Chapter 7

THE CHURCH OF THE LUKUMI BABALU AYE, INC. *v.* CITY OF HIALEAH

The Protection of Majority Religions' Privilege at the Nexus of Race, Class, and Ethnicity

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In the 1930s, a white, well-off American citizen, well travelled and sympathetic to the culture of Cuba, might have run across ñañigos.

> They are the devotees of voodooistic worship who celebrate their orgiastic rites in remote huts or in forest retreats. The appeal of this cult is, of course, to the lowest type of intellect and the basest passions. Practically all of the celebrants are negroes, though a few degenerate whites mingle with them. . . . But the black gods of Africa constitute the real passion of most *ñañigos*. While they respect the Christian God and Jesus and the Virgin . . . it is the jungle gods that drive them to ecstasies. Sacrifice occupies an important place in their rites and until fairly recently it was not at all uncommon for them to sacrifice white infants at their altars to win the favor of black gods. Fear of the police has now all but stamped out this practice in Cuba. One still hears horrible rumors of the occasional isolated cases, but in general chickens are now sacrificed in place of stolen babies.[1]

This American view reflected the thinking of important elements of the social and cultural elites in Cuba itself — white, economically well off, politically powerful, influential, well educated and well travelled, and formally Catholic for the most part.[2] Between 1959 and 1980, waves of all strata of Cuban society migrated to the United States, many settling in South Florida.[3] They brought little with them but themselves and the socio-cultural norms that had marked them as Cuban, including ideas about race, class, religion, and the use of state power to protect those norms.[4]

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But in the United States, race, class, ethnicity, migration, assimilation, and religion proved to be a highly combustible mix. And it was that mix which ignited in 1987, when a group of Cuban immigrants stepped into elective leadership roles in a predominantly Latino (and principally Cuban) city — Hialeah, Florida — and sought to enact a series of ordinances that would apply the standards of their country of origin to the residents of that city.[5] The flash point was religion and its rituals, including animal sacrifice, with a healthy dose of class, race, and assimilation thrown in.

The United States has been fertile soil for the growth of many religious sects. It has also been an important place for the birth of new forms of religious expression — from new sects of Judaism, Buddhism, Hinduism, and Christianity, to entirely new forms of worship as either organized religious communities, like Scientology, or more amorphous sects. Another set of ancient religions has flourished here as well — the religions of Africa, brought to the Americas on the slave ships from Africa. These religions, derived principally from those of the Yoruba, in present day Nigeria, and the Bantu peoples of the Kongo regions, in present day the Democratic Republic of the Congo, were preserved, reordered, and enriched by contact with Spanish and Portuguese Catholicism and American Protestantisms to produce new and powerful religious communities that flourished in the Caribbean and Latin America.[6] Yet, like the Protestant dissenters of seventeenth century England, the practitioners of what became Santería, Lukumi, Umbanda, Candamblé, Palo Mayombé, Voodoo, and other sects of Amero-African religions, were sometimes — and to different degrees — persecuted or, more often than not, driven underground in many places.[7] In others they were left unmolested but marginalized. Arriving in the United States with other migrants from those regions, members of these religious communities each found in this country a place where their religions could flourish openly. But that did not come without struggle.

This chapter traces the story of the practitioners of one sect of Santería, the devotees of the deity or guardian spirit (or in the language of Santería, the Orisha) Babalu Aye, as they moved from persecution and secrecy in Cuba to begrudging tolerance in the United States. In one respect it is the story of conflict within a well-organized, sophisticated, and ancient ethnic community whose foundations became deeply affected by the political values of a host nation. But it is also the story of assimilation, the religious politics of race, and the reordering of the values of immigrant communities within the United States. Most importantly though, it is the story of the way in which an intra-ethnic religious dispute served as the basis for great progress in the discussion about the character of an important constitutional value within the national community. The followers of the path of the Babalu Aye achieved something remarkable from a modest church in a small city in South Florida — an important milestone for the protection of non-majority and unconventional religious expression in the U.S.

A. Why This Case Is Important: Then and Now

Church of the Lukumi Babalu Aye, Inc. v. Hialeah (1993) marked the first important application of the newly announced and highly controversial analytical framework of *Employment Division v. Smith*.[8] In *Smith,* the U.S. Supreme Court

held that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even when it incidentally burdens a particular religious practice. *Lukumi* elaborated standards for determining when state action was neutral and of general applicability within the meaning of *Smith*.[9] The effect of *Smith* had been to limit the applicability of *Sherbert v. Verner*,[10] which provided that governmental action that substantially burdened religious practices could be sustained only if the state could demonstrate a compelling governmental interest related to the regulation and that no less burdensome alternative existed. *Lukumi* held that the *Sherbert* analysis was applicable to state action that was neither neutral nor generally applicable.[11]

Lukumi developed the current conceptual framework for analyzing whether a state action or rule is neutral and generally applicable within the meaning of the *Smith* standard and, on that basis, whether the rational basis standard of *Smith* or the strict scrutiny standard of *Sherbert* applies to analyze claims under the Free Exercise Clause. As such, *Lukumi* is an important refinement of and a framework for analysis of the *Smith* principles. For some, *Lukumi* also represents an important narrowing of the applicable scope of *Smith*. For others, the case serves merely as a clarification of a narrow exception to *Smith* focused on regulations that specifically target religion. It also serves to influence application of statutory protections of "free exercise" under federal and state law, provisions also enacted to limit the scope and applicability of the *Smith* standard.[12]

B. From Church to Court — A Narrative of the Dispute

The plaintiffs include an immigrant white man from a once relatively well-off family, seeking to embrace a traditionally African and lower class religious tradition, to transform it, and to assimilate it into American *religious life*. The defendants include immigrants, many from the same country, assimilating into American *political life*, but also seeking to naturalize the religious and class hierarchies of their country of origin within the forms of social organization and political traditions of the United States. Both sides invoked the judicial traditions and basic substantive political principles of the United States to protect each of their versions of adapting to American life. Yet once invoked, that judicial mediation of assimilation also affected the fundamental premises of protection of religion and of representative democracy within the United States. Each of the actors — church, city council, and court — reflect, in turn, the complexity of assimilation, its intersections with race, ethnicity, class, and the way in which those issues can sometimes leak into national conversations about religion in unforeseeable and significant ways. This section provides the basic narrative framework. Reframing this basic story from the perspective of religion, plaintiff, defendants, and courts then follows.

