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POLSC 294:14 - 01
Special Topics: Religion and the Constitution
Reading Materials

RELIGION AND THE CONSTITUTION

CHAPTER VII - THE FREE EXERCISE CLAUSE: 1990 to 2004

Introduction

The Supreme Court's interpretation of the Establishment Clause changed dramatically in 1990 with the Court's decision in *Employment Division v. Smith*. In that case, the Court announced that not all Free Exercise Clause cases would be analyzed using the strict scrutiny standard that had been applied in recent years when free exercise rights were infringed. The *Smith* two-track analysis, with many cases analyzed using a deferential reasonableness standard and only several specific categories still analyzed using a much more rigorous standard, drew a strong reaction both on and off the Court. As a result of *Smith*, more recent Establishment Clause cases have focused on discrimination against religion since laws that discriminate against one or more religions are not "neutral laws of general applicability," and fall within a category that escapes deferential review.

A. EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON v. SMITH

494 U.S. 872 (1990)

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, as modified by the State Board of Pharmacy. Persons who violate this provision are "guilty of a Class B felony." Schedule I contains the drug peyote.

Respondents Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct." The

Oregon Court of Appeals reversed that determination. On appeal to the Oregon Supreme Court, petitioner argued that the denial of benefits was permissible because respondents' consumption of peyote was a crime under Oregon law. The Oregon Supreme Court concluded that respondents were entitled to benefits. We granted certiorari.

Before this Court in 1987, petitioner continued to maintain that the illegality of respondents' peyote consumption was relevant to their constitutional claim. We agreed, concluding that "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." *(Smith I)*. We noted, however, that the Oregon Supreme Court had not decided whether respondents' sacramental use of peyote was in fact proscribed by Oregon's controlled substance law. Being "uncertain about the legality of the religious use of peyote in Oregon," we determined that it would not be "appropriate for us to decide whether the practice is protected by the Federal Constitution." Accordingly, we remanded for further proceedings.

On remand, the Oregon Supreme Court held that respondents' religiously inspired use of peyote fell within the prohibition of the Oregon statute, which "makes no exception for the sacramental use" of the drug. It then considered whether that prohibition was valid under the Free Exercise Clause, and concluded that it was not. The court therefore reaffirmed its previous ruling that the State could not deny unemployment benefits to respondents for having engaged in that practice. We again granted certiorari.

II

Respondents' claim for relief rests on our decisions in *Sherbert*, *Thomas*, and *Hobbie*, in which we held that a State could not condition unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in *Smith I*, however, the conduct in those cases was not prohibited by law. We held that distinction to be critical. Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we consider whether that prohibition is permissible under the Free Exercise Clause.

A

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think, that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.

Respondents, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is constitutional as applied to those who use the drug for other reasons.

We have never held that an individual's religious beliefs excuse him from compliance with

an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described in *Reynolds* v. *United States*[:] "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Prince v. Massachusetts*. Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was *United States* v. *Lee*. There, we observed that "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."

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, see *Cantwell v. Connecticut*, or the right of parents to direct the education of their children, see *Wisconsin* v. *Yoder*. Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion. And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.

The present case does not present such a hybrid situation. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls.

B

Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert* v. *Verner*. Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied, see *United States* v. *Lee*, 455 U.S. 252 (1982). In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all.

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. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. A distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: "The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." Our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, see *United States* v. *Lee*, we have never applied the test to invalidate one. We conclude that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" -- permitting him, by virtue of his beliefs, "to become a law unto himself" -- contradicts both constitutional tradition and common sense.

The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it here. What it produces in those other fields -- equality of treatment and an unrestricted flow of contending speech -- are constitutional norms; what it would produce here -- a private right to ignore generally applicable laws -- is a constitutional anomaly. Nor is it possible to limit the impact by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. It is no more appropriate for judges to determine the "centrality" of religious beliefs in the free exercise field, than it would be for them to determine the "importance" of ideas in the free speech field.

If the "compelling interest" test is to be applied at all, then, it must be applied to all actions thought to be religiously commanded. Moreover, many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs. Precisely because "we are a nation made up of people of almost every religious preference," 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. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every kind -- ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage, child labor, animal cruelty, environmental protection, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of laws against the centrality of religious beliefs.

Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join as to Parts I and II, concurring.

Although I agree with the result the Court reaches in this case, I cannot join its opinion. In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty. . . .

II

As the Court recognizes, the "free *exercise*" of religion often requires the performance of (or abstention from) certain acts. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion, even if the law is generally applicable. To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.

The Court attempts to support its narrow reading of the Clause by claiming that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." But as the Court later notes, in cases such as *Cantwell v. Connecticut and Wisconsin v. Yoder* we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. Indeed, in *Yoder* we expressly rejected the interpretation the Court adopts:

> It is true that activities of individuals, even when religiously based, are often subject to regulation by the States. But to agree that religiously grounded conduct must often be subject to the broad police power is not to deny that there are areas of conduct protected by the Free Exercise Clause and thus beyond the power of the State to control, *even under regulations of general applicability*. A regulation neutral on its face may, in its application, offend the constitutional requirement for

government neutrality if it unduly burdens the free exercise of religion.

The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them "hybrid" decisions, but both cases expressly relied on the Free Exercise Clause, and we have regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, we rejected the constitutional claims before us only after carefully weighing the competing interests. See *Prince*, *Lee*. That we rejected the free exercise claims hardly calls into question the applicability of First Amendment doctrine in the first place.

Respondents invoke our compelling interest test to argue that the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court, however, denies them even the opportunity to make that argument. A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible. I would have thought it beyond argument that such laws implicate free exercise concerns.

Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," or represents "the least restrictive means of achieving some compelling state interest." To me, the sounder approach is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling.

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a "constitutional anomaly," the First Amendment makes freedom of religion, like freedom from race discrimination and freedom of speech, a "constitutional nor[m]," not an "anomaly." A law that makes criminal such an activity therefore triggers constitutional concern -- and heightened judicial scrutiny -- even if it does not target the particular religious conduct at issue.

Finally, the Court suggests that the disfavoring of minority religions is an "unavoidable consequence" under our system of government and that accommodation of such religions must be left to the political process. In my view, however, the First Amendment was enacted precisely to protect those whose religious practices may be viewed with hostility. The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society.

III

The Court's holding not only misreads settled precedent; it appears to be unnecessary. I would reach the same result applying our established free exercise jurisprudence. There is no dispute that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Under Oregon law, members of the Native American Church must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution. There is also no dispute that Oregon has a significant

interest in enforcing laws that control the possession and use of controlled substances.

Thus, the critical question in this case is whether exempting respondents from the State's general criminal prohibition "will unduly interfere with fulfillment of the governmental interest." Although the question is close, I would conclude that uniform application of Oregon's criminal prohibition is "essential to accomplish" its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. Moreover, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote.

For these reasons, I believe that granting a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens. Under such circumstances, the Free Exercise Clause does not require the State to accommodate respondents' religiously motivated conduct.

Respondents contend that any incompatibility is belied by the fact that the Federal Government and several States provide exemptions for the religious use of peyote. But other governments may surely choose to grant an exemption without Oregon being *required* to do so by the First Amendment. Respondents also note that the sacramental use of peyote is central to the tenets of the Native American Church, but I agree with the Court that our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue.

I would therefore adhere to our established free exercise jurisprudence and hold that the State in this case has a compelling interest in regulating peyote use by its citizens and that accommodating respondents' religiously motivated conduct "will unduly interfere with fulfillment of the governmental interest." Accordingly, I concur in the judgment of the Court.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This Court has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute 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.

Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." The majority is able to arrive at this view only by mischaracterizing this Court's precedents. The Court discards leading cases such as *Cantwell* v. *Connecticut* and *Wisconsin* v. *Yoder* as "hybrid." The Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions and to state laws of general applicability. In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses.

This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a "luxury" that a well-ordered society cannot

afford, and that the repression of minority religions is an "unavoidable consequence of democratic government." I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty -- and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.

In weighing the clear interest of respondents Smith and Black (hereinafter respondents) in the free exercise of their religion against Oregon's asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest involved. It is not the State's broad interest in fighting the "war on drugs," but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote.

