing *Schneider*, the Court held for the first time that the First Amendment’s Free Exercise Clause applied to the States via the Due Process Clause of the Fourteenth Amendment and overturned the convictions of Jehovah’s Witnesses under a statute which acted as a “previous restraint [upon] the dissemination of religious views or teaching.”⁶³ Such censorship could not be countenanced, said the Court, because it implicated the religion’s very right to survive,⁶⁴ through “the solicitation of aid for the perpetuation of religious views or systems.”⁶⁵ Moreover, with regard to the conviction of one of the three Witnesses—for breach of the peace—this Court equated “the free exercise of religion” with the “freedom to communicate information and opinion,”⁶⁶ and held that the conviction could not stand based on speech which, though offensive, did not amount to fighting words.⁶⁷ The test that the Court applied in this latter part of *Cantwell* was that a conviction for “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,”⁶⁸ had to fail “in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.”⁶⁹ Comparing *Cantwell* to *Schenck v. United States*,⁷⁰ which involved the criminalization of speech that posed a clear and present danger to national security,⁷¹ the *Cantwell* Court held that “petitioner’s communication, considered in the light of the [C]onstitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.”⁷² Thus, *Cantwell* was yet another victory for the profession and

⁶¹ *Id.* at 161.

⁶² 310 U.S. 296 (1940).

⁶³ *Id.* at 304 (citing *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (which was, of course, a pure speech/press case).

⁶⁴ *Id.* at 305.

⁶⁵ *Id.* at 307.

⁶⁶ *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

⁶⁷ *See id.* at 309.

⁶⁸ *Id.* at 310.

⁶⁹ *Id.* at 311.

⁷⁰ 249 U.S. 47, 52 (1919).

⁷¹ *Cantwell*, 310 U.S. at 311 n.10.

⁷² *Id.* at 311.

propagation of belief, i.e., religious speech.⁷³ Perhaps even more significant, *Cantwell* marked the entry of what came to be called the “compelling state interest test” into the Court’s Free Exercise speech jurisprudence.

Hard on the heels of *Schneider* and *Cantwell* were more “Witness” cases—again and again vindicating their thwarted attempts at profession and propagation—virtually all of which were steeped in the language of First Amendment speech jurisprudence, carried over into Free Exercise.⁷⁴ During this time, of course, the Court’s long-standing belief-action dichotomy was far from repudiated; indeed, it was repeatedly reiterated.⁷⁵

At this point the Court had articulated the proper state of Free Exercise jurisprudence: religious belief was absolutely protected;⁷⁶ religious speech was protected against all but compelling state interests,⁷⁷ and religious action was subject to regulation if inimical to the health, safety, welfare, and morals of society.⁷⁸ Thus, the Court’s Free Exercise jurisprudence was then in accord with the Founders’ intentions. In fact, a statute, drafted by Thomas Jefferson, and promulgated by the Virginia House of Delegates provided that

to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty . . . [I]t is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.⁷⁹

The Supreme Court has acknowledged that “[i]n these two sentences is found the true distinction between what properly belongs to the church and what to the State.”⁸⁰

⁷³ See *id.* at 310 (manifestly revealing the “marketplace-of-ideas” basis for the holding).

⁷⁴ See, especially, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Marsh v. Alabama*, 326 U.S. 501 (1946). See also *Jones v. Opelika*, 319 U.S. 103 (1943); *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

⁷⁵ See *Schneider v. State*, 308 U.S. 147, 160 (1939); *Cantwell*, 310 U.S. at 304; *Cox v. New Hampshire*, 312 U.S. 569, 578 (1941); *Murdock*, 319 U.S. at 116; *Martin*, 319 U.S. at 143; *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *United States v. Ballard*, 322 U.S. 78, 87 (1944); *Cleveland v. United States*, 329 U.S. 14, 20 (1946); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961).

⁷⁶ *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925).

⁷⁷ *Cantwell*, 310 U.S. at 304; *Murdock*, 319 U.S. at 116.

⁷⁸ *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Davis v. Beacon*, 133 U.S. 333, 341-42 (1890); *Mormon Church v. United States*, 136 U.S. 1, 46 (1890); *Cox*, 312 U.S. at 574; *Prince*, 321 U.S. 158, 166-67; *Ballard*, 322 U.S. at 86; *Cleveland*, 329 U.S. at 20; and *Braunfeld*, 366 U.S. at 603.

⁷⁹ An Act for Establishing Religious Freedom, 1785 Va. Stat. ch. xxxiv, reprinted in 12 Hening’s Stat. 84, 85 (1823) (quoted by *Reynolds*, 98 U.S. at 163).