For over ten years since its founding, the Church of the Lukumi Babalu Aye functioned quietly within the community. But things changed in April 1987, when Ernesto Pichardo attempted to establish a place where the Santería religion could be practiced publicly in the City of Hialeah.[13] Pichardo indicated that the Church's goal was to practice the Santería faith openly rather than in secret, including more public conduct of its rituals involving animal sacrifice.[14] This change would effectively amount to a rejection of the social and legal rules

under which Santería practice had been tolerated in Cuba. The Church obtained a building and began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. Despite some difficulties, it appears that the Church received all needed approvals by August 1987.[15] However, the prospect of an openly established Santería church, and especially its animal sacrifice ceremonies, was distressing to many members of the Hialeah community. The local newspaper reported that the city council and mayor "were flooded with complaints from residents who thought sacrificing animals is barbaric."[16]

High Priest of the Church of the Lukumi Babalo Aye, Ernesto Pichardo, standing inside the throne of the Babaluaye, a health-related deity, at the church, located in a storefront, supposedly the only legal Santería church.
(Photo by Debra Lex//Time Life Pictures/ Getty Images)

In this atmosphere, the city council first acted in an emergency session in June 1987. The city council adopted Resolution 87-66, which noted the "concern" expressed by residents of the city "that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and declared that "[t]he City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety."[17] The council also approved an emergency ordinance, Ordinance 87-40, which incorporated in full, except as to penalty, Florida's animal cruelty laws.[18] The provision subjected to criminal punishment "[w]ho[m]ever . . . unnecessarily or cruelly . . . kills any animal."[19]

But the city council wasn't done. It wanted to take stronger action but thought it was prohibited from enacting more detailed animal cruelty statutes by Florida law.[20] To obtain clarification, Hialeah's city attorney requested an opinion from the attorney general of Florida as to whether §828.12 of the state law prohibited "a religious group from sacrificing an animal in a religious ritual or practice" and whether the city could enact ordinances "making religious animal sacrifice unlawful."[21] The Florida attorney general, responding in mid-July, brought good news on that score for the city: "ritual sacrifice of animals for purposes other than food consumption" was not a "necessary" killing and so was prohibited by §828.12.[22] The Attorney General's Report appeared to define "unnecessary" as "done without any useful motive, in a spirit of wanton cruelty or for the mere pleasure of destruction without being in any sense beneficial or useful to the person killing the animal."[23] He advised that religious animal sacrifice was against state law, so that a city ordinance prohibiting it would not be in conflict in with state law.[24]

On the basis of this response from the state, the city council adopted Resolution 87-90, which proclaimed Hialeah's opposition to animal sacrifice and, further, the city's intent to prosecute any person or organization involved in the practice of animal sacrifice.[25] According to the city, the resolution reflected residents' "great concern regarding the possibility of public ritualistic animal sacrifices" and paralleled similar state-law animal cruelty prohibitions.[26]

In September 1987, the Hialeah city council unanimously adopted a series of ordinances addressing religious animal sacrifice.[27] Ordinance 87-52 laid the groundwork for the other ordinances by defining "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."[28] Ordinance 87-52 also enacted a prohibition on owning or possessing an animal with the intent "to use such animal for food purposes."[29] However, application of this prohibition was restricted to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed."[30] Further, the ordinance provided an exemption for slaughtering by "licensed establishment[s]" of animals "specifically raised for food purposes."[31]

After declaring "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 enacted Ordinance 87-71.[32] Ordinance 87-71 adopted the definition of sacrifice provided in Ordinance 87-52 and declared it "unlawful for any person, persons, corporations or associations to sacrifice any animal within" the city limits of Hialeah.[33]

Finally, the city council adopted Ordinance 87-72, which both defined "slaughter" as "the killing of animals for food" and mandated that slaughter be confined to areas zoned for slaughterhouse use.[34] However, the ordinance provided an exemption for the slaughter or processing for sale of a "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law."[35] All four ordinances carried fines not exceeding $500 or imprisonment not exceeding 60 days, or both, for violations.[36]

The city maintained that it enacted the ordinances primarily to prevent cruelty to animals.[37] Hialeah officials also alleged that they were concerned about public health issues connected to the disposal of animal remains.[38] The city argued that the effect of the law was not to single out Santería, which could make the measure unconstitutional. Rather, it was intended only to prevent animal abuse. As such, the effects of the provisions on the ritual requirements of Santería practice were incidental, and perhaps even regrettable, but in any case lawful.

Mr. Pichardo and his church disagreed, claiming that Hialeah enacted the ordinances to keep the followers of Santería from practicing their religion.[39] Mr. Pichardo argued that Hialeah officials were not concerned about cruelty to animals but about the city's image. When Santería sacrifices and rituals were conducted discreetly and out of the public eye, no official seemed to mind. It was only when the Church sought to come out of the shadows that the city officials acted.[40]

1. Pichardo Versus the City — Round 1[41]

With the positions now starkly drawn, Mr. Pichardo and the Church acted. They filed suit in the Southern District of Florida against the City of Hialeah, and

the mayor and city council in their individual capacities. The suit alleged deprivation of the Church's First, Fourth, and Fourteenth Amendment rights, arising out of enactment of ordinances and adoption of resolutions relating to ritual animal sacrifice and certain actions taken by police and the city sanitation and electric companies.[42]

In support of their suit, the plaintiffs emphasized the conduct of city officials suggesting bias against their religion. These included: holding a city council meeting regarding the issue of granting the church a city permit to use the land as a place of worship; establishing a police perimeter at the boundaries and entrance to the church; publicly inciting residents to appear at a public hearing held by the city council and to protest against the Santería religion; adopting Florida Statutes Chapter 828 (Cruelty to Animals) as an emergency city ordinance; passing resolution number 87-66, reiterating the City of Hialeah's commitment to a prohibition of acts by religious groups deemed inconsistent with public morals, peace, or safety; passing resolution 87-90 that declared a policy to oppose ritual animal sacrifice; and proposing three criminal ordinances relating to the possession, sacrifice, and slaughter of animals within the City of Hialeah, one of which became law.[43]