In this case, Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote. The State's asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition. But a government interest in "symbolism" cannot abrogate the constitutional rights of individuals.

Similarly, this Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. In this case, the State's justification is entirely speculative. The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone. The factual findings of other courts cast doubt on the State's assumption that religious use of peyote is harmful. See *State* v. *Whittingham*, 19 Ariz. App. 27, 30 (1973).

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous. The Federal Government, which created the classifications of unlawful drugs from which Oregon's drug laws are derived, apparently does not find peyote so dangerous as to preclude an exemption for religious use.[1]

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns.[2]

The State also seeks to support its refusal to make an exception for religious use of peyote by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal

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[1] See 21 CFR § 1307.31 (1989) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration."). Moreover, 23 States have statutory or judicially crafted exemptions in their drug laws for religious use of peyote.

[2] The use of peyote is, to some degree, self-limiting. The peyote plant is extremely bitter, and eating it is an unpleasant experience, which would tend to discourage recreational use.

traffic in peyote. Also, the availability of peyote for religious use, even if Oregon were to allow an exemption, would still be strictly controlled by federal regulations, and by the State of Texas, the only State in which peyote grows in significant quantities. Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast traffic in illegal narcotics that plagues this country.

Finally, the State argues that granting an exception for religious peyote use would erode its interest in the uniform, fair, and certain enforcement of its drug laws. The State fears that, if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow. The State's apprehension is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions.[3] Though the State must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the "compelling interest" *test* to all free exercise claims, not by reaching uniform *results* as to all claims.

I conclude that Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion. Since the State could not constitutionally enforce its criminal prohibition against respondents, the interests underlying the drug laws cannot justify its denial of unemployment benefits. Absent such justification, the State's regulatory interest in denying benefits for religiously motivated "misconduct" is indistinguishable from the state interests this Court has rejected in *Frazee, Hobbie, Thomas*, and *Sherbert*. The State of Oregon cannot, consistently with the Free Exercise Clause, deny respondents unemployment benefits. I dissent.

B. CHURCH OF THE LUKUMI BABALU AYE, INC. v. CITY OF HIALEAH
508 U.S. 520 (1993)

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II-A-2. THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join all but Part II-A-2 of this opinion. JUSTICE WHITE joins all but Part II-A of this opinion. JUSTICE SOUTER joins only Parts I, III, and IV of this opinion.

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari. Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments.

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[3] Over the years, various sects have raised free exercise claims regarding drug use. In no reported case, except those involving claims of religious peyote use, has the claimant prevailed.

I

This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting fusion is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called *orishas*, through the iconography of Catholic saints, Catholic symbols, and Catholic sacraments.

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *orishas*. The basis of the Santeria religion is the nurture of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice. The sacrifice of animals as part of religious rituals has ancient roots. Animal sacrifice is mentioned throughout the Old Testament. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son.

According to Santeria teaching, the *orishas* are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals.

Santeria adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent. The religion was brought to this Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today.

Petitioner Church of the Lukumi Babalu Aye, Inc. and its congregants practice the Santeria religion. In April 1987, the Church leased land in the city of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. The Church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. It received all needed approvals by early August 1987.

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and prompted the city council to hold an emergency public session on June 9, 1987. First, the city council adopted Resolution 87-66, which noted the "concern" expressed by residents "that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety." Next, the council approved an emergency ordinance, Ordinance 87-40, which incorporated Florida's animal cruelty laws. Among other things, the law subjected to criminal punishment "whoever unnecessarily or cruelly kills any animal."

The city council desired to undertake further legislative action, but Florida law prohibited a municipality from enacting legislation relating to animal cruelty that conflicted with state law. To obtain clarification, Hialeah's city attorney requested an opinion from the attorney general of Florida. The attorney general advised that religious animal sacrifice was against state law, so that a city ordinance prohibiting it would not be in conflict.

The city council responded at first with Resolution 87-90, that noted its residents' "great concern regarding the possibility of public ritualistic animal sacrifices." The resolution declared the city policy "to oppose the ritual sacrifices of animals" within Hialeah and announced that any person or organization practicing animal sacrifice "will be prosecuted."