⁸⁰ *Reynolds*, 98 U.S. at 163. This concept found its most recent expression in the net result of two speech cases decided late in the 1991 Term, *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749 (June 26, 1992), and *Lee v. International*

It was not until *Sherbert v. Verner*,⁸¹ that the Supreme Court made a fundamental error in its Free Exercise jurisprudence. The prelude to *Sherbert* came in Justice Brennan's opinion in *Braunfeld v. Brown*,⁸² dissenting from the Court's rejection of the claim of Orthodox Jews that Sunday blue laws impermissibly burdened the Free Exercise of their religion. Justice Brennan's dissenting opinion foreshadowed the unseen manner in which the "grave and immediate danger" test,⁸³ or the "compelling state interest" test,⁸⁴ was permitted to seep into the religious action side from the belief and speech side of the Free Exercise Clause.⁸⁵ "This exacting standard," wrote Justice Brennan, "has been consistently applied by this Court as the test of legislation under all clauses of the First Amendment, not only those specifically dealing with freedom of speech and of the press. For religious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society."⁸⁶ Justice Brennan then proceeded to cite a series of examples.⁸⁷ Justice Brennan's view was that these cases, together with *Barnette*—even though they dealt with the highly protected area of religious belief and religious speech—justified the application of the compelling state interest test. He would have permitted the *Braunfeld* claimants to act contrary to the law because of their religion.⁸⁸

Two years later in *Sherbert*, Justice Brennan applied the compelling state interest test, for the first time, to a religiously inspired claim to act. Referring first to a series of cases involving religious belief or speech,⁸⁹ and noting that certain religious conduct has "invariably posed some substantial threat to public safety, peace or order" (notably

Soc'y for Krishna Consciousness, Inc., 60 U.S.L.W. 4761 (June 26, 1992) (per curiam). There, against the claimed right of a sect for its members to "perform a ritual known as sankirtan . . . [which] consists of going into public places, disseminating religious literature and soliciting funds to support the religion," 60 U.S.L.W. at 4750 (quotations and citations omitted), a municipal airport's ban on solicitation was upheld, *id.* at 4753, but the airport's ban on distribution of literature was struck down, 60 U.S.L.W. at 4761.

⁸¹ 374 U.S. 398 (1963).

⁸² 366 U.S. 599 (1961).

⁸³ *Id.* at 612 (Brennan, J. dissenting) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

⁸⁴ *Id.* at 613.

⁸⁵ *See id.* at 607 (plurality opinion) ("If the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect.") But *see id.* at 603-604 ("legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion").

⁸⁶ *Id.* at 612.

⁸⁷ *Id.* (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jones v. Opelika*, 319 U.S. 103 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); and *Marsh v. Alabama*, 326 U.S. 501 (1946)).

⁸⁸ *See Braunfeld v. Brown*, 366 U.S. 599, 611 (1961).

⁸⁹ *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); and *Murdock*, 319 U.S. 105).

omitting "morals"⁹⁰), Justice Brennan observed that the state's "incidental burden on [Sherbert's] free exercise . . . [could only] be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .'"⁹¹ In *Sherbert*, the state and its arguably important and legitimate interest⁹² lost; Sherbert's claim to act in the name of religion prevailed.⁹³ Thereafter, the results in *Thomas v. Review Board of Indiana Employment Sec. Div.*,⁹⁴ and *Hobbie v. Unemployment Appeals Commission of Florida*,⁹⁵ were foreordained. And ever since *Sherbert*, the Court has had to deal with the tar baby called the compelling state interest test—sometimes working with it,⁹⁶ sometimes getting around it.⁹⁷

The Supreme Court's decision to rely upon the compelling state interest test in Free Exercise cases involving actions was a mistake, but not because the free exercise of religion is unworthy of protection. It was a mistake, because the otherwise unrestrained freedom to act contrary to law in the name of religion can relegate to oblivion other important and legitimate interests of an ordered society. These interests, while not "grave" or "compelling," are nonetheless basic to a civilized voluntary association of free individuals. Even as early as *Braunfeld*, the Court had begun to express a concern about restricting "the operating latitude of the legislature" whenever a claimant waved the flag of Free Exercise.⁹⁸ The Court echoed this concern in *United*

⁹⁰ *Sherbert*, 374 U.S. at 403, (citing *Reynolds v. United States*, 98 U.S. 145 (1878); *Prince v. Massachusetts*, 321 U.S. 158 (1944); and *Cleveland v. United States*, 329 U.S. 14 (1946)).

⁹¹ *Id.*, (citing *NAACP v. Button*, 371 U.S. 415, 438. (*Button*, of course, was a freedom of association case.)).

⁹² This interest included "a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might . . . dilute the unemployment compensation fund [and] disrupt the scheduling of work." *Sherbert*, 374 U.S. at 410.

⁹³ *Id.*

⁹⁴ 450 U.S. 707 (1981) (holding that Indiana's refusal to award unemployment compensation benefits to Jehovah's witness, who refused to accept transfer to position which contributed to the production of weapons, violated the Free Exercise Clause).

⁹⁵ *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987), (court held Florida's refusal to award unemployment compensation benefits to a Seventh Day Adventist who refused to work on her sabbath violated the Free Exercise Clause).

⁹⁶ See *Gillette v. United States*, 401 U.S. 437 (1971); *Johnson v. District of Columbia*, 30 Ap. D.C. 520 (1908); *Thomas*, 450 U.S. 707; *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Hobbie*, 480 U.S. 136; *Hernandez v. Commissioner*, 490 U.S. 680 (1989).

⁹⁷ See *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Goldman v. Weinberger*, 475 U.S. 503, 513 (1986).

⁹⁸ See *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).