Because the petitioner sought relief against the councilmen and the mayor in their *individual* capacities, the case turned on whether the acts complained of were legislative.[44] The defendants would be absolutely immune from prosecution if the acts were deemed legislative. A legislative act involves public policy making as opposed to mere administrative application of existing policies. In deciding whether the passage of the resolutions was a legislative act, the court had to determine whether the action resulted from the nature and execution of the official's legislative duties.[45]

The court held that the enactment of the ordinances was in accordance with a legislative function, thus providing absolute immunity to both the councilmen and the mayor.[46] Similarly, the court held that in order to impose personal liability on the defendants for the acts of the police and the city sanitation, it was not enough to plead that they may have created an atmosphere antagonistic to Santería worshippers through their adopted legislative ordinances and resolutions.[47] Rather, plaintiff had to show some causal connection between an act of the official defendants and the alleged violations. The defendants could not be held liable as supervisory officials for the actions of the police and city sanitation unless they directed such actions or had personal knowledge of the wrongdoings.[48]

The court thus held that the defendants were entitled to absolute legislative immunity in their individual capacities for their activities and dismissed the suit.[49] In reaching this conclusion, however, the court did not decide whether the plaintiff's First, Fourth, and Fourteenth Amendment rights were violated by any of the alleged activities. The court also did not decide whether the City of Hialeah could be held liable for the activities.[50]

2. Pichardo Versus the City — Round 2

After being unsuccessful in his attempt to hold the council members and mayor personally liable for their actions, Mr. Pichardo and the Church filed suit, again in the Southern District of Florida, under 42 U.S.C. §1983 alleging that the city's ordinances regulating animal sacrifice violated their rights under the Free

Exercise Clause of the First Amendment.[51] The case was tried before Judge Eugene P. Spellman.

In framing his analysis, Judge Spellman appeared to embrace the assumptions of the traditional Cuban elite views of Santería. He adopted a characterization of Santería as an underground religion, largely due to the fact that practitioners fear discrimination from the community at large.[52] More importantly, he characterized Santería as not socially accepted by a majority of Cubans, as having lost connection with its African roots, and as including only incidental institutional or communal aspects to its practice.[53] He rejected the argument that "the religion would become more open if the Church was allowed to practice its rituals openly, [noting that] Dr. Lisandro Perez, a sociologist, testified that in his opinion, the outcome of this case would not necessarily affect the degree of which Santeria was practiced in private."[54]

Judge Spellman sought to apply the Eleventh Circuit's version of the *Sherbert* strict scrutiny standard for considering the Free Exercise claims, which required the government to meet the compelling interest test.[55] The district court held that although the ordinances were not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah, the ordinances were not passed to interfere with religious beliefs but rather to regulate conduct.[56] The court upheld the ordinances because the government had three compelling secular purposes: (1) to prevent cruelty to animals; (2) to safeguard the health, welfare, and safety of the community; and (3) to prevent the adverse psychological effect on children exposed to such sacrifices.[57] The court also dismissed Plaintiff's §1983 claim because the government, as an entity, can only be held liable when execution of a municipality's official policy or custom inflicts the alleged injury.[58]

The Court of Appeals for the Eleventh Circuit affirmed the district court's decision in a "Table of Decisions Without Reported Opinions."[59] Interestingly, the appellate court panel found it unnecessary to consider the effect of *Employment Division v. Smith*, delivered after the district court decision, because, according to the petitioners, "the District Court 'employed an arguably stricter standard' than that applied in *Smith*."[60] In other words, if the city could pass the compelling state interest test, it should be able to survive *Smith*'s neutral and generally applicable standard. The Supreme Court granted certiorari.

C. Religion Beyond Narrative: The History of the Santería Religion

Though conventional analysis focuses on the ritual sacrifice aspects of *Lukumi* — reducing the meaning of the case to little more than a standard for determining mandatory tolerance of non-conventional religious ritual by government — the issues ran much deeper within the communities in which the case arose. To understand these issues, it is necessary to understand the social, historical, racial, and ethnic context in which this religion arose in the Western Hemisphere. The religions brought to Latin America by African slaves were as varied as the cultures and nations from which these slaves were taken. In the Caribbean the religions essentially became grouped into two major traditions. One, known as Santería, Lukumi, or Regla de Osha, can be traced to a historical accommodation between Yoruba religious traditions and Catholicism

in the slave culture of Cuba. The Yoruba people live in what is now the southwestern part of Nigeria and eastern Benin. The other major tradition, known as Palo, Palo Mayombé, and other names, can be traced to the Kongo regions of central Africa and the Luba, Kuba, and other Bantu speaking peoples.

In the Spanish colonial America, colonists were overwhelmingly Catholic and showed little tolerance of African religions. These non-European religions were considered to be forms of paganism that had to be suppressed. As a consequence, African slaves, seeking to preserve what they could, hid the oral traditions and practices of their faith within the religion of their European masters.[61] In the parlance of academics and theologians, the African religions brought from Africa were syncretized principally with the outward forms of Roman Catholicism. The idea was to hide what could be preserved of the original religions of the slaves within the iconography and practices of the colonial masters. Though outwardly Catholic, the syncretization was based on African religious conceptions rather than Christian notions of theology or structures of hierarchies of divine power.[62] Thus, for example, male deities or guardians (orishas) could be syncretized with female saints — the connection was the relation of the life or symbolism of that saint with the powers traditionally associated with an African guardian or deity in African theology. As a result, the name given to the religion in the Caribbean, Santería — Spanish for "saint worship" — refers to the outward appearance rather than to the content and cosmology of the religion itself. The name Santería hides as much as it reveals — paralleling the way the syncretism hid as well as revealed the religious practices of Caribbean slaves and their descendants.

In this new form, Santería developed practices and customs that reinforced its reflex to stay hidden from official view and for centuries was practiced discreetly by slaves and their descendants. Eventually, portions of the white population in Cuba also embraced Santería in varying degrees, though usually discretely and as an addition to their mostly Catholic faith. From this foundation, Santería in Cuba eventually emerged as a loosely organized religion practiced in private homes and secluded places, rather than in churches or public institutions of any kind. As it had in Africa, its rituals, beliefs, and traditions, including its core ideas and practices, passed from generation to generation mainly as oral history.

