A CENTURY OF FREE EXERCISE JURISPRUDENCE: DON'T PRACTICE WHAT YOU PREACH

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.[1]

I. PREFACE: LIBERTY AND THE FREE EXERCISE OF RELIGION

A religious believer in the 1990's who seeks to practice what he preaches may find his practices confined to home or church, just as a voyeur may be limited to possessing obscene pornography only in his home.[2] The tension between categorically protecting religious belief while simultaneously regulating religious practice remains unresolved after a century of free exercise litigation. While the judiciary had sought to "rescue[] the temporal institutions from religious interference"[3] and simultaneously "secure[] religious liberty from the invasions of civil authority,"[4] the results are skewed. Subjective religious beliefs of individuals have been well protected, but external religious practices have been virtually swept from the public square.

The cleansing was Kafkaesque. The government, clothed in the trappings of ceremonial deism,[5] systematically eliminated the peoples' expression of public faith. Congress still opens their sessions in

1. Reynolds v. United States, 98 U.S. 145, 166 (1878).

2. Stanley v. Georgia, 394 U.S. 557 (1969) (striking down on First Amendment grounds a conviction for the private possession of obscene matter).

3. Everson v. Board. of Educ., 330 U.S. 1, 15 (1947) (quoting Watson v. Jones, 80 U.S. 679, 730 (1871).

4. *Id.*

5. Ceremonial deism is where a religious practice "protected from Establishment Clause scrutiny chiefly because [it has] lost through rote repetition any significant religious content." Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting). Justice Brennan suggested such examples as the national motto of "In God We Trust" and the references to God in the Pledge of Allegiance to illustrate ceremonial deism. *Id.*

prayer, but now only private prayers are permitted in public schools.[6] The President is sworn into office with one hand on the Holy Bible, but public school students likely remain ignorant of this book, its contents, and its role in American history.[7] Even the compelling state interest test that purportedly protected religious believers from governmental pogroms has been cast aside.[8] Ironically, while the Supreme Court makes such rulings, it sits beneath a bas-relief of the Ten Commandments.[9]

A contemporary religious believer who dares express his faith must wonder how secure he is under the First Amendment. Surely the believer feels rather unprotected, given the demise of the compelling state interest test and the amputation, [10] if not death, of its legislative replacement, the Religious Freedom Restoration Act (RFRA).[11] Indeed, the religious believer who surveys free exercise jurisprudence is likely befuddled as to what he may or may not do without incurring judicial wrath.

This comment addresses that confusion by contrasting the constitutional categorical protection for religious beliefs that runs through the history of free exercise jurisprudence with the minimal protections extended to the practices motivated by those beliefs. In

6. Engel v. Vitale, 370 U.S. 421, 424-25 (1962) (holding voluntary, non-denominational school prayer unconstitutional).

7. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963) (holding school prayer and Bible readings unconstitutional).

8. Michael P. Farris & Jordan W. Lorence, *Employment Division v. Smith and the Need for the Religious Freedom Restoration Act*, 6 REGENT U.L. REV. 65 (1995) [hereinafter Farris].

9. CATHERINE MILLARD, THE REWRITING OF AMERICA'S HISTORY 383-84 (1991).

10. *See infra* notes 97-99 and accompanying text.

11. RFRA states that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C.A § 2000bb-1 (West 1996). Introduced in 1991, RFRA was intended to overrule the *Smith* decision. Substantial support was lost when pro-life groups withdrew support, fearing that abortion advocates would argue that restricting abortion infringes on the aborting woman's free exercise rights. Slight changes in the bill's wording mitigated the risk of such a challenge. This, combined with the election of a pro-abortion President, sufficed to draw religious conservatives back to supporting the bill and it was enacted in 1993. Herbert W. Titus, *The Free Exercise Clause: Past, Present and Future*, 6 REGENT U.L. REV. 7, 35-36. (1995).

conclusion, it suggests how to craft claims that may enhance the constitutional protections for the inalienable right[12] to freely exercise religious faith in the coming millennium.

II. THE WARP AND WOOF OF FREE EXERCISE JURISPRUDENCE

A few rules of law emerging from crucial Free Exercise cases may be thought of as forming the warp[13] of free exercise jurisprudence. Among the strongest of those threads is the consistent and near-absolute protection for religious belief and profession of faith. The myriad individual cases decided under those rules form the woof.[14] As discussed below, the warp and the woof create a jurisprudential fabric that covers the religious believer with paltry legal protections where outward practices are concerned, but profound protection where internalized beliefs are at issue.

If a polygamist sacrificed a chicken to his gods he would inadvertently illustrate the beginning and end of the warp. Free exercise jurisprudence began with the Supreme Court upholding a polygamist's conviction in *Reynolds v. United States*[15] and culminated with the Court striking down a law that, as it was applied, prohibited a Cuban religious sect from sacrificing chickens in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[16] Between these

12. James Madison summarized the inalienable nature of the free exercise right:

> This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator.

Everson v. Board of Educ., 330 U.S. 1, 64 (1947) (quoting Memorial and Remonstrance Against Religious Assessments (circa June 20, 1785)).

13. A warp is "a series of yarns extended lengthwise in a loom . . . forming the lengthwise threads of a woven fabric and usually twisted tighter than the filling [or woof] threads." WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 2577 (1986).

14. The woof is "a filling thread or yarn in weaving [crossing the warp threads]." *Id.* at 2632.

15. 98 U.S. 145 (1889).

16. 508 U.S. 520 (1993).

endpoints are the few seminal cases that define free exercise jurisprudence.

A. The Warp: Categorically Protected Belief and Profession

Categorical protection for religious belief and its profession is the thread running the length of free exercise jurisprudence. Proclaiming one's faith is limited only by reasonable time, place, and manner restrictions not unlike those governing secular free speech.[17] On the other hand, religious practices, aside from professing belief in religious tenets or seeking to convert others to one's faith, are accorded less substantial protection. In distinguishing between belief and practice, the government assumes the curious position that religious adherents have virtually unlimited protection to seek converts, yet at the same time, the government may freely proscribe the very conduct that emanates from those beliefs.

Reynolds arose when a Mormon in Utah Territory practiced what he preached and took a second wife. Charged under a federal polygamy statute, he asserted a free exercise defense.[18] In this progenitor of all free exercise cases, the Court set forth the categorical protection of belief and profession: "[T]o restrain the profession or propagation of [religious] principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty . . . ."[19] According to the Court, regulation is appropriate when

17. Time, place, and manner restrictions are broadly applicable to all forms of free speech, both secular and religious. In considering the use of public areas by labor organizers, the Court observed in an oft-quoted passage that

> [t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. Committee for Indus. Org., 307 U.S. 496, 515-16 (1939).