States v. Lee,⁹⁹ and most recently reiterated its concern in *Smith v. Employment Division, Department of Human Resources (Smith II)*:¹⁰⁰

Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.¹⁰¹

The Court's concern is especially justified given the allocation of burdens in a Free Exercise lawsuit. For, in light of the deference accorded to legislative enactments when their constitutionality is challenged in non-religious-based suits (where the plaintiff's injury is usually concrete),¹⁰² there would be much to say in Free Exercise cases (where injury, perforce, is ephemeral) for the requirement that plaintiffs prove by clear and convincing evidence that the government has prevented them from performing a religious duty.¹⁰³ Instead, as matters stand today, the mere mention of religion in a Free Exercise case causes some to believe that the usual presumption of constitutionality dissolves.¹⁰⁴ Indeed, a religious claimant need not even show that the religious practice at issue is central to a faith.¹⁰⁵ The belief impelling the claimant to act need only be religious,¹⁰⁶ and sincerely held.¹⁰⁷

⁹⁹ *United States v. Lee*, 455 U.S. 252 (1982).

¹⁰⁰ *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (*Smith II*).

¹⁰¹ *Id.* at 888 (quotation and citation omitted).

¹⁰² *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728 (1984). *See also Lucas v. South Carolina Coastal Council*, 60 U.S.L.W. 4842, 4853 (June 29, 1992) (Blackmun, J., dissenting).

¹⁰³ *See, e.g., Reynolds v. United States*, 98 U.S. 145, 161 (1878); *Davis v. Beacon*, 133 U.S. 333, 341 (1890); *Mormon Church v. United States*, 136 U.S. 1, 18 (1890); *Schneider v. State*, 308 U.S. 147, 159 (1939); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943); *Prince v. Massachusetts*, 321 U.S. 158, 163 (1944); *Braunfeld*, 366 U.S. at 601; *Sherbert v. Verner*, 374 U.S. 398, 399 n.1 (1963); *Thomas v. Review Board of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981); *United States v. Lee*, 455 U.S. at 255; *Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 602, n. 28 (1983); *Goldman v. Weinberger*, 475 U.S. 503, 513 (1986) (Brennan, J., dissenting); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 138 (1987); *O'Lone*, 482 U.S. at 345 (all noting that a religious duty was at issue).

¹⁰⁴ *See Prince*, 321 U.S. at 167.

¹⁰⁵ *See Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 886-87 (1990) (*Smith II*); *Hernandez*, 490 U.S. at 699.

¹⁰⁶ *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972).

¹⁰⁷ *See Hobbie*, 480 U.S. at 138 n.2 ("It is undisputed that appellant's conversion was bona fide and that her religious belief is sincerely held"); *Bob Jones Univ.*, 461 U.S. at 602 n.28 (noting that "[t]he District Court found, on the basis of a full evidentiary record, that the challenged practices of petitioner Bob Jones University were based on a genuine belief that the Bible forbids interracial dating and marriage"); *cf. United States v. Ballard*, 322 U.S. 78, 84 (1944) (left sincerity issue to jury); *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968) (drug-taking sect whose motto was "Victory Over Horseshit!" was not a sincere religion).

And so long as plaintiff's religion "is burdened,"¹⁰⁸ the state, as defendant, is then forced to justify the law.¹⁰⁹

The modern explosion of real and supposed religions under the putative protection of Free Exercise Clause jurisprudence also strongly argues against applying the compelling state interest test in cases involving religious action. For, while the Free Exercise Clause may once have been perceived to protect only Christianity or "established" religions,¹¹⁰ it is now rightly held to extend its protection to all religious beliefs:

We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents.¹¹¹

In the context of a Free Exercise case today, then, virtually anything goes. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."¹¹² "Courts," we have been told, "should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."¹¹³ The "religion" involved can even be a religion of one.¹¹⁴ Thus, given the current unprecedented surge in immigration,¹¹⁵ with the great bulk of immigrants coming from areas that traditionally have not shared the "Judeo-Christian" ethic,¹¹⁶ coupled with the virtually limitless capacity of the human spirit (or mind) for revelation (or im-

¹⁰⁸ *Thomas*, 450 U.S. at 718.

¹⁰⁹ See *McDaniel v. Paty*, 435 U.S. 618, 628-29 (1978) (state failed in proving that its once-arguably-important interest had not lost its validity with time). *But see id.* at 625 (against historical background Court would not "lightly invalidate a statute enacted pursuant to a provision of a state constitution which has been sustained by its highest court").

¹¹⁰ *Cf. Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985).

¹¹¹ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

¹¹² *Thomas*, 450 U.S. at 714.

¹¹³ *Id.* at 715. Thus, in *Bowen v. Roy*, 476 U.S. 639 (1986), which was predicated upon the plaintiff's "recently developed . . . religious objection to obtaining a Social Security number for [his daughter] Little Bird of the Snow," (*Bowen*, 476 U.S. at 696), the plaintiff, Roy, was permitted casually to change his religious views mid-trial when it was discovered that his daughter already had a Social Security number - apparently only then did it occur to Roy that Little Bird of the Snow's spirit would be "robbed" of its power only by the use of her Social Security number. *Bowen*, 476 U.S. at 697.