AU: do you mean separately?

Because Santería's traditions and practices are primarily oral, much of its cosmology, theology, and practice evidence sometimes substantial variation among its practitioners. These variations became routed among distinct communities of the faithful in the absence of a strongly centralized governance structure controlling matters of faith and practice. Despite these variations, there is a set of core beliefs for which there is general agreement, namely belief in a hierarchy of divinities — orishas — over which presides a higher power, Olodumare (sometimes Olorun, Eledumare, Eleda, and Olofin-Orun). The orishas represent specific manifestations of Olodumare and are powerful as such within the scope of their powers. In the Caribbean region, the most important orishas (and their syncretized "saints") attracted large communities of worshippers. Each of these orishas has many aspects ("caminos") that vary according to the religious community. The usual pantheon of important orishas includes:[63]

Elegua/Esu/Legua, represented by a manifestation of the infant Jesus as "El Nino de Atocha" or as Saint Anthony, is guardian of the crossroads, beginnings,

and opportunity; he is the necessary intercessor between people and orishas, but he is also a trickster, a causer of confusion, and the messenger to God;

Obatala, represented in Cuba by an aspect of the Virgin Mary, "La Virgen de la Merced," is the guardian of creativity and justice; he is sometimes said to have been charged with the making of humans as a punishment for being drunk when he should have been making the world;

Orunmila, represented by St. Francis of Assisi, is the source and guardian of divination (ifá) and wisdom through his priests (santeros or babalawos);

Ochosi, represented by Saint Norbert, is the guardian of the hunt, dispenser of justice;

Ogun, represented by Saint Peter or Saint Santiago, is the guardian of justice and oaths; related to industry and work, he is sometimes associated with prisons;

Oshun, represented as an aspect of the Virgin Mary, "La Virgen de la Caridad del Cobre" (and in this aspect is revered as the patron of Cuba), is guardian of rivers and fresh waters, and has been given a variety of aspects, including curing the sick, fertility, love, luxury, and money;

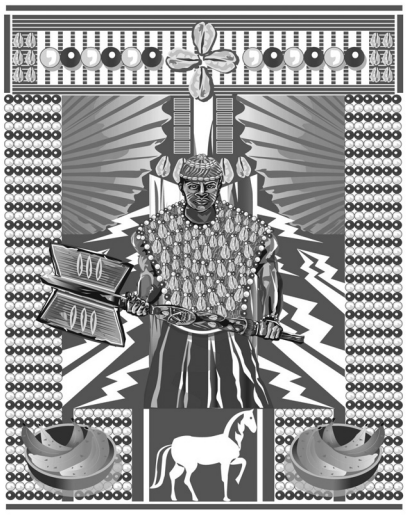
Shango, represented by Saint Barbara, is the guardian of thunder and lightning, the warrior orisha;

Yemaya, represented as an aspect of the Virgin Mary, "La Virgen de Regla" (and an important figure in Cuban Catholicism), is the guardian of the oceans and seas, protector of the family, and mother of life; and

Oya, the unseen guardian of the wind, weather, and cemeteries; she is connected sometimes to ancestors, watcher of the doorway between life and death.

Babalu Aye is also included in the pantheon of principal orishas as the guardian of illness. In the Americas, Babaluaye (or Obaluaye in Brazil) became associated with the Lazarus, the beggar covered with sores, whose story is recounted in the Gospel of Luke.[64] According to Mary Ann Clark, Babaluaye (Father and Lord of the World) is also the praise name for the Orisha known as Sopona, who controlled epidemics, and particularly smallpox, which he could both heal and inflict.[65] Those who survived the smallpox disease would become the Sopona priests in Yorubaland, charged with the disposal of the bodies of those who died of the disease. Babalu Aye is associated as well with all maladies of the skin, especially severe ones causing boils or rashes, infectious diseases, and, since the 1980s, with the AIDS virus.[66] Yet, though "[h]ighly feared in Africa, in Cuba his kinder aspects as a lover and a healer are emphasized. . . . Although Shango may be the most admired and Oshun the most invoked, it is 'the Old Man' who inspires the most tender feelings in Cuba."[67] As Saint Lazarus the leper he

The orisha, Elegua, known as the Trickster and Guardian of the Crossroads of Life, by artist/illustrator Jorge L. Vallina (used with permission). See http://www.church-of-the-lukumi.org.



The orisha, Shango, god of thunder and weather, considered central to Santería, by artist/illustrator Jorge L. Vallina (used with permission). See http://www.church-of-the-lukumi.org.

was famously involved by all strata of society, including the former Cuban dictator Fulgencio Batista, who is said to have donated a gold Rolex watch to the statue of St. Lazarus in the leprosarium of El Rincón in Cuba.[68]

The foundations of Santería are grounded in the belief in a strong personal relationship between individuals and their guardian orishas. The relationship between individual and orisha must be nurtured through worship. In addition, orishas can be invoked through appropriate ritual when their particular powers are required to aid the suppliant. Thus, for example, individuals seeking protection against epidemics, like tuberculosis, might seek to invoke the aid of the orisha Babalu Aye. The invocation of orishas and their worship requires ritual, offerings, and sacrifice. Communication with the orishas, to determine their will or to seek their advice or prediction for the future, is accomplished through divination. For that purpose a variety of instruments might be used — though the most common instruments are pieces of coconut or cowrie shells. The mechanics of divination can range from simple throws and readings to complex procedures under the auspices of an appropriate priest.

The forms of worship, invocation, and divination are undertaken through the offices of a priest (known as a santero or a babalawo) dedicated to the particular orishas. There is a rich and complex oral tradition on the steps to priesthood, the limitations on candidacy for certain priestly offices, the rituals to be used to confer office, and the hierarchy of priestly authority. Generally, there is a 12-month period during which the person seeking priesthood must comply with a number of ritual commands. The initiate (*iyawó)* is usually compelled to wear white and refrain from certain activity — both in his personal and religious life. Some of these traditions are now being standardized and reduced to writing. In June 1989, the Church of the Babalu Aye in Hialeah issued a "Decree on Standards Governing Iyawó Vestments and Safety Matters" in which the traditional rituals were standardized and elaborated for use by its adherents. However, written statements like those produced by the Church of the Babalu Aye are rare within Santería communities. Many still fiercely adhere to the oral traditions and look with suspicion on attempts to reduce the faith to writing.