18. *Reynolds*, 98 U.S. at 161.

19. *Id.* at 163 (quoting 12 Hening's Stat. 84).

"principles break out into overt acts against peace and good order."[20] Here, the defendant's faith was overtly manifested when he married a second wife while his first wife was living.[21]

Reynolds' offense lay not in holding the religious belief that he was exempt from the polygamy law, but in externalizing his faith. When religious belief was expressed in action, there was a concomitant breach of the law, "and the breaking of the law is the crime."[22] Actions were thus regulated, while belief, profession, and proselytizing enjoyed categorical protection from government interference.[23] Although sixty years passed before the Court again considered free exercise challenges, this pattern of protected belief and regulated conduct would be confirmed in the years to come.

In *Cantwell v. Connecticut*[24] the Court struck down a law that expressly targeted soliciting for religious causes. The contested law required solicitors for charitable donations to apply for a state permit.[25] A state official then evaluated the nature of the applicant's cause.[26] If the state official determined the cause to be either "religious" or a bona fide charity, a permit would issue.[27] Cantwell was charged under the statute when he and others, after failing to apply for permits, went from door to door in a Roman Catholic neighborhood, offering books and playing vitriolic records attacking Catholicism.[28] The appellate court, reviewing Cantwell's conviction, interpreted the statute as a valid regulation of solicitation rather than an infringement of religious belief.[29] The Supreme Court, while agreeing that the state may generally regulate solicitation, held that the state official's discretion to determine "what is a religious cause[] is to lay a forbidden burden upon the exercise of liberty protected by

20. *Id.*
21. *Id.* at 167.
22. *Id.*
23. *Id.* at 163.
24. 310 U.S. 296 (1940).
25. State v. Cantwell, 8 A.2d 533, 535 n.1 (Conn. 1939), *rev'd*, 310 U.S. 296 (1940).
26. *Id.*
27. *Id.*
28. *Cantwell*, 8 A.2d at 535.
29. *Id.* at 536.

the Constitution"[30] and reversed the appellate court.[31] The Court again acknowledged the categorical protection for the profession of religious faith:

> No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets . . . .[32]

Cantwell was followed by *Murdock v. Pennsylvania*,[33] in which a neutral, generally applicable law required fees and licenses for solicitation. Eight Jehovah's Witnesses challenged the law, claiming that they were following the Scriptural admonition to "[g]o ye into all the world, and preach the gospel to every creature."[34] The Court saw the issue as one regarding the right to profess faith.[35] In *Murdock*, religiously motivated solicitation was compared to worshipping and preaching in church.[36] The Court affirmed that religious profession has constitutional protection equal to "freedom of speech and freedom of the press."[37]

While acknowledging that solicitation could give rise to special problems that would be within the state's power to regulate, the Court nonetheless found that the ordinance was "not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations."[38] Holding that the general, non-discriminatory nature of the challenged law was immaterial, and ruling that the law

30. *Cantwell*, 310 U.S. at 307.
31. *Id* at 311.
32. *Id.* at 304 (footnotes omitted).
33. 319 U.S. 105 (1943).
34. *Id.* at 108 (quoting *Mark* 16:15 (King James)).
35. *Id.*
36. *Murdock*, 319 U.S. at 109.
37. *Id.*
38. *Id.* at 116.

was unconstitutional, the Court reasoned that such licenses were a destructive influence akin to the power of censorship.

> A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce, although it may tax the property used in, or the income derived from, that commerce . . . . A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect . . . . The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down.[39]

The tax on literature distribution was equated to taxing a preacher for the delivery of a sermon.[40] This type of public evangelism was categorically protected from government interference: "[T]he present ordinance is not directed to the problems with which the police power of the state is free to deal."[41]

These early cases established the principle that religious ideas, profession of those ideas or beliefs, and even the pursuit of converts, were all strongly protected. Yet when the profession of faith became incarnate through the actual practice of the religious beliefs, then the Court moved toward a balancing test that allowed regulation of conduct by weighing the individual's interest against either society's or the government's interests.

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39. *Id.* at 113 (citations omitted).

40. The Court stated that:

> It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon . . . . Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse.

Id. at 112.

41. *Id.* at 116.

Free exercise jurisprudence was quiescent until 1963, when the Supreme Court decided *Sherbert v. Verner*.[42] *Sherbert* introduced a test for balancing state interests against the burden on an individual believer when a free exercise claim was asserted outside the categorically protected realm of belief and profession.[43] Before the Court announced its balancing test, it summarized the inviolate area of categorical protection for belief and profession. "Government may neither compel affirmation of a repugnant belief; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities; nor employ the taxing power to inhibit the dissemination of particular religious views . . . ."[44]

Sherbert perpetuated the categorical protection of religious belief and profession, but also specified a balancing test for overt practices. Now, religiously motivated actions not categorically excluded[45] would be reviewed under the "compelling state interest" test.[46] As the first century of free exercise jurisprudence moved into history, contemporary cases arose to shape the contours of free exercise jurisprudence.

In 1990, Justice Antonin Scalia, writing for the majority in *Employment Division v. Smith*,[47] noted that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment

42. 374 U.S. 398 (1963).

43. "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such . . . ." *Id.* at 402.

44. *Id.* (citations omitted).

45. "On the other hand, the Court has rejected challenges . . . to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." *Sherbert* at 402-03, quoting Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (alteration in original). Prior to *Sherbert*, the Court used a variety of balancing approaches to determine when the threat to public peace overwhelmed the free exercise right. *See, e.g.*, Cleveland v. United States, 329 U.S. 14 (1946) (upholding federal prohibition of polygamy); Prince v. Massachusetts, 321 U.S. 158 (1944) (applying child labor laws to religious literature distribution); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding state mandated vaccinations); Reynolds v. United States, 98 U.S. 145 (1878) (upholding state prohibition of polygamy).

46. *See infra* note 66 and accompanying text.

47. 494 U.S. 872 (1990).

obviously excludes all 'governmental regulation of religious beliefs as such.'"[48] As did Justice Brennan in *Sherbert,* Justice Scalia enumerated the inviolate areas of free exercise,[49] then suggested that beyond these established areas there may be others that are categorically protected.[50] Such other areas might include assembling for worship, participating in sacramental use of bread and wine, proselytizing, and abstaining from certain foods or modes of transportation.[51]

This thread of categorical protection, first articulated in *Reynolds* and running through more than a century of free exercise jurisprudence, was securely tied off in the most recent significant free exercise case, *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah.*[52] Here, confronted with a city's efforts to proscribe animal sacrifices by a religious sect, the Court considered the same question raised in *Reynolds*: Whether a law, neutral and generally applicable, is valid even if it incidentally burdens the free exercise of religion?[53] In *Reynolds,* the law was neutral and the act of polygamy, falling outside the categorically protected realm of belief and profession, was held illegal under a balancing test.[54] Unlike *Reynolds,* the purportedly neutral and generally applicable law in *Lukumi Babalu Aye* was not neutral in application, and the law was stricken.[55]

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48. *Id.* at 877 (quoting *Sherbert*, 374 U.S. at 402).