¹¹⁴ See *Bowen*, 476 U.S. at 696. See also *Wallace*, 472 U.S. at 52-53.

¹¹⁵ "The USA's largest 10-year wave of immigration in 200 years—almost 9 million people—arrived during the 1980s." Margaret L. Usdansky, *Immigrant Tide Surges in '80s*, USA TODAY, May 29, 1992, at 1 (citing Census Bureau figures).

¹¹⁶ *Immigration & Naturalization Service*, 1990 STATISTICAL YEARBOOK 50 (1991) (immigration from Asia, 1981-90: 2,738,157; from Caribbean, 1981-90: 872,051; from Europe, 1981-90: 761,550).

provisation and rationalization),¹¹⁷ religious claims to act which are contrary to our essentially Western law¹¹⁸ will inevitably proliferate on a grand scale. This tide of "religiosity" will only augment the already-taxed relations between religious claimants and our enlarged 20th century governments.¹¹⁹ While "[t]he rise of the welfare state" should not spell the decline of the Free Exercise Clause,¹²⁰ the increase in the scope and number of religious claims to act contrary to law should not be allowed to undo the legitimate ends of civilized society.

For these reasons the Court should have taken the opportunity presented by *Lukumi* to abandon the compelling state interest test in cases involving Free Exercise action claims (if indeed it has ever truly been applied outside of the unemployment benefits context of *Sherbert*, *Thomas*, and *Hobbie*).¹²¹ This is not to say that the appropriate test

¹¹⁷ See, e.g., Larry Rohter, *Sect's Racketeering Trial Is Set To Open*, N.Y. TIMES, Jan. 6, 1992, at A14 (discussing allegations that Yahweh ben Yahweh, leader of Temple of Love, Nation of Yahweh, and The Brotherhood, required his inner circle to kill "white devils" and present to him their severed ears as proof of the deed); Marjorie Miller & J. Michael Kennedy, *Mexico Massacre; Potent Mix of Ritual and Charisma*, L.A. TIMES, May 16, 1989, at 1 (relating human sacrifice of University of Texas student, Mark Kilroy of Sante Fe, by marijuana-smuggling practitioners of Palo Mayombe in Matamoros, Mexico to their belief in animal sacrifices); *Religion Based on Sex Gets a Judicial Review*, N.Y. TIMES, May 2, 1990, at A17 (Federal district judge considers whether to halt state prosecution for prostitution by priestess of Church of the Most High Goddess, which grants "absolution" through sex and "sacrifice" through payment of money. Priestesses must have sexual relations with 1,000 men before qualifying for priesthood); *Renegade Mormons*, NEWSWEEK, Jan. 20, 1975, at 72 (violent sect practicing polygamy in Mexican commune as Church of the First Born in the Fullness).

¹¹⁸ But see *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 473-74 (1988) (Brennan, J., dissenting) (suggesting that Western concepts of land, centered around notions of ownership and use of private property, be balanced against those of Native Americans "in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred"). Interestingly, this issue was raised at the *Santeria* trial when Plaintiff-Priest Pichardo accused counsel for the City of Hialeah of "applying western logic to a religion which is not western." (R729) "Mr. Pichardo," said late District Judge Spellman, "so you understand, we're applying western law as well." (R730)

¹¹⁹ See *Bowen v. Roy*, 476 U.S. 639, 707, 707 n.17 (1986); *Thomas v. Review Board of Indiana Employment Sec. Div.*, 450 U.S. 707, 721 (1981) (Rhenquist, J., dissenting).

¹²⁰ *Bowen*, 476 U.S. at 732 (O'Connor, J., concurring in part and dissenting in part).

¹²¹ See *United States v. Lee*, 455 U.S. 252, 163 n. 3 (1982) (Stevens J., concurring). Yet another reason for abandoning the compelling state interest test in Free Exercise action cases is that by purporting to set the water mark so very high, while simultaneously realizing that it is an impossible burden in a religiously pluralistic ordered society, courts are constrained to hold proffered state interests to be "compelling," even though, truly, they are important and legitimate at best. The compelling state interest test is thus dangerously devalued as a tool against repression in the contexts of race and speech. Congress, of course, has now done what the court failed to do in the *Lukumi* case. The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993), expressly directs all courts to apply the compelling state interest test to all alleged religious practices: "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

for the Court regarding Free Exercise action claims is the "rational relation" test, which would not afford Free Exercise the obviously heightened protection that it deserves. Thus, this "general law" formulation of *Smith II* was flawed as well. On the one hand, the general law test was too susceptible to legislative legerdemain; too much depends on legislative craft and not enough on evaluating the government's interest and intent as juxtaposed against the religious claim. For example under the *Lukumi* circumstances, the city of Hialeah could have promulgated a law stating: "No one, except licensed commercial purveyors of food for human consumption, may possess live turtles, fowl, goats, sheep, and other livestock." Had this ordinance been passed, *certiorari* probably would never have been granted. Indeed, under the general law test, the validity of such an ordinance would have been definitively and quickly disposed of in the lower court(s); Hialeah's interests and intent in passing the ordinance would have remained unscrutinized—even if the law had still been promulgated precisely because of plaintiffs' announced intention to open a Santerian church. But, in *Lukumi*, because Hialeah's drafting was a bit more specific—forthrightly declaring that the City was appalled by animal sacrifice—the Supreme Court's attention was engaged, and Hialeah had the burden of arguing compelling governmental interest (even though, arguably, the ordinances were truly general).¹²² Thus, in addition to being underprotective of religious claims, the general law formulation is overprotective, as well, by leaving legislatures no operating latitude to target antisocial action when religious practitioners are the only ones currently interested in committing the act.¹²³