Cubans fleeing the country in the aftermath of the 1959 Cuban Revolution brought significant numbers of members of Santería communities to the United States. Their numbers were considerably increased with the arrival of larger numbers of working class Cubans and Afro-Cubans to South Florida in the wake of the Mariel boatlift in the late 1970s. This second wave of immigrants brought Cubans from all classes of Cuban life and included substantial numbers of practitioners (and, to the faithful, the orishas who followed the priests).

Although the religion was practiced underground, the region was covered with evidence of its existence: the remains of animals were found in streets and parks, and there were many shops, called botánicas, that sold ritual paraphernalia and filled prescriptions from Santería priests.

This short review suggests the importance of the peculiarities of Santerís in the genesis of the case. Here is a religion whose character was shaped by racial and religious subordination. It was a religion comfortably tolerated in the shadows of official life in its country of origin. Here is the story of a faith community that sought to assimilate into the cultural framework of its new host community. But that effort also constituted a revolutionary break with the traditions and understandings of its home community.

D. Beyond Narrative and History: The Faces of Assimilation and Religion

Narrative and history provide the stage setting for the drama that played out in Hialeah and before the justices of the Supreme Court in Washington, D.C. Within that setting, a large cast of character each played their important roles. Indeed, by the time the *Lukumi* case reached the Supreme Court, it had become operatic in scope. Each of the actors played an important role in part as representative of bundles of assumptions about religion, history, class, race and the appropriate public conduct that such assumptions produced. The case itself served to play out the complex cultural, political, class, race, and ethnic struggles that followed from the transformation of South Florida into a great entrepôt of Latin American immigration. The narrative is recast as a slice of the larger process of social, religious, ethnic, and racial convergence that powerfully informs this case.

1. The Plaintiffs: Ernesto Pichardo and the Church of the Lukumi Babalu Aye

a. Ernesto Pichardo

According to accounts of his life currently circulating, Ernesto Pichardo was born in Havana, Cuba, to a white middle-class family.[69] His mother was introduced to Santería as a child through a first generation olorisha (priest) who was the family cook. A part of Pichardo's family was socially that might have once held interests in some sugar plantations. The family was known for being active in both Catholic and Santería groups. Pichardo recalls no conflict in these religious activities, except that Santería was embraced discreetly in order to conform to conventional social norms in Cuba. By one account, the family's move away from its original faith to Lukumi began following a miscarriage during Pichardo's mother's second pregnancy. The doctors were unable to treat her toxic reactions and warned her that a third pregnancy could kill her. This episode contributed to the family's decision to turn towards Santería as a source of protection and guidance.

Pichardo's family moved to the United States in the early 1960s and settled in the "Little Havana" area of Miami, an area with a great concentration of recently arrived Cuban immigrants. Like many of these immigrants, when the

family acquired sufficient funds they sought to better their lives in the suburbs. In the case of the Pichardo family, that meant a move to Hialeah. It was there, during his high school years, that Pichardo first encountered Santería. "At the time, administrators were trying to drum him out of high school for associating with the wrong crowd. They eventually succeeded. He never finished."[70] For Pichardo, the entry into religious life was the great shaper of his life. "My entire life as I knew it was disrupted at age 16," he said. "And all of a sudden, here's this explanation for everything."[71] The reaction to his religious choice had social consequences. "His friends' parents, he said, shunned him for joining what they considered a cult." And these consequences had racial implications as well. Even years after the litigation, Americans, like Cubans, rationalized Santería in racial terms. As late as 2008, Pichardo was still defending his religious choice in racialized terms. "Pichardo sees nothing odd about a white man defending a religion with roots in West Africa. Many whites have adopted Santería since slaves imported it to the New World."[72] Pichardo and his brother Fernando served as the founders of the Church of the Lukumi Babalu Aye in Hialeah in 1973. At the time of the lawsuit, Pichardo served as president of the Church and was also the Church's priest with the religious title of *Italero,* "the second highest in the Santería faith."[73]

b. The Church of the Lukumi Babalu Aye

The Church of the Lukumi Babalu Aye was incorporated by Ernesto Pichardo in 1973.[74] According to its website, the Church claims to be the first of its kind established in the United States as a religious corporation.[75] But it appears to have begun its operations in earnest in the 1980s, with a public campaign to bring its practices into the open and to demand the same treatment as other mainstream religious communities. The Church came to the attention of city officials in 1987 when it took possession of the site of a former garage in Hialeah, which it intended for its church, and sought relevant operating permits.[76] In 1988, during the pendency of the litigation, the Church moved its headquarters to a building across the street from Hialeah City Hall, which became the site of much highly publicized political activity, including protests in support and against the Church by religious, animal rights, and other groups. According to the Church, "[p]ending litigation in Federal Court, this location was vandalized numerous times. Law Enforcement entered Church premises daily. Members were stopped leaving the Church. Christian denominations protested frequently, and its activists implemented a hate campaign, joined by several animal rights organizations."[77]

2. The Defendants

The City of Hialeah and its mayor and members of its city council in their individual capacities were sued by the plaintiffs.

a. The City of Hialeah

The City was established in 1925 and is among Florida's five most populous cities.[78] "The [C]ity is also one of the largest employers in Dade County. Predominantly Hispanic, Hialeah residents have assimilated their cultural heritage

and traditions into a hard-working, diverse community proud of its ethnicity, as well as its family oriented neighborhoods."[79] The City occupies about 20 square miles in northwest Miami-Dade County. It is organized around a strong mayor model, with a city council of seven members.