49. In the three decades since *Sherbert* the list had somewhat broadened:

> The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Id. (citations omitted).

50. *Id.*

51. *Id.* at 877-78.

52. 508 U.S. 520 (1993).

53. The statute, per the *Reynolds* Court, was one that prescribed "a rule of action for all those residing in the Territories," i.e., generally applicable and facially neutral. Reynolds v. United States, 98 U.S. 145, 166 (1878).

54. *Id.* at 166-67.

55. *Lukumi Babalu Aye, Inc.*, 508 U.S. at 547.

B. The Woof: Minimally Protected Religious Practices

> Just as *Reynolds* announced the beginning of the continuous thread of categorical protection for religious belief and profession, so also it was first to balance public interest against private religious rights when religion moved from profession to practice.[56] The *Reynolds* Court held that the dividing line between what belongs to the church and what to the State was the point at which religious "principles break out into overt acts against peace and good order."[57]

In considering the free exercise claim raised in defense of Mr. Reynolds' polygamy, the Court asked

> whether those who make polygamy a part of their religion are excepted from the operation of the statute[?] If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted . . . .[58]

While recognizing that belief and profession of religion are categorically protected,[59] the Court announced its fundamental rule of free exercise jurisprudence: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief, they may with practices."[60] The Court rejected the notion of allowing an exception for religiously motivated criminal conduct to a facially neutral, generally applicable law and upheld Reynolds' conviction.[61] To hold otherwise would be to "make the professed doctrines of

56. *Reynolds*, 98 U.S. at 166.
57. *Id.* at 163 (quoting 12 Hening's Stat. 84).
58. *Id.* at 166.
59. *Id.* at 163.
60. *Id.* at 166-67.
61. *Id.* at 168.

religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[62]

Thus, when overt religious acts conflicted with facially neutral, generally applicable laws, the interests of the individuals would be weighed against the public interest. The *Sherbert*[63] compelling state interest test was developed to evaluate cases falling outside the categorical protection. It required that the plaintiff initially show that a government action burdened his sincerely held religious belief.[64] Then, unless the government could justify its action by proving that the action furthered a compelling state interest[65] by the least restrictive means, the religious believer was exempted from the law.[66] The strong language that demanded a compelling interest be proven implied that, *Reynolds* notwithstanding, one might now "excuse his practices . . . contrary [to the law] because of his religious belief."[67] Yet time would prove this strong protection for religious practices to be illusory.[68]

In *Sherbert*, a Seventh Day Adventist was denied unemployment benefits when she was fired for refusing to work on Saturday, her Sabbath day.[69] Just as the *Murdock* Court likened a license to a tax on preaching, so the *Sherbert* Court analogized the denial of unemployment benefits to a fine for worshipping on Saturday.[70] The Court then asserted that "only the gravest abuses, endangering paramount interest, give occasion for permissible limitation."[71] The validity of regulating religious conduct depended upon whether a "substantial threat to public safety, peace, or order" was posed by the

62. *Id.* at 167. This concern for potential anarchy stems from Biblical roots: "For when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves . . . ." *Romans* 2:14 (King James).

63. Sherbert v. Verner, 374 U.S. 398 (1963).

64. *Id.* at 403.

65. *Id.* at 406-07.

66. Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

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

68. *See infra* note 79 and accompanying text.

69. *Sherbert*, 374 U.S. at 399.

70. *Id.* at 404.

71. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

religious practice.[72] This decision echoed *Reynolds*, where the Court observed that limits were appropriate once religious "principles break out into overt acts against peace and good order."[73] In *Sherbert,* the refusal to work on Saturday did not threaten peace and good order, while the burden of being denied unemployment benefits was quite substantial.[74] Thus, an exemption from a generally applicable, facially neutral law was warranted.[75]

By contrast, in *Reynolds* the Court viewed monogamy as one of the principles on which the "government of the people . . . rests" and that polygamy, applied to large communities, would "fetter[] the people in stationary despotism."[76] In *Reynolds,* the balance tipped in favor of the state; the practice of holding multiple wives yielded to the state's interest in preserving its desired form of society.[77]

Despite an occasional victory for religious believers, the powerful rhetoric of the compelling state interest test was, in practice, shorn of strength. Of ninety-seven cases brought to federal appellate courts in the ten years prior to *Smith*, the state prevailed in eighty-five.[78] Similarly, of the seventeen cases heard by the Supreme Court in the *Sherbert* era (1963-1990), the religious believer's claim failed in all but four cases.[79] Three of these four dealt with unemployment

72. *Id.* at 403-04.

73. *Reynolds*, 98 U.S. at 163 (quoting 12 Hening's Stat. 84).

74. *Sherbert*, 374 U.S. at 404.

75. *Id.* at 410.

76. *Reynolds*, 98 U.S. at 165-66.

77. *Id.*

78. James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1417 (1992) [hereinafter Ryan].

79. *Id.* at 1458. The religious claim failed in: Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985); Wayte v. United States, 470 U.S. 598 (1985); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982); Trans World Airlines v. Hardison, 432 U.S. 63 (1977); United States v. American Friends Serv. Comm., 419 U.S. 7 (1974); Johnson v. Robinson, 415 U.S. 361 (1974); Gillette v. United States, 401 U.S. 437 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); United States v. Seeger, 380 U.S. 163 (1965).

benefits, leaving only *Wisconsin v. Yoder*[80] as an example of religious behavior exempted from a facially neutral, generally applicable law.[81] The compelling state interest test appeared more adept at compelling the religious adherent to accept his burden than in restraining the government's ability to regulate conduct.

C. Whole Cloth? The Smith Decision

In 1990, the Court turned away from *Sherbert's* broad application of a compelling interest test when it decided *Employment Division v. Smith.*[82] *Smith* sketched the full array of judicial options in reviewing free exercise claims.[83] As in *Reynolds*, belief and profession were categorically protected and facially neutral, generally applicable laws that incidentally burdened religion were presumptively valid.[84] The *Smith* Court held that "[i]n addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be

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Religious claims prevailed in Frazee v. Illinois Dep't. of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972).