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. 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," and prohibited owning or possessing an animal "intending to use such animal for food purposes." It restricted application of this prohibition, however, to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." The ordinance contained an exemption for slaughtering by "licensed establishment[s]" of animals "specifically raised for food purposes." Declaring, moreover, that the city council "has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community," the city council adopted Ordinance 87-71. That ordinance defined "sacrifice" as had Ordinance 87-52, and then provided that "it shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the City of Hialeah, Florida." The final 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." All ordinances and resolutions passed the city council by unanimous vote.

II

The city does not argue that Santeria is not a "religion" within the First Amendment. Nor could it. Neither the city nor the courts below have questioned the sincerity of petitioners' desire to conduct animal sacrifices for religious reasons.

In addressing the free exercise of religion, our cases establish that a law that is neutral and of general applicability need not be justified by a compelling interest. *Employment Div.* v. *Smith.* Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. These ordinances fail to satisfy the *Smith* requirements.

A

Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis. At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In *McDaniel* v. *Paty*, 435 U.S. 618 (1978), for example, we invalidated a state law that disqualified members of the clergy

from holding certain public offices, because it "impose[d] special disabilities on the basis of . . . religious status."

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Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context. Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words "sacrifice" and "ritual," words with strong religious connotations. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words "sacrifice" and "ritual" have a religious origin, but current use admits also of secular meanings. The ordinances, furthermore, define "sacrifice" in secular terms, without referring to religious practices.

We reject the contention advanced by the city that our inquiry must end with the text of the laws at issue. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. Resolution 87-66, adopted June 9, 1987, recited that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all [such] acts of any and all religious groups." No one suggests that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. The subject at hand does implicate concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes a "religious gerrymander," an impermissible attempt to target petitioners and their religious practices.

Almost the only conduct subject to Ordinances 87-40, 87-52, and 87-71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. Ordinance 87-71 prohibits the sacrifice of animals, but defines sacrifice as "to unnecessarily kill . . . an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter. This feature of the law support[s] our conclusion that Santeria alone was the legislative concern. The result is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during

a ritual and its primary purpose is to make an offering to the *orishas*, not food consumption.

Operating in similar fashion is Ordinance 87-52, which prohibits the "possession, sacrifice, or slaughter" of an animal with the "intent to use such animal for food purposes." This prohibition applies if the animal is killed in "any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others: If the killing is -- unlike most Santeria sacrifices -- unaccompanied by the intent to use the animal for food, then it is not prohibited by Ordinance 87-52; if the killing is specifically for food but does not occur during the course of "any type of ritual," it again falls outside the prohibition; and if the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals "specifically raised for food purposes." A pattern of exemptions parallels the pattern of narrow prohibitions.

Ordinance 87-40 incorporates the Florida animal cruelty statute punishing "whoever . . . unnecessarily . . . kills any animal." The city claims this ordinance is the epitome of a neutral prohibition. The problem, however, is the interpretation given to the ordinance. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct." As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Respondent's application of the test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is singled out for discriminatory treatment.

We also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends. It is not unreasonable to infer that a law which visits "gratuitous restrictions" on religious conduct seeks to suppress the conduct because of its religious motivation.

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice. If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city's interest in the public health.

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. With regard to the city's interest in ensuring the adequate care of animals,

regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city's interest in prohibiting cruel methods of killing. Under federal and Florida law and Ordinance 87-40, killing an animal by the "simultaneous and instantaneous severance of the carotid arteries with a sharp instrument" -- the method used in kosher slaughter -- is approved as humane. The District Court found that, though Santeria sacrifice also results in severance of the carotid arteries, the method used during sacrifice is less reliable and therefore not humane. If the city has a real concern that other methods are less humane, however, the subject of the regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it.

2

In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. These objective factors bear on the question of discriminatory object.

That the ordinances were enacted "'because of,' not merely 'in spite of,'" their suppression of Santeria religious practice is revealed by the events preceding their enactment. The minutes and taped excerpts of the June 9 session evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. When Councilman Martinez stated that in prerevolution Cuba "people were put in jail for practicing this religion," the audience applauded. Other statements by members of the city council were in a similar vein. The president of the city council asked: "What can we do to prevent the Church from opening?" Various city officials made comparable comments. This history discloses the object of the ordinances to target animal sacrifice by Santeria worshippers.