The media characterized Hialeah as a working class Hispanic city, a place where Cuban immigrants looking to improve their lives and preserve the culture of their homeland might move,[80] but also a city where public officials might too closely mix personal and public affairs.[81] In the 1980s, the City of Hialeah was on the receiving end of unfavorable scrutiny by the *Miami Herald*, an important local newspaper publishing in English and Spanish. In 1985, for example, the *Herald* ran a story suggesting some unsavory characteristics of city government. The City's officials were accused of embracing a culture of bribery. "Councilmen often use their votes to grant favors. Conflicts of interest are commonplace. It is a city where long-range development plans are altered regularly, often enriching city officials, their relatives and business associates."[82] The local papers reported that the focus of investigation at the time involved land deals and zoning issues.[83]

b. The Mayor of Hialeah

Raul Martinez was the first Cuban-born mayor of Hialeah.[84] During his tenure there were allegations of misconduct that blossomed into an indictment. In March 1991, as the *Babalu Aye* case was winding its way up to the Supreme Court, the mayor was convicted of extortion and racketeering after a jury found he had accepted cash and property from land developers.[85]

Raul Martinez was the first Cuban-born mayor of Hialeah

c. The Hialeah City Council

The Hialeah City Council reflected the diversity of the community. Council members included Silvio Cardoso, Salvatore D'Angelo, Herman Echevarría, Julio Martinez, Andrés Mejides, Paulino Nuñez, and Ray Robinson.[86] The make-up of the Hialeah City Council reflected the ethnic, social, and religious dimensions of the dispute. Their outlook and beliefs personalized what would have otherwise been a battle of abstractions. But that personalization was the more passionately driven in a case born of antagonisms within the immigrant communities of South Florida each seeking to impose their vision of assimilation in the community. A review of the make up of the Hialeah City Council at the time of the adoption of the anti-Santería ordinances reveals a very different sense of the path to assimilation, and of ethnic and religious solidarity within the Cuban community of South Florida.

The two non-Hispanic surnamed members of the council, Herman D'Angelo and Ray Robinson, were connected with local political and economic interests. Mr. D'Angelo was a real estate agent with offices in Hialeah. Mr. Robinson was a close friend of Hialeah Mayor Martinez. In the 1980s, he served as a vice president of a local bank.[87] He played a minor role in the corruption case against the Mayor.[88]

The Hispanic surnamed council members were immigrants and children of adult immigrants. Most appeared to be models of classical assimilation into American society and tended to reflect traditionalist values of both their countries of origin and settlement. Mr. Cardoso immigrated to Hialeah from Cuba with his family at age five.[89] He received his education from public schools and later earned a full scholarship to the University of Miami to play football, where he was a running back from 1970-1974. Cardoso started in the building business in 1972, operating a residential housing construction enterprise. At the time of the litigation he was quoted as saying, "They [Santería practitioners] are in violation of everything this country stands for. I believe this council has the authority to stop these people."[90] Mr. Echevarria was in the marketing and advertising business; he was setting up an enterprise with others outside of Hialeah city government during the course of the lawsuit. Mr. Mejides was a land developer in Hialeah during the 1980s.[91] He was indicted by a Federal grand jury on charges that he conspired with Mayor Raul Martinez to extort payoffs from developers in exchange for approving zoning changes.[92] Mr. Nuñez came to Hialeah shortly after the ascension to power of Fidel Castro and became the city's fifth Cuban councilman in 1981.[93] Prior to his election he had served as a member of the Hialeah Housing Authority Board.[94]

Julio Martinez was the Hialeah City Council President at the time that Mayor Martinez and Councilman Mejides were indicted[95] and then served as Acting Mayor. He was the council member that introduced the ordinances at issue in the case and heatedly debated Pichardo on local radio.[96] He was quoted in the local paper as saying at the time: "I personally do not want to go back in time. . . . These practices belong in the 14th or 15th century. Ninety-nine percent of the people in this city don't agree with sacrificing an animal to a god. . . . I represent those people."[97] As a result, he became the object of some attention among a segment of the Santería community that manifested itself through rituals directed against Mr. Martinez and his staff. Two of his supporters found cow's tongues at their office door, another received a fish head in his mailbox, and a severed and muzzled goat's head was discovered in a police department parking lot.[98] During his first few days in office, someone broke into Hialeah City Hall and left two rows of nails, staggered one under the other and another set forming a triangle on Mr. Martinez's office door.[99] "Someone who is supposed to know about these things says it's the devil's triangle — whatever that means," Martinez said.[100]

E. Rules of Law that Emerged from the Case

Church of the Lukumi Babalu Aye v. City of Hialeah provides a basis for applying the baseline rule established in *Employment Division v. Smith*[101] by emphasizing the "neutrality" and "general applicability" limits of *Smith*. In effect, while *Smith* accords free exercise protection against neutral and

generally applicable laws only on the basis of the lenient "reasonable basis" test, *Lukumi* imposes a standard for determining neutrality and general applicability that permits a court to look to the intent, impact, and alternatives to achieving the statutory objectives — ironically enough in a manner that mimics the *Sherbert*[102]/*Yoder*[103] style analysis rejected in *Smith*.[104] By signaling that neutrality and general applicability analysis could be broadly conceived, the Supreme Court's *Lukumi* opinion made it possible for courts to begin to narrow the applicability of *Smith* and broaden the set of circumstances under which the pre-*Smith* standards could continue to be applied.

Justice Kennedy's opinion for the Court is presented in three parts. Part I set out the facts and procedural history of the case. Part II developed the constitutional interpretive standards to be applied to the case derived from the majority's reading of *Smith*, focusing on the rule that the reasonable basis test is available only to test legislation that is neutral and generally applicable. Part II-A elaborated principles and standards of a neutrality analysis. Part II-A.2, in particular, suggests the relevance of equal protection analysis to the application of neutrality principles in Free Exercise cases. Part II-B applied the general applicability prong of *Smith*. Having determined that the ordinances were neither neutral nor generally applicable, the majority opinion then applied the more rigorous "strict scrutiny" review to those provisions in Part III.

Yet, like many current Supreme Court decisions interpreting the Religion Clauses, the effort to elaborate an analytical framework of *Smith* was marked by significant fracture among the Justices. Seven Justices, including Chief Justice Rehnquist and Justices White, Stevens, Scalia, Souter, and Thomas, joined that majority opinion with respect to Parts I, III and IV. Part II of the opinion, in many respects the most important section of the Court's opinion, garnered less support. Six Justices, including the Chief Justice and Justices White, Stevens, Scalia, and Thomas, joined the opinion of the Court with respect to Part II-B (general applicability). Of that group, five Justices, all but Justice White, joined Parts II-A.1 and II-A.3 of the opinion. Only Justice Stevens joined Justice Kennedy on Part II-A.2. Concurrences were filed by Justices Blackmun, Souter, and Scalia.