The proper test for the Court regarding Free Exercise action claims is "heightened scrutiny," a test familiar from, and similar to, the intermediate level of Equal Protection analysis.¹²⁴ Under this test, laws supported by important and legitimate governmental interests

of furthering that compelling governmental interest." *Id.* at § 3(b). The constitutional and other legal implications of Congress mandating that courts (including state courts) utilize a Court-created constitutional litmus test are yet to be seen.

¹²² The ordinances were arguably general, of course, because they applied to both religious and non-religious ritual or ceremonial killings of animals not for the primary purposes of food. For instance, the ordinances would penalize the action of college students who, in a drunken spree, ceremonially hack to death a beached whale in homage to "The God of Spring Break," and arguably would prohibit tradition-laden English-style fox hunting. Moreover, unlike the law in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), the ordinances at issue in the *Lukumi* case were applicable everywhere in Hialeah. *Cf. id.* at 2472 (White, J., dissenting).

¹²³ *Cf. Dawson v. Delaware*, 112 S. Ct. 1093, 1102 (1992) (Thomas, J., dissenting) ("Although we do not sit in judgment of the morality of particular creeds, we cannot bend traditional concepts of relevance to exempt the antisocial.").

¹²⁴ See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Clark v. Jeter*, 486 U.S. 456 (1988); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

would survive religious claims to act contrary to them.¹²⁵ In the *Lukumi* case, the interests of Hialeah are undoubtedly important. First, prevention of cruelty to animals has long been recognized as well within the states' police power to safeguard the health, safety, welfare, and morals of its citizens.¹²⁶ Further, the primary reason for statutes banning cruelty to animals—the protection of public morals—highlights the importance of yet another of Hialeah's interests, shielding children from scenes of cruelty.¹²⁷

The legitimacy of Hialeah's interests is established in several ways. First, on the basis of wholly credible expert testimony, the district court found as a matter of fact that the interests were actually present in this case.¹²⁸ Second, making an exception for petitioners (who claimed they dispose of carcasses in a hygienic fashion) would abuse the cruelty-to-animals and protection-of-children interests, and would undoubtedly raise charges of favoritism from other groups in the area that practice exposed animal sacrifice.¹²⁹ Finally, the ordinances are legitimate because they were not passed with "an intent to discriminate against particular religious beliefs or against religion in general."¹³⁰ The district court found as a matter of fact (which the court of appeals affirmed) that when Hialeah passed the ordinances it did not have an intent to suppress Santeria, though it did want to stop animal sacrifice by whomsoever it was practiced.¹³¹ This finding was supported by the record, most tellingly by the fact that Hialeah

¹²⁵ Cf. *Bowen*, 476 U.S. at 709 ("The Social Security number requirement clearly promotes a legitimate and important public interest").

¹²⁶ See the Appendix to this article for a list of cases and statutes relating to state protection of animals.

¹²⁷ *Commonwealth v. Higgins*, 178 N.E. 536, 538 (Mass. 1931); ("[statute] directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe); *Stephens v. State*, 3 So. 458, 459 (Miss. 1888) ("cruelty to [animals] manifests a vicious and degraded nature, and it tends inevitably to cruelty to men"). See also *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (the state's "authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience"). Finally, Hialeah's interest in protecting its citizens from disease-fostering animal carcasses need only be stated to establish its importance. *Prince*, 321 U.S. at 166-67 ("The right to practice religion freely does not include liberty to expose the community . . . to communicable disease.")

¹²⁸ *Church of the Lukumi Babalu Aye, Inc. and Ernesto Pichardo v. City of Hialeah*, 723 F. Supp. 1467, 1477 (1989).

¹²⁹ *Id.* at 1471. Cf. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987); *Goldman v. Weinberger*, 475 U.S. 503, 512-13 (1986) (Stevens, J., concurring); *United States v. Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring). The appearance of favoritism also presents yet another reason for abandoning the compelling state interest test in Free Exercise action cases, for, given the nature of things, no one thinks government is favoring particular religions when it merely countenances the profession and propagation of those beliefs. But, when government stands idly by, allowing a particular religion's actions to affect others, and permits arguably antisocial behavior, general society may come to the conclusion that government is favoring one group at the expense of all others.

¹³⁰ See *Bowen*, 476 U.S. at 707.

¹³¹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467, 1477 (1989).

granted plaintiffs a certificate of occupancy, permitting them to open their doors and operate as a church.¹³² All they could not do was sacrifice animals.