3

In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than necessary to achieve legitimate ends. These ordinances are not neutral.

B

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum

standard necessary to protect First Amendment rights.

Respondent claims that Ordinances 87-40, 87-52, and 87-71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by Ordinance 87-40 sanctions euthanasia of "stray, neglected, abandoned, or unwanted animals," destruction of animals judicially removed from their owners "for humanitarian reasons," the infliction of pain or suffering "in the interest of medical science," the placing of poison in one's yard or enclosure, and the use of a live animal "to pursue or take wildlife or to participate in any hunting," and "to hunt wild hogs."

The city concedes that "neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." It asserts, however, that animal sacrifice is "different" from the animal killings that are permitted by law. According to the city, it is "self-evident" that killing animals for food is "important"; the eradication of insects and pests is "obviously justified"; and the euthanasia of excess animals "makes sense." These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing cruel treatment of animals.

The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat. Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The city does not prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. Despite testimony that health hazards result from improper disposal by restaurants, restaurants are outside the scope of the ordinances. Improper disposal is a general problem that causes health risks, but which respondent addresses only when it results from religious exercise.

The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Hunters may eat their kill and fishermen may eat their catch without undergoing inspection. Likewise, state law requires inspection of meat that is sold but exempts meat from animals raised for the use of the owner. The asserted interest in inspected meat is not pursued in contexts similar to that of religious animal sacrifice.

Ordinance 87-72, which prohibits the slaughter of animals outside of areas zoned for slaughterhouses, is underinclusive on its face. The ordinance includes an exemption for "any person, group, or organization" that "slaughters or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." Although the city has classified Santeria sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings for food in like manner.

We conclude, in sum, that each of Hialeah's ordinances pursues the city's interests only against conduct motivated by religious belief. This precise evil is what the requirement of general applicability is designed to prevent.

III

A law burdening religious practice that is not neutral or not of general application must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. 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 that these ordinances cannot withstand this scrutiny.

First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. All four ordinances are overbroad or underinclusive in substantial respects. The proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances. Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

The Court analyzes "neutrality" and "general applicability" in separate sections. If it were necessary to make a clear distinction between the two terms, I would draw a line somewhat different from the Court's. But I think it is not necessary, and would frankly acknowledge that the terms are not only "interrelated," but substantially overlap.

In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion; whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment. But certainly a law that is not of general applicability (in the sense I have described) can be considered "nonneutral" and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability. Because I agree with most of the invalidating factors set forth in Part II of the Court's opinion, and because it seems to me a matter of no consequence under which rubric each invalidating factor is discussed, I join the judgment of the Court and all of its opinion except section 2 of Part II-A.

I do not join that section because it departs from the opinion's focus on the object of the *laws* to consider the subjective motivation of the *lawmakers*. It is virtually impossible to determine the singular "motive" of a legislative body. Perhaps there are contexts in which determination of legislative motive *must* be undertaken. But the First Amendment does not put us in the business of invalidating laws by reason of the evil motives of their authors.

JUSTICE SOUTER, concurring in part and concurring in the judgment.

Because prohibiting religious exercise is the object of the laws at hand, this case does not present the more difficult issue addressed in our last free-exercise case, *Employment Div., Dept.*

of Human Resources of Ore. v. *Smith*, which announced the rule that a "neutral, generally applicable" law does not run afoul of the Free Exercise Clause even when it prohibits religious exercise in effect. The Court today refers to that rule in dicta, and I do not join Part II, where the dicta appear, for I have doubts about whether the *Smith* rule merits adherence. I write separately to explain why the *Smith* rule is not germane to this case and to express my view that, in a case presenting the issue, the Court should reexamine the rule *Smith* declared.

I

In being so readily susceptible to resolution by applying the Free Exercise Clause's "fundamental nonpersecution principle," this is far from a representative free-exercise case. While the Hialeah City Council has provided a rare example of a law actually aimed at suppressing religious exercise, *Smith* was typical of our free-exercise cases, involving a formally neutral, generally applicable law. The rule *Smith* announced, however, was decidedly untypical of the cases involving the same type of law. Because *Smith* left those prior cases standing, we are left with a free-exercise jurisprudence in tension with itself, a tension that may legitimately be addressed by reexamining the *Smith* rule in the next case that would turn upon its application.