80. 406 U.S. 205 (1972). *Yoder* is arguably a hybrid claim as the Court intertwined parental rights with the free exercise claim:

> [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . . ."

Id. at 214.

81. Ryan, *supra* note 78, at 1413-15. Ryan noted Justice John Paul Steven's assessment in *Lee*, 455 U.S. at 261-63 (Stevens, J., concurring), that given the weak state interests of uniformity and administrative ease, the Court was not applying a true "compelling interest" test. Ryan, *supra* note 78, at 1415.

82. 494 U.S. 872 (1990).

83. *Id.* at 877.

84. *Id.* at 878-79.

justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.[85]

Smith considered the free exercise rights of Native Americans who were denied unemployment benefits after being fired for criminal, albeit religious, use of peyote.[86] Here, where the religious exercise devolved into "socially harmful conduct," the religious conduct fell prey to the incidental effect of a facially neutral, generally applicable law.[87] Broad application of *Sherbert's* compelling interest test to future cases was proscribed: "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."[88]

The criminal nature of the religious conduct in *Smith* suggested that the general rule might be limited to cases involving criminal behavior. This potential limitation dissolved in *City of Seattle v. First Covenant Church of Seattle*,[89] where the United States Supreme Court vacated the Washington Supreme Court's decision in favor of a church that disputed a city landmark preservation ordinance.[90] Although the dispute was civil rather than criminal, the Court remanded the case "for further consideration in light of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 . . . ."[91]

Smith's holding sounded like a disaster for free exercise rights. The blunt language limiting the compelling interest test stirred legal commentators to raise a clarion cry for a return to *Sherbert*.[92]

85. Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Employment Div. v. Smith, 494 U.S. 872 (1990)).

86. *Smith*, 494 U.S. at 874.

87. *Id.* at 885.

88. *Id.* at 884.

89. 499 U.S. 901 (1991).

90. *Id.*

91. *Id.*

92. Typical comments in response to *Smith*: "Religious exercise is no longer to be treated as a preferred freedom; so long as it is treated no worse than commercial or other secular activity, religion can ask no more." Michael W. McConnell, *Free Exercise and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1153 (1990). "The effect of *Smith* was immediate and profound. Literally hundreds of free exercise claimants found a broad spectrum of

Emerging from the clamor, a diverse coalition of concerned practitioners and academicians called for a rehearing.[93] Denied review, interested parties turned to the political process and Congress responded by drafting the Religious Freedom Restoration Act (RFRA).[94] After three years of debate, Congress enacted RFRA in 1993.[95] The Act legislatively overruled *Smith*, restoring the compelling state interest test for free exercise claims.[96] The constitutionality of RFRA was promptly challenged[97] and with the Court's decision in *City of Boerne v. Flores*,[98] RFRA was struck down at least in regard to claims arising from state law.[99] Whether RFRA is

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religious rights trampled by laws and governmental practices that were now unrestrained by the constitutional mandate of the First Amendment." John W. Whitehead & Alexis I. Crow, *The Religious Freedom Restoration Act: Implications for Religiously-Based Civil Disobedience and Free Exercise Claims*, 33 WASHBURN L.J. 383, 389 (1994). Also:

> *Smith* relegated our national commitment to the free exercise of religion to the sub-basement of constitutional values. Indeed, the majority declared that treating the free exercise of religion as a fundamental constitutional freedom gave it too high a standard of legal protection; the free exercise of religion was a 'luxury' our nation could no longer afford.

Farris, *supra* note 8, at 65-66.

93. The drafting committee for RFRA was the Coalition for the Free Exercise of Religion. Members spanned a broad spectrum of political opinion and religious belief. The People for the American Way worked alongside the Concerned Women for America, their ideological opposites. Similarly, the American Civil Liberties Union found itself on the same side of the fence as the Christian Legal Society. *Id.* at 88 n.131.

94. 42 U.S.C.A. § 2000bb (West 1996).

95. *See supra* note 11 and accompanying text.

96. The statutory test differs from the *Smith* test in that a "substantial" burden on free exercise must be shown, 42 U.S.C. § 2000bb(a)(3). In *Sherbert*, no quantitative measure was attached. Thus an indirect, incidental burden of any dimension could be tested. Sherbert v. Verner, 374 U.S. 398, 403-404 (1963).

97. Courts holding RFRA unconstitutional opined that it violated the separation of powers. *See, e.g.*, Keeler v. Mayor of Cumberland, 928 F. Supp 591 (D. Md. 1996) and In Re Tessier, 190 B.R. 396 (D. Mont. 1995). However, other courts expressly upheld RFRA and applied it in free exercise cases. *See, e.g.*, Hamilton v. Schriro, 74 F.3d 1545 (8th Cir. 1996) (Majority upholding RFRA; McMillan, C.J., dissenting, arguing RFRA was unconstitutional due separation of powers); Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996); and Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997).

98. 117 S. Ct. 2157 (1997).

wholly vitiated or if it retains vitality in federal claims, *Smith* now clearly prevails as the primary rule to adjudicate free exercise claims.

Much of the debate centered on *Smith's* general proposition, that a facially neutral, generally applicable law need not be justified by a compelling state interest if it incidentally burdens the free exercise of religion.[100] Yet, perhaps the focus on the general proposition was misplaced. All that *Smith* did was to return the compelling state interest test to its historic, pre-*Sherbert* role.[101] The compelling state interest test remained applicable to several types of claims, and religious belief and profession retained its historical, categorical protection.

1. Protection for Free Exercise Under *Smith*

While *Smith,* on its face, seemingly offered scant hope for religious believers, a close reading discloses significant protection for the religious believer. These include claims based on the historical categorical protection for profession of faith;[102] challenging the elements of neutrality and general applicability;[103] individualized exceptions to generally applicable laws,[104] and hybrid claims that join free exercise claims with other constitutionally protected rights.[105]

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99. The question presented in *Boerne* was whether Congress had the power under the Fourteenth Amendment, § 5, to enforce the provisions regulating state action in § 1 of the Amendment. *Boerne*, 117 S. Ct. at 2162. Thus, the decision that Congress exceeded its powers did not reach the issue of whether RFRA was constitutional under an exclusively federal cause of action. *Id.* at 2171-72

100. *Smith*, 494 U.S. at 881.

101. *Boerne*, 117 S. Ct. at 2172-76.

102. *Smith*, 494 U.S. at 887.

103. *Id.* at 881.

104. *Id.* at 884.