All of this raises the final interest of Hialeah—one that is obviously legitimate and important. Having already suffered, for some time, the surrounding area being littered with the remains of animals in streets, parks, and cemeteries,¹³³ the announcement of the church's imminent opening placed the subject of animal sacrifice squarely before the city council, and it rightly recoiled in disgust. The City Council of Hialeah recoiled in disgust at, and acted affirmatively to prevent, animal sacrifice because it is, in a word, barbaric, and is, as a secular matter, deemed to be immoral.¹³⁴ On several occasions the Supreme Court has declared that government may legislate against a return to barbarism. For example, in *Mormon Church v. United States*,¹³⁵ noting that "[t]he organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism,"¹³⁶ the Court held that "[t]he State has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced."¹³⁷ In *Cleveland v. United States*,¹³⁸ after quoting *Mormon Church*,¹³⁹ the Court wrote that "[w]hether an act is immoral within the meaning of the statute, is not to be determined by the accused's concepts of morality."¹⁴⁰ Thus, while the enlightened sensibilities of our society unanimously and rightly condemn the unnecessary killing of animals, regrettably, in this culture, it is generally accepted that the usual fate of the animals which the Santerians wish to sacrifice is to provide food for the sustenance of humankind. It was, therefore, well within the bounds of civi-

¹³² *Id.* at 1477.

¹³³ See Jeffrey Schamlz, *Hialeah Journal; Animal Sacrifices: Faith Or Cruelty?*, N.Y. TIMES, Aug. 17, 1989, at A16; A.J. Dickerson, *Secretive Religion Makes Waves In South Florida*, AP, June 7, 1987, available in LEXIS, Nexis Library, Omni File (the article quotes Fred Cruz, a sales manager at Graceland Memorial Park, as saying "They drop it over the fence or they leave it on a grave. Every day we send an employee to clean up. We throw away the dead animals.").

¹³⁴ Although this case *does* involve a clash of cultures, it does *not* present a "white" versus "black" or "white" versus "brown" scenario. Hialeah has a population of approximately 174,000—86% of which is Hispanic. D&B Donnelly Demographics, July 29, 1992, available in DIALOG, File No. 575. Cuban emigres and their progeny, then, are hardly outnumbered in Hialeah. Indeed, at the time the instant ordinances were enacted, the City of Hialeah was governed by its mayor, Raul L. Martinez, and city council members Cardoso, D'Angelo, Echevarria, J. Martinez, Mejides, and Robinson. What the *Lukumi* case did present, however, is the struggle of Western Values versus something quite different.

¹³⁵ 136 U.S. 1 (1890).

¹³⁶ *Id.* at 49.

¹³⁷ *Id.* at 50.

¹³⁸ *Cleveland v. United States*, 329 U.S. 14 (1946).

¹³⁹ *Id.* at 19.

¹⁴⁰ *Id.* at 20.

lized judgment for Hialeah to make the secular determination that the killing of these animals not for the primary purpose of consumption is “unnecessary” and thus immoral. Because we are civilized, we must permit the profession and propagation of any belief whatsoever; but we are not yet so “civilized,” that barbarism must be countenanced, irrespective of the reason advanced for its practice.

The day has passed when America could be parochially described as strictly a “Christian Nation.” It may be, moreover, that we are no longer strictly even a “religious” people—at least not in the traditional sense of established faith. But the United States is—still, at least—a Western nation, one that proceeds from the very best that Western Civilization has to offer, including limited government, trial by jury, other due process, and most assuredly, religious tolerance. Regarding the latter, government must, therefore, be utterly tolerant of religious beliefs and the peaceable profession and propagation of such beliefs, no matter how barbaric or misguided those beliefs may seem, even to a vast number of people. This is the “marketplace of ideas,” religious and otherwise. But in this free—yet civilized—society of ours, neither the federal government, nor the states, nor the city of Hialeah, should be required to tolerate rampant anti-animal primitivism in the name of religion. For while governments may choose to accommodate, nevertheless they may also choose to forbid non-expressive religious action when it is contrary to important and legitimate interests within their spheres of power. The prevention of cruelty to animals, the protection of children from the dulling of their humane sensibilities through witness to carnage, the protection of the citizenry from disease-fostering rotting carrion, and the securing of society against a return to barbarism are all governmental interests of high and time-honored importance. All were genuinely, and very strongly, present in the *Lukumi* case. Because of this, and because the city of Hialeah, Florida, acted to safeguard these interests without discriminatory intent, the judgment of the court of appeals, upholding that of the district court, should have been—and could have been—affirmed by the Supreme Court. But it was not!

IV. THE PROBLEM WITH SOCIETY’S VIEW OF ANIMALS

The substantive argument advanced at length above—rooted in government’s legitimate interest in protecting, if not every animal, then at least some—may not be determinative, but it was at least plausible. Yet, though presented at length,¹⁴¹ the argument was not even considered by the Court in the *Lukumi* case. The question is: “Why not?” The answer is found in the fundamental contradiction in contemporary society’s view and treatment of animals. This view, regrettably, is shared by every one of the Justices.

¹⁴¹ See Amicus briefs, *supra* note 1.

My own notes at the time certiorari was granted in the *Lukumi* case identified the inherent problem confronted by those concerned with the animal rights aspects of the case.