Part II sheds light on Justice Kennedy's interpretation of neutrality and general applicability. Kennedy notes that although the neutrality and general applicability standards are distinguishable, the failure to satisfy one is likely to indicate a failure to satisfy the other. The majority opinion grounds neutrality analysis on the determination that "the object of the law is to infringe upon or restrict practices because of their religious motivation."[105] To prove suppression, courts are to examine the text of the ordinance at issue. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context."[106] Reference to "sacrifice" and "ritual" were insufficient to show a lack of facial neutrality because "current use admits also of secular meanings."[107]

However, "facial neutrality is not determinative."[108] Subtle departures from neutrality and covert suppression also suggest the sort of lack of neutrality that would invoke a strict scrutiny test. For the purpose of determining if bias exists even where a provision is facially neutral, Justice Kennedy engaged in a broad and searching scrutiny, including the use of circumstantial evidence of intent, the legislative record, and the likelihood of adverse impact given the peculiarities of the construction of the ordinance and its over-inclusiveness.[109] Balanced against

this evidence are the "legitimate governmental interests in protecting the public health and preventing cruelty to animals."[110] Especially important is an analysis of the existence of less restrictive alternatives to meeting governmental objectives.

A determination of lack of neutrality, then, can be made to depend on an analysis of the gravity of the government's interest, the relation of that interest to the actual form and effect of the regulation, and a determination of available less burdensome alternatives — an analysis suspiciously like the strict scrutiny analysis rejected in *Smith*. Ironically, it is possible to read Justice Kennedy's opinion as suggesting that in order to determine whether the "rational basis" test of *Smith* can be applied, the court would first have to apply a perhaps milder strict scrutiny test to determine the question of neutrality. But the majority of the Justices avoided engaging this possible interpretation. None but Justice Stevens joined in that portion of Justice Kennedy's opinion suggesting that equal protection analysis was relevant to the question of discrimination.[111]

Justice Kennedy's discussion of general applicability, like that of neutrality, starts from insights drawn from *Smith*. Acknowledging that all laws are selective to some extent, the focus shifts to those laws whose effects incidentally burden religion, the starting point for pre-*Smith* Free Exercise Clause analysis. Here, again, Kennedy picks up the thread of the language of equal protection, explaining "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."[112] But Justice Kennedy saw no need to define "with precision" the standard for determining the difference between provisions of general applicability and those which impose "burdens only on conduct motivated by religious belief"[113] because the Hialeah ordinances fell "well below" any minimum.[114] Justice Kennedy determined that the ordinances were underinclusive in relation to their purported object — the protection of public health and the prevention of animal cruelty. On that basis, Justice Kennedy concluded for the Court, that the ordinances were not of general application but meant to target the Santería practices of the Church of the Lukumi Babalu Aye, without the necessary narrowly drawn countervailing governmental interest.

On that basis, the general standard of *Smith* was no longer applicable and the older "strict scrutiny" test was applied in Part III of the majority opinion.[115] The majority opinion determined that even if the governmental interests were compelling, the ordinances were not narrowly drawn. But even if the ordinances had been narrowly drawn, the interests advanced by Hialeah, in the context of the case, were not compelling. Ironically, Justice Kennedy relied, in part, on the analysis of "general applicability" to buttress the argument that the ordinances could not survive strict scrutiny.[116]

Justice Scalia's concurrence forgave Justice Kennedy a certain perceived flabbiness in reasoning.[117] Justice Scalia argued that there was a better way of distinguishing between neutrality and general applicability. The former, he noted, focused analysis on the terms of a provision. The latter, general applicability, should focus analysis on the effects of the provision. Justice Scalia, however, drew the line when it came to the use of the subjective motivation of the legislators for determining the character or effect of the ordinances. Justice Souter also concurred but used the occasion to make a case for the abandonment of *Smith*.[118] Justice Blackmun also concurred, suggesting that the ordinances were facially discriminatory, without mentioning *Smith*.[119]

The elaboration of *Smith*'s neutrality and general applicability requirements — and their application to find that the ordinances did not meet either standard — has proven to be quite important. *Smith* provided a template that encouraged lower courts, especially those uncomfortable with the application of the reasonable basis standard presumption of *Smith*, to narrow the circumstances under which *Smith* would be applicable and expand those circumstances under which a court could find that an ordinance failed to satisfy neutrality or general applicability rules. As a consequence, *Lukumi* could provide a means for getting around *Smith* without appearing to do so.

Critically, the task left unfinished by Justice Kennedy — the definition of the standard to be "used to evaluate whether a prohibition is of general application"[120] — has been taken up by the appellate courts, which have used the opportunity as an invitation to more narrowly define the characteristics of statutes of general applicability. An opinion by Justice Alito, sitting as a judge on the Third Circuit, provides a hint as to the future applicability of this approach. In *Fraternal Order of Police v. Newark*,[121] the court held the policy of the Newark (N.J.) Police Department regarding the wearing of beards by officers violated the Free Exercise Clause of the First Amendment.[122] Under that policy, "exemptions are made for medical reasons . . . but the Department refuses to make exemptions for officers whose religious beliefs prohibit them from shaving their beards."[123] Judge Alito used *Lukumi* to significantly reduce the meaning of *Smith*'s "generally applicable" standard, rejecting the "argument that, because the medical exemption is not an 'individualized exemption,' the *Smith/Lukumi* rule does not apply."[124] Thus, Judge Alito read *Lukumi* as an invitation to substantially narrow the applicability of the general rule of *Smith*, arguing that "[w]hile the Supreme Court did speak in terms of 'individualized exemptions' in *Smith* and *Lukumi*, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations."[125] Of course, the effect is to reduce the meaning of "generally applicable" and thereby broaden a revivified compelling interest standard to the rule at issue.