105. *Id.* at 881.

a) Categorical Protection for Religious Conduct

As *Smith* recognizes, the First Amendment categorically excludes certain religious conduct from government regulation.[106] This blanket exclusion, as discussed above, can be traced from *Reynolds* to *Lukumi Babalu Aye*.[107] Several forms of religious exercise are covered.[108] The most broadly protected form is profession of faith and proselytization and was concisely described by the *Smith* Court:

> The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The free exercise of religion means, first and foremost, the right to believe *and profess* whatever religious doctrine one desires. Thus, the First

106. *Id.* at 887.

107. In *Reynolds*, the Court discussed Madison's Memorial and Remonstrance, noting 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 religious liberty" Reynolds v United States, 98 U.S. 145, 163 (1878). "Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation." Braunfeld v. Brown, 366 U.S. 599, 603 (1961).

108. *Smith* noted numerous examples of religious practices that are categorically exempt from government regulation:

> The government may not compel affirmation of religious belief, *see* Torcaso v. Watkins, 367 U.S. 488 (1961), punish the expression of religious doctrines it believes to be false; United States v. Ballard, 322 U.S. 78, 86-88 (1944), impose special disabilities on the basis of religious views or religious status; *see* McDaniel v. Paty, 435 U.S. 618, 98 (1978); Fowler v. Rhode Island, 345 U.S. 67, 69, 73 (1953); *cf.* Larson v. Valente, 456 U.S. 228, 245 (1982), or lend its power to one or the other side in controversies over religious authority or dogma; *see* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445 452 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95-119 (1952); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-725 (1976).

Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (parallel citations omitted).

> Amendment obviously excludes all "governmental regulation of religious beliefs as such."[109]

The reference to the profession of faith is crucial. It offers broad protection under the Free Exercise Clause and often implicates other constitutionally protected rights such as the freedom of speech.[110] While belief alone is internal and mute, profession demands some outward act to demonstrate the believer's religious faith to another. Depending upon the tenets of the religion, such profession may be speech or physical acts such as caring for the poor or bereaved;[111] refusing exposure to immoral conduct,[112] or challenging government regulations that usurp religious roles.[113] Historically, claimants have argued free exercise rights for such practices, but have not offered evidence of the practice functioning as an outward profession of faith.

b) The "As Applied" Claim

Under *Smith*, courts must examine not just the express terms, but the actual application of the law: "[F]acial neutrality is not

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109. *Smith*, 494 U.S. at 876-77 (quoting *Sherbert*, 374 U.S. at 402) (internal references and original emphasis omitted; emphasis added).

110. *Id.* at 882.

111. For example, the following passage has motivated generations of Christians to serve the poor and imprisoned as an expression of their faith and love in Jesus:

> "Then the righteous will answer him, 'Lord, when did we see you hungry and feed you, or thirsty and give you something to drink? When did we see you a stranger and invite you in, or needing clothes and clothe you? When did we see you sick or in prison and go to visit you?' [Jesus] will reply to His disciples 'I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me.'"

Matthew 25:37-40 (New International).

112. In Rader v. Johnston, 924 F. Supp. 1540, (D. Neb. 1996), note 92 *infra*, the complaint was grounded in expressive behavior professing the plaintiff's faith. Rader wrote that he wanted "to live a daily life which reflects high moral standards" and sought permission to live off campus at a Christian dormitory that housed students wishing to share a "lifestyle which glorifies Christ." *Id.* at 1545.

113. Salvation Army v. New Jersey Dep't. of Community Affairs, 919 F.2d 183 (3rd Cir. 1990) (opposing city regulations that infringed on the Army's ministry to the homeless).

determinative . . . . The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[114] Masked hostility is revealed by the actual operation of the law.[115] Laws that fail the test of applicability "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[116] Both neutrality and applicability must be tested.[117] This "as applied" challenge was effectively used in *Lukumi Babalu Aye*, discussed in section II(C)(2) below.

c) The "Individualized" Exception Claim

If the state actor systematically allows exemptions for non-religious reasons, then another type of claim may be advanced under *Smith*.[118] The Court has held that if a state creates a system of individualized exemptions, "its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."[119] This line of attack was preserved in *Smith*: "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[120] In this situation, the compelling state interest test is applied in lieu of *Smith's* general rule.[121]

114. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." Church of the Lukumi Babalu Aye, Inc., 508 U.S. 520, 534 (1993).

115. *Id.* at 535.

116. *Id.* at 531-32.

117. *Id.* at 531.

118. *Smith*, 494 U.S. at 884.

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

120. *Smith*, 494 U.S. at 884.

121. *See, e.g.*, Rader v. Johnston, 924 F. Supp 1540 (D. Neb. 1996). *Rader* used the individualized exception principle to invalidate a university housing policy requiring all freshman students to reside on campus. The *Rader* court found a system of individualized exceptions existed where there was evidence of three exceptions allowed under criteria enumerated in the policy and several "administrative" exceptions allowed for non-religious, non-enumerated reasons such as marital status, health conditions, family responsibilities, or following intervention by influential alumni. Yet when the plaintiff student noted the grossly immoral conduct typical in campus housing and sought an exception based on the Biblical admonition to flee evil, the exception was refused.

d) The "Hybrid" Claim: Free Exercise Plus Another Protected Right

Smith also suggested a "hybrid" claim, although the courts have generated rather equal doses of confusion and protection when this type of claim is raised.[122] The hybrid claim came from Justice Scalia's observation that:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . .[123]

Some courts consider the protected right associated with the free exercise right to derive from that free exercise right. They then infer that the derivative right demands no higher scrutiny than the parent right and evaluate the claim based upon the parent claim. In other words, the associated claim is treated with the same level of scrutiny as the parent right.

For example, in *Salvation Army v. New Jersey Dep't. of Community Affairs*[124] the plaintiff asserted hybrid claims of free association-free exercise of religion[125] and free association-freedom of speech.[126] Here, the city had enacted regulations for boarding houses,

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The *Rader* court first found that the university had created a system of individualized exceptions. Then the court used the unequal treatment in excepting students from the policy to show that the requirement was not enforced against Rader in a neutral, generally applicable manner. This finding required the university to demonstrate that the policy was the least restrictive means to further a state interest. The plaintiff prevailed when the university failed to meet its burden. The court closed its opinion noting that "[t]hough there is no constitutional right to a free public education, the state may not unequally condition access to a public education on performance of an act . . . that infringes on the exercise of First Amendment Rights." *Id.*

122. *See infra*, notes 133-35 and accompanying text.

123. *Smith*, 494 U.S. at 881.

124. 919 F.2d 183 (3d Cir. 1990).

125. *Id.* at 196.