Although there are anti-cruelty laws purporting to protect animals in every state, they are no impediment to production and slaughter for food, to experimentation for "science," to hunting for "conservation," to fishing for "sport," to "ranching" for fur, to performance for "entertainment," and on and on. I mention this because the [Supreme] Court knows it . . . well. There isn't an Animal Rights person, let alone an ethical vegetarian, among them. Even the "pet owners" and other "animal lovers" among them know that, at least as far as the law is concerned, there is precious little that one can't do to animals, including killing your poodle if the kids outgrow her—providing, of course, that she is "put to sleep" humanely. [Justice X] is rumored to enjoy duck pate and [Justice Y] pigeon pie.

And here come these poor, worshipping, minority religionists who only want to kill—humanely, mind you—a few chickens, goats, ducks, and pigeons. Why, it almost sounds like a fine French restaurant. And in the name of religion, no less.

I don't mean to trivialize a horrible situation. I'm simply trying to convey my view of how this case is going to hit the Court. In *Smith, supra*, [the case which held that incident to anti-drug laws a state could outlaw Indians' use of peyote, even though the substance was used as a religious sacrament] they had a "general law" and a practice which was illegal throughout the United States, federal and state. Here [in the *Lukumi* case], whatever "general law" means, this doesn't look like one, and here not only is killing animals not illegal throughout the United States, the practice is an integral part of everyone's daily existence.¹⁴²

It turned out that these were prophetic insights. In fact, it was not surprising to hear Justice Sandra Day O'Connor ask Hialeah's attorney how he could defend prohibiting an unarguably religious killing of animals, but accept that lobsters were boiled alive in the city's restaurants, or, for that matter, accept that homeowners can rid their basements of rats. He could not!

Justice O'Connor's insightful, albeit implicit, recognition of the central contradiction in society's attitude toward animals—*i.e.*, some killing of animals is acceptable, but other killing of animals is not—heavily influenced Justice Kennedy's majority opinion for the divided Supreme Court:

Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing—which occurs in Hialeah . . .—is legal. Extermination of mice and rats within a home is also permitted. Florida law . . . sanctions euthanasia of "stray, neglected, abandoned, or unwanted animals . . ."; destruction of animals judicially removed from their owners "for humanitarian reasons" or when the animal "is of no commercial value . . ."; the infliction of pain or suffering "in the interest of medical science . . ."; the placing of poison in one's yard or

¹⁴² Personal notes of Henry Holzer.

enclosure . . ."; and the use of a live animal "to pursue or take wildlife or to participate in any hunting, . . ." and "to hunt wild hogs. . ."¹⁴³

In other words, if animals can be murdered in Hialeah, and, for that matter, everywhere else in the United States, for virtually any reason (or no reason) at all, how can the Constitution, which protects the free exercise of religion, prohibit the killing of animals for religious purposes— Even though in the *Lukumi* case the Court's answer was that the Constitution protected the abominable practice of animal sacrifice—thus, apparently opening the door to even more reprehensible acts done in the name of "religion," and implying that government cannot protect even those fortunate animals it wishes to protect, especially from acts claimed to be rooted in religious necessity—there is a glimmer of hope.

Justice Harry Blackmun, in a short opinion joined by Justice O'Connor, concurred in the Court's judgment because while "[i]t is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such Because the [City of Hialeah] here does single out religion in this way the present case is an easy one to decide."¹⁴⁴ However—and this is the important message for the animal rights movement—the Blackmun-O'Connor opinion continued:

A harder case would be presented if [the Santerians] were requesting an exemption from a generally applicable anticruelty law. The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals. This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment.¹⁴⁵

In other words, if a law were passed not specifically aimed at the cruel practice of a particular religious group, but was part of a consistent, unified, noncontradictory, general attempt to deal with the problem of cruelty to animals, that might constitute a sufficiently strong government interest to overcome an assertion of a claim to abuse animals for religious reasons.¹⁴⁶

Thus, for the animal rights movement, the message is clear: it must redouble its effort to eliminate all forms of cruelty to animals. Then, neither Santerians nor anyone else will be able to justify their obscene, religious practices on the ground that everyone else is mistreating animals for reasons considerably less important than the free exercise of religion.

¹⁴³ 113 S.Ct. 2217, 2232.

¹⁴⁴ *Id.* at 2251.

¹⁴⁵ *Id.*

¹⁴⁶ It must be noted, however, that with the advent of the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-131, 107 Stat. 1488 (1993), and its imposition of the "compelling state interest" test, it may now be wholly impossible to prevent animal sacrifices under any circumstances.

Contradictions will out, as the unfortunate animal victims of the Santerians have learned from the Supreme Court's decision, and as the future victims of other religious practices have yet to learn. Perhaps the day will come when Santerians will be prohibited from sacrificing animals, but it is not likely to arrive until lobsters are no longer boiled alive and eaten in Hialeah.