Though *Smith* sought to distinguish the free-exercise cases in which the Court mandated exemptions from secular laws of general application, I am not persuaded. *Yoder* and *Cantwell*, according to *Smith*, were not true free-exercise cases but "hybrid[s]" involving "the Free Exercise Clause in conjunction with other constitutional protections." Neither opinion, however, leaves any doubt that "fundamental claims of religious freedom [were] at stake."[4] And 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 probably be so vast as to swallow the *Smith* rule. 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 hybrid cases to have mentioned the Free Exercise Clause at all.

Smith sought to confine the remaining free-exercise exemption victories, which involved unemployment compensation systems, as "stand[ing] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." But prior to *Smith* the Court had already refused to accept that explanation of the unemployment compensation cases.

Since holding in 1940 that the Free Exercise Clause applies to the States, the Court repeatedly has stated that the Clause sets strict limits on the government's power to burden religious exercise, whether it is a law's object to do so or its unanticipated effect. *Smith* responded to these statements by suggesting that the Court did not really mean what it said. I

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[4] *Yoder* mentioned the parental rights recognized in *Pierce* v. *Society of Sisters*. But *Yoder* did so only to distinguish *Pierce*. Where parents make a "free exercise claim," the Court said, the *Pierce* reasonableness test is inapplicable. The Yoders raised only a free-exercise defense; and the Court plainly understood the case to involve "conduct protected by the Free Exercise Clause."

would have trouble concluding that the Court has not meant what it has said in more than a dozen cases over several decades, particularly when it repeatedly applied the compelling-interest test to require exemptions. In sum, it seems to me difficult to escape the conclusion that, whatever *Smith's* virtues, they do not include a comfortable fit with settled law.

III

The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God. "Neutral, generally applicable" laws, drafted as they are from the perspective of the nonadherent, have the unavoidable potential of putting the believer to a choice between God and government. Our cases now present competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands. The case before us is rightly decided without resolving the existing tension, which remains for another day when it may be squarely faced.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

I write separately to emphasize that the First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion for disfavored treatment, as in this case. In my 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." The Court, however, applies a different test. It applies the test announced in *Smith*. I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle. Thus, while I agree with the result the Court reaches in this case, I arrive at that result by a different route.

When a law discriminates against religion as such, as do the ordinances in this case, it automatically will fail strict scrutiny under *Sherbert* v. *Verner*. This is true because a law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest. Otherwise, however, "the First Amendment does not distinguish between laws that are generally applicable and laws that target particular religious practices."

It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such. Because respondent here does single out religion in this way, the present case is an easy one to decide. A harder case would be presented if petitioners were requesting an exemption from a generally applicable anticruelty law. 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. The number of organizations that have filed *amicus* briefs on behalf of this interest, however, demonstrates that it is not a concern to be treated lightly.

C. LOCKE v. DAVEY
540 U.S. 712 (2004)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The State of Washington established the Promise Scholarship Program to assist academically gifted students with postsecondary education expenses. In accordance with the State Constitution, students may not use the scholarship at an institution where they are pursuing a degree in devotional theology. We hold that such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment.

The Washington State Legislature found that "[s]tudents who complete high school with high academic marks may not have the financial ability to attend college." In 1999, to assist these high-achieving students, the legislature created the Promise Scholarship Program. The scholarships are funded through the State's general fund. The scholarship was worth $1,125 for academic year 1999-2000 and $1,542 for 2000-2001.

To be eligible for the scholarship, a student must meet academic, income, and enrollment requirements. The student must enroll "at least half time in an eligible postsecondary institution in the state of Washington," and may not pursue a degree in theology at that institution while receiving the scholarship. Private institutions, including those religiously affiliated, qualify as "eligible postsecondary institution[s]" if they are accredited by a nationally recognized accrediting body. A "degree in theology" is not defined, but the statute simply codifies the State's constitutional prohibition on providing funds to pursue degrees that are "devotional in nature or designed to induce religious faith."