126. *Id.* at 200.

including a right "to practice the religion of his or her choice, or to abstain from religious practice . . . ."[127] The Salvation Army operated a shelter for the homeless that required attendance at Christian religious services, and sought an exemption from the new regulations.[128]

The *Salvation Army* court considered the free association claim to derive from the free exercise claim and observed that "[w]e would not expect a derivative right to receive greater protection than the right from which it was derived."[129] The court went on to say that "the primary right of free exercise does not entitle an individual to challenge state actions that are not expressly directed to religion. Accordingly, the derivative right to religious association could not entitle an organization to challenge state actions . . . that are not directly addressed to religious association"[130] The hybrid free association-free exercise claim failed: "[b]ecause the present controversy does not concern any state action directly addressed to religion, [the Salvation Army] cannot receive protection from the associational right derived from the free exercise clause."[131] Contrast the finding for the free exercise hybrid with a hybrid free speech-free association claim in the same case. Here, the Salvation Army prevailed:

> Unlike the derivative right of religious association, the right to associate for free speech purposes does not require that the challenged state action be directly addressed to the constitutionally protected activity. [I]t is sufficient that [the Salvation Army] seeks to communicate a message; for this purpose it is not relevant that [the message] happens to be religious in nature.[132]

127. *Id.* at 187.
128. *Id.* at 186-87.
129. *Id.* at 199.
130. *Id.* at 199-200.
131. *Id.* at 200.
132. *Id.*

Finding that factual issues were not adequately explored under this claim, the court remanded for further development of facts regarding the reporting requirements.[133]

The second approach concludes that the hybrid claim is a mere tautology. Typical of this view is the Justice Souter's observation that

> the distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would . . . swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and association rights are certainly implicated in the peyote-smoking ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[134]

Put more simply, if a hybrid claim arises when a parent right implicates another, then the exception would swallow the *Smith* rule. Such rights as free association, free speech, and privacy may be implicated in almost any constitutional action. Alternatively, if a hybrid claim is one where the associated claim is the one meriting relief, then the hybrid claim should have been brought under the associated claim rather than being attached to the parent claim.[135]

2. *Church of the Lukumi Babalu Aye*: Applying *Smith*

As the scholarly debates waxed and waned, religious discrimination claims moved through the judicial system. Some

133. *Id.* at 202.

134. *Lukumi Babalu Aye*, 508 U.S. at 567 (Souter, J., concurring in part and concurring in judgment).

135. *Id.*

claimants found safe havens in state constitutions while others met *Smith* head on.[136] The state of the law under *Smith* was murky; clouds of legal briefs and showers of opinions obscured the view from the bench. It was not until 1993 that a landmark case arrived to guide the courts in their application of *Smith*.

In 1993, the Court decided *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[137] Here, the city of Hialeah passed an ordinance proscribing cruel or unnecessary killing of animals.[138] The plaintiffs practiced animal sacrifice as part of their Cuban religion, Santeria.[139] The Court eschewed a mechanical application of *Smith* in favor of an "as applied" test.[140] After reviewing both facial neutrality and general applicability, the Court struck down the law.[141]

The Court noted that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context."[142] Here, the use of the words "sacrifice" and "ritual" in the contested law, although raising suspicion in light of the court record, was insufficient to show express suppression of religion.[143] The Court went on to examine the law as it was applied: "Apart from the text, the effect of a law in its real operation is strong

136. *See, e.g.*, First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992). First Covenant Church contested a designation under the National Trust for Historic Preservation, claiming a religious exemption permitting it to modify its building without city approval. The Washington Supreme Court reversed the appellate court, holding in favor of the church. The city appealed and the United States Supreme Court remanded for consideration in light of *Smith*. City of Seattle v. First Covenant Church of Seattle, 499 U.S. 901 (1991). Upon remand, the Washington Supreme Court found both a system of individualized exceptions and a hybrid claim. These distinctions permitted the court to apply the compelling state interest test and sustain its earlier decision in favor of the church. *See also*, State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) Here, the state sought to enforce the display of slow-moving traffic emblems on Amish horse-drawn carts. Upon remand from the U.S. Supreme Court, the Minnesota Supreme Court declined to decide the applicability of *Smith*, but held in favor of the Amish defendants after analyzing their claim under the Minnesota Constitution.

137. 508 U.S. 520 (1993).

138. *Id.* at 521-22.

139. *Id.* at 525.

140. *Id.* at 546.

141. *Id.* at 547.

142. *Id.* at 533-34.

143. *Id.*

evidence of its object."[144] In operation, the law allowed exceptions to kill animals for almost any purpose except the church's, supporting the conclusion that the "ordinances had as their object the suppression of religion."[145] Thus, when applied, the law was not neutral in its effect on religion.[146]

III. PERVASIVE FAITH VERSUS PARTICULARIZED ACTS

While *Lukumi Babalu Aye* illuminated the contours of contemporary free exercise jurisprudence, newer types of claims arose as religious believers asserted that their practices were inextricably intertwined with their beliefs. In simpler, less regulated times, courts seemed to understand the tangible acts and injuries brought to the fore in free exercise cases. When polygamy,[147] religious upbringing,[148] Sabbath observance,[149] or religious speech[150] were at issue, the exercise[151] and the injury seemed sufficiently discrete and tangible for the courts to apply strict scrutiny with some degree of consistency and logic.[152] This relative clarity of judicial opinion, however, faltered when confronted with more recent claims merging belief and practice.

144. *Id.* at 535
145. *Id.* at 542.
146. *Id.* at 546-47.
147. Reynolds v. United States, 98 U.S. 145 (1878).
148. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).
149. Sherbert v. Verner, 374 U.S. 398 (1963).
150. Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940).
151. In *Reynolds*, the Court's observation that "the accused . . . was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines . . . ." sufficed to show religious belief. *Reynolds*, 98 U.S. at 161. Sixty-two years later, the distribution of literature containing Jehovah's Witness' doctrine placed the controversy within the free exercise realm. *Cantwell*, 310 U.S. at 302. *Murdock* was similar; here Biblical interpretations and religious tracts were distributed and the Court equated such activity with evangelism. *Murdock*, 319 U.S. 105. In *Sherbert*, the action was again a single, discrete act; the plaintiff was a Sabbatarian seeking protection for her chosen day of worship. *Sherbert*, 374 U.S. at 399.
152. Recalling, of course, that these decisions often went against the religious believer. *See supra*, note 79, and accompanying text.

In *Lyng v. Northwest Indian Cemetery Protective Association*,[153] the plaintiffs argued that their faith pervaded every aspect of daily life.[154] Yet, having recognized the pervasive nature of the complainants' faith, the Court stood aside while the Forest Service authorized logging and road construction that arguably would destroy the very ability of the Native Americans to practice their religion.[155] *Lyng* echoed the holding in *Wilson v. Block*,[156] decided five years earlier. In *Wilson*, the court admitted that allowing a ski area to expand would encroach on the plaintiff's sacred mountain and potentially impair the practice of their Native American religion.[157] Yet the Court discerned no burden upon the plaintiff's exercise of religion because the land in question was not *indispensable* to the continued existence of their religion.[158]

153. 485 U.S. 439 (1988). In *Lyng*, Native Americans sought to enjoin timber harvesting and road construction, asserting that these activities would fundamentally alter the character of sacred areas.