APPENDIX A

People v. Reed, 176 Cal. Rptr. 98, 103 (App. Dep't Super. Ct. L.A. County 1981); *Bland v. People*, 76 P. 359, 360-61 (Colo. 1904); *Johnson v. District of Columbia*, 30 App. D.C. 520, 522 (1908); *C.E. America, Inc. v. Antinori*, 210 So. 2d 443, 444 (Fla. 1968); *Hargrove v. State*, 321 S.E. 2d 104, 108 (Ga. 1984); *State v. Abellano*, 441 P.2d 333, 340 (Haw. 1968); *Illinois Gamefowl Breeders Ass'n. v. Block*, 389 N.E. 2d 529, 532 (Ill. 1979); *State v. Karstendiek*, 22 So. 845, 846-47 (La. 1897); *State v. Starkey*, 90 A. 431, 432, 433 (Me. 1914); *Commonwealth v. Higgins*, 178 N.E. 536, 537 (Mass. 1931); *City of St. Louis v. Schoenbusch*, 8 S.W. 791, 792 (Mo. 1888); *State v. Prince*, 94 A. 966, 966 (N.H. 1915); *State v. Davis*, 61 A. 2,4 (N.J. Super Ct. 1905), *aff'd*, 64 A. 1134 (1906); *Barrett v. State*, 116 N.E. 99, 101 (N.Y. 1917); *State v. Longhorn World Championship Rodeo, Inc.*, 438 N.E. 2d 196, 200, 201 (Ohio Ct. App. 1985); *Kuchler v. Weaver*, 415 A.2d 47, 49 (Pa. 1980); *State v. Tabor*, 678 S.W.2d 45, 48 (Tenn. 1984); *Cinadr v. State*, 300S.W. 64, 65 (Tex. Crim. App. 1927); *Peck v. Dunn*, 574 P.2d 367, 369 (Utah) *cert. denied*, 436 U.S. 927 (1978); *Anderson v. George*, 233 S.E. 2d 407, 410 (W. Va. 1977).

Indeed, all fifty states have laws protecting animals. See ALA. CODE 13A-11-14 (1982); ALASKA STAT. 11.61.140 (1989); ARIZ. REV. STAT. ANN. 13-2910 (1956); ARK. CODE ANN. 5-62-101 (Michie 1987); CAL. PENAL CODE 597 (West Supp. 1992); COLO. REV. STAT. 18-9-202 (1986 & Supp. 1991); CONN. GEN. STAT. 53-247 (Supp. 1992); DEL. CODE ANN. TIT. 11, 1325 (1974 & Supp. 1990); D.C. CODE ANN. 22-801 & 802 (1981); FLA STAT. Ch. 828.12 (1976); GA. CODE ANN. 16-12-4 (Michie 1988); HAW. REV. STAT. 711-1109 (Supp. 1991); IDAHO CODE 18-2102 (1987); ILL. ANN. STAT. Ch. 8, para. 703.01 (Smith-Hurd Supp. 1992); IND. CODE ANN. 35-46-3-12 (Supp. 1991); IOWA CODE ANN. 717.2 (Supp. 1992); KAN. STAT. ANN. 21-4310 (Supp. 1992); KY. REV. STAT. ANN. 525.130 (1990); LA. REV. STAT. ANN. 14:102 (West 1986 & Supp. 1992); ME. REV. STAT. ANN. TIT 7, 4011 (West 1964); MD. CODE ANN. 27:59 (1992); MASS. GEN. 1. Ch. 272, 77 (1990); MICH. COMP. LAWS 752.21 (1991); MINN. STAT. 343.21 (1990); MISS. CODE ANN. 97-41-1 (1972); MO. ANN. STAT. 578.012 (Vernon Supp. 1992); MONT. CODE ANN. 45-8-211 (1991); NEB. REV. STAT. 28-1002 (1989); NEV. REV. STAT. ANN. 574.100 (Michie Supp. 1991); N.H. REV. STAT. ANN 644:8 (1986 & Supp. 1991); N.J. STAT. ANN. 4:22-26 (West Supp. 1991); N.M. STAT. ANN. 30-18-1 (Michie 1978); N.Y. AGRIC. & MKTS. LAW 353 (McKINNEY 1991); N.C. GEN. STAT. 14-360 (Supp. 1991); N.D. CENT. CODE 36-21-1-02 (1987 & Supp. 1989); OHIO REV. CODE ANN. 959.13 (ANDERSON 1988); OKLA. STAT. ANN. TIT. 21, 1685 (West 1983); OR. REV. STAT. 167.315-330 (1991); 18 PA. CONST. STAT. ANN 5511 (Supp. 1992); R.I. GEN. LAWS 4-1-2 & 3 (1987)); S.C. CODE ANN. 47-1-40 (LAW CO-OP Supp. 1991); S.D. CODIFIED LAWS ANN. 40-1-2 (1985); TENN. CODE ANN. 39-14-202 (1991); TEX. PENAL CODE ANN. 42.11 (West 1989 & Supp. 1992); UTAH CODE ANN. 76-9-301 (Supp. 1991); VT. ST. ANN., TIT. 13, 352

(Supp. 1991); VA. CODE ANN. 3.1-796.122 (Michie Supp. 1991); WASH. REV. CODE ANN. 16.52.070 (West 1992); W.VA. CODE 62-8-19 (Supp. 1991); WIS. STAT. ANN. 951.02 (West Supp. 1991); WYO. STAT. 6-3-203 (1997).

The following states, (plus the District of Columbia), like the State of Florida and the City of Hialeah, forbid the "unnecessary," "needless," "unjustifiable" or "undue" suffering of animals: California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, New York, South Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