A student who applies for the scholarship and meets the academic and income requirements is notified that he is eligible if he meets the enrollment requirements. Once the student enrolls at an eligible institution, the institution must certify that the student is enrolled at least half time and that the student is not pursuing a degree in devotional theology. The institution, rather than the State, determines whether the student's major is devotional. If the student meets the enrollment requirements, the scholarship funds are sent to the institution for distribution to the student to pay for tuition or other educational expenses.

Respondent, Joshua Davey, was awarded a Promise Scholarship, and chose to attend Northwest College. Northwest is a private, Christian college affiliated with the Assemblies of God denomination, and is an eligible institution under the Promise Scholarship Program. Davey had "planned for many years to attend a Bible college and to prepare [himself] through that college training for a lifetime of ministry, specifically as a church pastor." To that end, when he enrolled in Northwest College, he decided to pursue a double major in pastoral ministries and business management/administration. There is no dispute that the pastoral ministries degree is devotional and therefore excluded under the Scholarship Program.

At the beginning of the 1999-2000 academic year, Davey learned for the first time that he could not use his scholarship to pursue a devotional theology degree. Davey then brought an action to enjoin the State from refusing to award the scholarship solely because a student is pursuing a devotional theology degree, and for damages.

The Religion Clauses are frequently in tension. Yet we have long said that "there is room for play in the joints" between them. There are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause. This case involves that "play in the joints." Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology. The question before us, however, is whether Washington, pursuant to its own constitution,[1] which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, can deny them such funding without violating the Free Exercise Clause.

Davey urges us to answer that question in the negative. He contends that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, the program is presumptively unconstitutional because it is not facially neutral with respect to religion.[2] We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning. In *Lukumi*, we found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any religious service or rite. And it does not require students to choose between their religious beliefs and receiving a government benefit.[3] The State has merely chosen not to fund a distinct category of instruction.

Justice Scalia argues, however, that because the Promise Scholarship Program funds training for all secular professions, the State must also fund training for religious professions. But training for religious professions and training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit. And the subject of religion is one in which both the United States and state constitutions embody distinct views--in favor of free exercise, but opposed to establishment--that find no counterpart with respect to

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[1] The relevant provision of the Washington Constitution, Art. I, § 11, states:

"Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

[2] Davey contends that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech. But the Promise Scholarship Program is not a forum for speech. Our cases dealing with speech forums are simply inapplicable.

[3] Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology.

other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

Even though the Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an "established" religion.

Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry. *E.g.*, Ga. Const., Art. IV, § 5 (1789) ("All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own"); Pa. Const., Art. II (1776) ("[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent"). The plain text of these constitutional provisions prohibited *any* tax dollars from supporting the clergy. That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk.

Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited. And under the Promise Scholarship Program's current guidelines, students are still eligible to take devotional theology courses.[4] Davey notes all students at Northwest are required to take at least four devotional courses, and some students may have additional religious requirements as part of their majors.

In short, we find neither in the history or text of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus towards religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.

Without a presumption of unconstitutionality, Davey's claim must fail. The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, the majority opinion held that "[a] law

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[4] The State notes that it is an open question as to whether the Washington Constitution prohibits nontheology majors from taking devotional theology courses. At this point, however, the Program guidelines only exclude students who are pursuing a theology degree.

burdening religious practice that is not neutral must undergo the most rigorous of scrutiny," and that "the minimum requirement of neutrality is that a law not discriminate on its face." The concurrence of two Justices stated that "[w]hen a law discriminates against religion as such, it automatically will fail strict scrutiny." These opinions are irreconcilable with today's decision, which sustains a public benefits program that facially discriminates against religion.

I

When the State makes a public benefit generally available and withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax. That is precisely what the State of Washington has done here. It has created a generally available public benefit, whose receipt is conditioned only on academic performance, income, and attendance at an accredited school. It has then carved out a solitary course of study for exclusion: theology. No field of study but religion is singled out for disfavor in this fashion. Davey is not asking for a special benefit to which others are not entitled. He seeks only *equal* treatment--the right to direct his scholarship to his chosen course of study, a right every other Promise Scholar enjoys.