154. "[F]or Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life 'is in reality an exercise which forces Indian concepts into non-Indian categories.'" *Id.* at 459 (Brennan, J., dissenting) (quoting D. Theodoratus, *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest* (1979)). Justice Brennan reasoned that for most Native Americans, 'the area of worship cannot be delineated from social, political, cultur[al], and other areas o[f] Indian lifestyle." *Id.* at 459-60 (Brennan, J., dissenting) (quoting *American Indian Religious Freedom, Hearings on S.J. Res. 102 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess., 86 (1978) (statement of Barney Old Coyote, Crow Tribe) (alterations in original).

155. The dissent in *Lyng* observed:

> [T]he Court nevertheless concludes that even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, the Government is simply not "doing" anything to the practitioners of that faith. Instead, the Court believes that the Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government de facto beneficial ownership of federal property.

Lyng, 485 U.S. 439, 458 (1988) (Brennan, J. dissenting).

156. 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983).

157. *Id.* at 745 n.7.

158. *Id.* at 743-44. Remarkably, even while agreeing that "First Amendment protection of religion 'does not turn on the theological importance of the disputed activity,'" *id.* at 743 (quoting Unitarian Church West v. McConnell, 337 F. Supp 1252, 1257 (E.D. Wis. 1972), *aff'd*, 474 F.2d 1351 (7th Cir. 1973), *vacated and remanded on other grounds*, 416

The idea that religion is more than a discrete facet of a person; that it pervades all of the believer's life, is not restricted to Native American religions. For example, one who would seek the Biblical God is told to love God "with all [his] heart and with all [his] soul and with all [his] strength and with all [his] mind . . . ."[159] Such a command demands that religion be more than an afterthought. Indeed, as the Court recognized in *Rosenberger v. Rector & Visitors of University of Virginia*,[160] it is "something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought."[161]

The plaintiff in *Tucker v. California Department of Education*[162] was motivated by such a body of comprehensive thought. Tucker, a computer programmer, believed that he was commanded to "give credit to God for the work he perform[ed]."[163] He engaged in religious discussions, kept religious material around his work area, and began using a religious phrase, "Servant of the Lord Jesus Christ" along with an acronym, "SOTLJC," on his programs and papers.[164] Unlike previously discussed cases involving acts mandated by religious dogma, Tucker's claim suggested that his overt acts were a form of professing his faith.[165] Tucker's employer, the California Department of Education, took exception to these practices and broadly proscribed the use of religious names, acronyms, or symbols in the workplace.[166]

U.S. 932 (1974)), the *Wilson* court held that "at a minimum, [the plaintiffs must] demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site." *Id.* at 744. While superficially sensible in that the proposed ski area affected only 777 acres out of 75,000 acres comprising the allegedly sacred mountain, *id.*, the logic fails when extended to other religious situations. An *ad absurdum* argument under the Wilson standard would permit every Christian church in the United States to be razed at the government's whim, so long as Christians could gather somewhere for corporate worship.

159. *Luke* 10:27 (New International).
160. 115 S. Ct. 2510 (1995).
161. *Id.* at 2517.
162. 97 F.3d 1204 (9th Cir. 1996).
163. *Id.* at 1208.
164. *Id.*
165. *Id.*
166. *Id.*

Examining both state and federal constitutional claims, the Ninth Circuit held the restrictions to be overbroad and granted Tucker summary judgment.[167]

Profession of faith may be manifested in a wide variety of practices, as evidenced by the decision in *Vernon v. City of Los Angeles.*[168] Here, the dichotomy between the courts' tendency to look at religion as some internal, private mental state, disconnected from any practical effect on life, is plainly illustrated. In *Vernon*, the City of Los Angeles investigated its assistant Chief of Police, fearing that Vernon's personal religious views improperly shaped the operations and policies of the Department.[169] Vernon filed suit, asserting that the investigation "chilled" the free exercise of his faith and inhibited his worship, his ability to consult with elders and pastors, and his public religious testimony (i.e., profession of faith).[170]

The *Vernon* court treated both the state and federal constitutional free exercise claims coterminously using *Sherbert's* compelling state interest test.[171] The court required that a "substantial" burden be shown, one that would either pressure the religious believer to commit a forbidden act or refrain from engaging in conduct mandated by his belief.[172] Vernon's complaint failed when the Court found no substantial burden upon his religious exercise.[173] Had the *Vernon* court used the *Sherbert* Court's view of injury as well as the *Sherbert*

167. *Id.* at 1217. The acronym issue was not reached, as Tucker did not challenge the administrative ban. *Id.* at 1209 n.1.

168. 27 F.3d 1385 (9th Cir. 1994).

169. *Id.* at 1388. The conduct of the investigation was rather curious. Purportedly the investigation was to "ensure that Chief Vernon's personal beliefs have not created any adverse impact on any job-related matters and that he has not violated any Department policies or procedures." *Id.* at 1390. Remarkably, the city accomplished that task without ever discovering just what the Chief's personal beliefs were. The *Vernon* court carefully noted there was "no specific inquiry . . . made into Vernon's religious beliefs." *Id.* Lest there be any mistake, the opinion reiterated "[t]here is simply no evidence that the City ever monitored Vernon's private religious activities." *Id.* at 1394.

170. *Id.*

171. *See id.* at 1392-93.

172. *Id.* at 1393.

173. *Id.* at 1395.

test, the outcome likely would have favored Vernon. The *Sherbert* Court stated that:

> [T]he degree of injury . . . may indeed be nonexistent by ordinary standards. The harm is the interference with the individual's scruples or conscience–an important area of privacy which the First Amendment fences off from government. The interference here is as plain as it is in Soviet Russia, where a churchgoer is given a second-class citizenship, resulting in harm though perhaps not in measurable damages.[174]

In contrast, the religious believer prevailed in *Brown v. Polk County, Iowa*.[175] The defendant county prohibited Brown, a county employee, from leading prayer before work and from occasionally praying or referring to religion in the course of his government duties.[176] Brown avowed that prayer was "part of [his] being" and that prayer was integral to his daily life.[177] Here, the contested acts were primarily speech and the court adopted a free speech test to analyze the claim.[178] The court conceded that religious behavior may not intimidate or harass others, but held it "too extravagant to maintain" that the Establishment Clause flatly prohibits all religious expression.[179] Occasional references to personal faith or a spontaneous, brief prayer were held acceptable, as was the display of religious items in personal work areas.[180]

The dissent in *Brown* typifies a misunderstanding of the nature of religious faith that is not uncommon to the judiciary. After the county prohibited all religious displays or references in the office, Brown

174. Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).

175. 61 F.3d 650 (8th Cir. 1995).

176. *Id.* at 652-53.

177. *Id.* at 658 (alteration in original).

178. The test was adopted from Pickering v. Board of Educ., 391 U.S. 563 (1968). Under *Pickering*, a public employee may speak on matters of public concern so long as he does not interfere with his public employer's function.

179. *Brown*, 61 F.3d at 659.

180. *Id.*

could practice his faith only by leaving the office and praying at a nearby library.[181] Remarkably, being banished from his work because of the content of his speech was insufficient to persuade the dissenting judge that Brown's free exercise rights were burdened.[182] While other employees could fully exercise free speech rights on secular topics, Brown could mention religious subjects only in exile from the office.[183]

Chalmers v. Tulon Co.[184] also illustrates a shallow understanding of pervasive religious faith. Here, the plaintiff was discharged because she wrote a letter that challenged another employee on an ethical issue and urged that the other employee be reconciled with God.[185] Chalmers had previously discussed similar issues in the workplace without incurring punishment. However, when the same type of speech was committed to paper, Chalmers was fired and the court ruled in favor of the defendant.[186]

The court reasoned that under Title VII of the 1964 Civil Rights Act,[187] notice to the employer of a religious belief was a required element of a claim.[188] Lacking that element, the employer had no duty to accommodate.[189] Here, the court held that the employer's knowledge that Brown held strong religious beliefs did not constitute notice that she would write "accusatory letters to co-worker's homes."[190] Lacking notice, the claim failed under Title VII.[191]

A vigorous dissent asserted it was "legal error to construe Title VII to impose a burden on the employee of informing her employer in advance about each practice the employee will follow in furtherance

181. *Id.*
182. *Id.* at 660 (Fagg, J., dissenting).
183. *Id.* at 659.
184. 101 F.3d 1012 (4th Cir. 1996).
185. *Id.* at 1014-15.
186. *Id.* at 1021.
187. 42 U.S.C.A. 2000e (West 1996).
188. *Chalmers*, 101 F.3d at 1018-19.
189. *Id.* at 1019-20.
190. *Id.* at 1020.
191. *Id.* at 1021.

of religious beliefs."[192] The dissent preferred *Brown's* rule that notice is sufficient when the employer is "well aware of the potential for conflict between their expectations and [the employee's] religious activities."[193] The narrow standard drawn by the majority would lead to an almost automatic failure of most religious discrimination claims.[194] For example, "a Jew could not make out a prima facie case under Title VII if, on the first day of work, he was fired for wearing a yarmulke that, unknown to him, violated his company's dress code."[195]

Such a thin understanding of the importance of a religious believer's faith to that believer's identity and humanity is widespread in the courts. Overcoming that bias requires drafting claims that call on the strongest possible protection of the law and clearly articulate the burden upon the believer's faith.

IV. DRAWING THE THREADS TOGETHER: DEFENDING FREE EXERCISE IN THE 1990S

The Supreme Court has repeatedly asserted broad categorical protection for religious belief and profession of faith. Claimants should emphasize the categorical protection available for professing their faith and clearly link their practices to profession.

Smith, rather than diminishing protection for religious rights, instead turns the judiciary back to the straight paths of the Constitution.[196] Even while the judicial role is being returned to historic norms, the nature of free exercise complaints is changing. Plaintiffs see burdens upon faith less in discrete terms, looking more toward the aesthetic injury model. Although the injury may be intangible and subjective, profound protection is available if the claims may be fairly cast as arising from the profession of faith.

192. *Id.* at 1025 (Niemeyer, J., dissenting).
193. *Id.* (quoting *Brown*, 61 F.3d at 654).
194. *See id.* at 1026.
195. *Id.*
196. *See Boerne*, 117 U.S. at 2172-76 (Scalia, J., concurring in part).

Profession is at the very core of religion;[197] a totally private religion is meaningless outside the individual.

Many typical actions, such as impromptu prayer, casual workplace conversations, or keeping a Bible on one's desk at the office might be properly characterized as a profession of faith.[198] Such actions mimic secular free speech claims, suggesting that the solid protection given to secular free speech can be extended to religious freedom claims.[199] Furthermore, some acts of profession might be analogized to expressive conduct in secular freedom of speech cases, and the "First Amendment generally prevents government from proscribing speech . . . or even expressive conduct."[200] A woman bowing in prayer before an abortion clinic is no less expressive in her conduct than a political activist who burns a flag[201] or flaunts an armband to protest a war.[202]

Alternate claims under *Smith v. Employment Division*[203] should also be raised. Despite a general rule that appears to constrain the inalienable right to freely exercise religion, the exclusions and exceptions to *Smith* permit strong claims to advance along several

197. For example, central to the Christian faith is Jesus' admonition to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you." *Matthew* 28:19-20 (New International).

198. This view is supported in the administrative context:

> Some religions encourage adherents to spread the faith at every opportunity, a duty that can encompass the adherent's workplace. As a general matter, proselytizing is as entitled to constitutional protection as any other form of speech–as long as a reasonable observer would not interpret the expression as government endorsement of religion.

Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, § A(3), The White House, Office of the Press Secretary, Aug. 14, 1997.

199. *Brown*, 61 F.3d at 658.

200. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

201. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (striking down conviction for burning U.S. flag); Spence v. Washington, 418 U.S. 405 (1974) (striking down conviction for improper use of U.S. flag).

202. Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969).

203. 494 U.S. 872 (1990).

avenues.[204] The strongest claims appear to be those involving individualized exceptions[205] and unequal application of the law.[206] Identifying exceptions allowed for non-religious reasons brings the compelling state interest test into play, as will demonstrating unequal application of the law.

Claimants should clearly illustrate the burden on their religious beliefs when authorities proscribe the display of their religious identity. A believer whose pervasive faith applies to every daily act is seriously burdened when he must conceal his motives, deny the God he is bound to proclaim, and give his implied assent to a barrage of secular "free speech" because he is made mute by the law. Religious profession, whether by word or act, must not be relegated to second class status in civil rights; it must be accorded the full categorical protection proclaimed for it by the United States Supreme Court for well over a century.

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204. *See supra* notes 102-05 and accompanying text.
205. *See supra* note 119 and accompanying text.
206. *See supra* note 114 and accompanying text.