The Court does not dispute that the Free Exercise Clause places some constraints on public benefits programs, but finds none here, based on a principle of "'play in the joints.'" Even if "play in the joints" were a valid legal principle, surely it would apply only when it was a close call whether complying with one of the Religion Clauses would violate the other. But that is not the case here. It is not just that "the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology." The establishment question *would not even be close*, as is evident from the fact that this Court's decision in *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U.S. 481 (1986), was unanimous.

In any case, the State already has all the play in the joints it needs. There are any number of ways it could respect both its unusually sensitive concern for the conscience of its taxpayers *and* the Free Exercise Clause. It could make the scholarships redeemable only at public universities or only for select courses of study. Either option would replace a program that facially discriminates against religion with one that just happens not to subsidize it. The State could also simply abandon the scholarship program altogether. If that seems a dear price to pay for freedom of conscience, it is only because the State has defined that freedom so broadly that it would be offended by a program with an incidental, indirect religious effect.

What is the nature of the State's interest here? It cannot be protecting the pocketbooks of its citizens; given the tiny fraction of Promise Scholars who would pursue theology degrees. It cannot be preventing mistaken appearance of endorsement; where a State merely declines to penalize students for selecting a religious major, "[n]o reasonable observer is likely to draw an inference that the State itself is endorsing a religious practice or belief."

No, the interest to which the Court defers is a pure philosophical preference: the State's opinion that it would violate taxpayers' freedom of conscience *not* to discriminate against candidates for the ministry. This sort of protection of "freedom of conscience" has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context. The Court never says whether it deems this interest compelling (the opinion is

devoid of any mention of standard of review) but, self-evidently, it is not.[1]

II

The Court identifies two features thought to render its discrimination less offensive. The first is the lightness of Davey's burden. The Court offers no authority for approving facial discrimination against religion simply because its material consequences are not severe. Even if there were some threshold quantum-of-harm requirement, surely Davey has satisfied it. The State exacts a financial penalty of almost $3,000 for religious exercise. The Court's only response is that "Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology." But part of what makes a Promise Scholarship attractive is that the recipient can apply it to his *preferred* course of study at his *preferred* accredited institution. The Court distinguishes our precedents only by swapping the benefit to which Davey was actually entitled with another, less valuable one.

The other reason the Court thinks this particular facial discrimination less offensive is that the scholarship program was not motivated by animus toward religion. The Court does not explain why the legislature's motive matters, and I fail to see why it should. It may be that Washington's original purpose in excluding the clergy from public benefits was benign, and the same might be true of its purpose in maintaining the exclusion today. But those singled out for disfavor can be forgiven for suspecting more invidious forces at work. Let there be no doubt: This case is about discrimination against a religious minority. The State's policy poses no obstacle to practitioners of only a tepid, civic version of faith. Those the statutory exclusion actually affects – those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry – are a far narrower set. One need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction. In an era when the Court is so quick to come to the aid of other disfavored groups, see, *e.g., Romer* v. *Evans*, its

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[1] The Court argues that those pursuing theology majors are not comparable to other Promise Scholars because "training for religious professions and training for secular professions are not fungible." That may well be, but all it proves is that the State has a *rational basis* for treating religion differently. If religious discrimination required only a rational basis, the Free Exercise Clause would impose no constraints other than those the Constitution already imposes on all government action. The question is not whether theology majors are different, but whether the differences are substantial enough to justify a discriminatory financial penalty that the State inflicts on no other major. Plainly they are not. Equally unpersuasive is the Court's argument that the State may discriminate against theology majors in distributing public benefits because the Establishment Clause and its state counterparts are themselves discriminatory. The Court's premise is true at some level – the Establishment Clause discriminates against religion by singling it out as the one thing a State may not establish. All this proves is that a State has a compelling interest in not committing *actual* Establishment Clause violations. We have never inferred from this principle that a State has a constitutionally sufficient interest in discriminating against religion in whatever other context it pleases, so long as it claims some connection to establishment concerns.

indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional.

Today's holding is limited to training the clergy, but its logic is readily extendible, and there are plenty of directions to go. What next? Will we deny priests and nuns their prescription-drug benefits? When the public's freedom of conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression. Having accepted the justification in this case, the Court is less well equipped to fend it off in the future.