Yet, the effort to reduce the scope of "general applicability" is not without limits, the most important of which were stressed by Chief Justice Rehnquist in *Locke v. Davey*,[126] in which the Supreme Court held that there was no Free Exercise Clause violation where a state scholarship program denied use of scholarships only in institutions where the holder sought to pursue a degree in devotional theology. The Court rejected the effort to recast *Lukumi* as demanding that states positively accommodate the religious preferences of individuals in constructing benefit programs. In the absence of evidence that a provision had the effect of imposing civil or criminal sanctions, denying ministers or others the right to participate in the political affairs of the community, or requiring an individual to choose between religious beliefs and the receipt of a government benefit, the "general applicability" limits of *Lukumi* is not implicated. In doing so, it distinguished religious education for the ministry with education for other callings.

What Justice Alito suggested in *Fraternal Order of Police* and what Chief Justice Rehnquist explained in *Locke v. Davey* highlight the ambiguous position of *Lukumi* within the Religion Clause jurisprudence. On the one hand, conventional analysis might suggest a modest place for *Lukumi,* as no more than an important instance of a reasonable clarification of the limits of *Smith*'s logic,

and in that sense useful at least against the most severe critics of that decision. On the basis of this reading, *Smith* and *Lukumi* stand as conjoined twins, each fully understandable only in the context of the other. On the other hand, it is plausible to suggest that *Lukumi* provided a framework for effectively reducing *Smith* to its essential and innocuous principle — that neutral and generally applicable regulations need not be justified under a compelling interest standard even if they incidentally burden a religious practice. The focus moves from burdening religion to neutrality and general applicability.

F. Aftermath

On remand from the Supreme Court, the 11th Circuit remanded, in turn, to the district court.[127] "A one dollar compensation was paid to CLBA by acting Mayor Julio Martinez as a symbol of re-conciliation."[128] In addition, the City of Hialeah, and its taxpayers, spent about $375,000 to prosecute the suit.[129]

Much has changed for both the Church and the Hialeah political scene since the Supreme Court's decision, yet the City of Hialeah remains overwhelmingly Latino. Based on 2000 Census information updated through 2004, a little over 62 percent of the city's population identified itself as Cuban or of Cuban ancestry.[130] However, since 1988, the city's population has seen substantial growth by immigrants from other parts of the Caribbean region and Central America. There is still a bit of negative sentiment among the Church's neighbors that flared briefly when the Supreme Court decision was reported in the local newspapers.[131] But, by 1998, the Church had relocated again, to serve its community a block away from Hialeah City Hall.

The Church itself has become a center for the public life of Santería communities, attempting to create an institutional structure "that could be sustained over time and better fit with what they call the 'eurocentric secular framework' of the American religious landscape."[132] In 1995, the "first historic group of forty senior Ifa, Oriate, Iyalosha, and Babalosha, priests and priestesses became officially certified as 'Clergy' members of the Lukumi/Ayoba religion through CLBA."[133] The next year, a radio program was established with transmission to Cuba. In 1998, an article in a local paper reported on efforts to modernize and expand the operations of the Church. It noted the expansion of Church membership among non-Latino individuals, "Lukumi Babalu Aye lists people of seventeen nationalities in its congregation, which . . . includes Italian, British, and Russian immigrants as well."[134] It also noted the expansion of more conventional services performed through the Church, including, "for the first time ever in the United States Santería baptism, marriage ceremonies, and funerals in an institutional setting; burial plots were recently contracted for at Woodlawn West Cemetery in West Dade. The Pichardos also visit inmates in local prisons for religious ceremonies and counseling."[135] The report also noted the growing acceptance of Santería in South Florida, with more local people more openly seeking the services of the local Santeros — including politicians and others.

By 2007, Pichardo might be said to have joined the elite himself — lecturing as an Honorary Africana Research Fellow at Florida International University in Miami.[136] In early 2008, he was a leading force in a decision to reveal a basic text of the Lukumi religion — The Book of Diagnosis in Ifá Divination — which "was drawn from the religion's oral tradition and first published in the 1940s.

The original text and its copies were kept from the public until the present day."[137]

Yet, acceptance has also accentuated rivalry and contests for power to speak for the religion and to chart its course, in which Pichardo has played a role. "It is a power struggle that appears to be tied to the process of modernization and institutionalization. . . . But there are also accusations that behind the bad blood is competition for the money spent on rituals — millions of dollars each year in Dade County."[138] Pichardo and his Church are at the center of this controversy.

Raul Martinez returned as mayor of Hialeah, although he stepped down from office in 2005. His 1991 conviction "was overturned on appeal, two subsequent trials ended in hung juries and a federal prosecutor ultimately dropped the charges."[139] In 1999, while again serving as Mayor, he was involved in a brawl with a Cuban protestor that was caught on tape. "Mayor Raul Martinez leads the charge to create Hialeah county, a battle temporarily sidetracked by an actual brawl. During a traffic-blocking protest, the burly mayor pummels slender butcher Ernesto Mirabal — landing a left and at least five right uppercuts as police officers also jump Mirabal. Prosecutors drop charges against Mirabal after news videos prove he didn't start it."[140] Martinez was active in Democratic Party circles, serving as Parliamentarian of the Democratic National Convention in Boston in 2004.[141] In 2008, he unsuccessfully sought to unseat Lincoln Diaz-Balart (whose cousin is Fidel Castro's oldest son Fidel Ángel (Fidelito) Castro Diaz Balart) in a race for a U.S. Congressional seat.[142]

Many of the members of the Hialeah City Council resumed their lives, some quite successfully, in the conventional sense of the word. Herman Echevarria remained on the Council, pushing through a term limits proposal in 1997, and lost a bid against Martinez for mayor.[143] He became the head of a marketing firm targeting Latino markets and was recognized in 2001 by *Miami Business Review* as one of the top 100 most influential leaders in South Florida.[144] In 2000, Echevarria became Chairman of the Miami-Dade 2000 Marketing Initiative, and, in 2002, he was appointed by the U.S. Small Business Administration (SBA) as a member of the SBA's National Advisory Council, serving a 2-year term. He remained a political foe of former Mayor Raul Martinez.[145] Silvio Cardoso became the President of the Builders Association of South Florida, winning awards for his work from local builders' associations.[146] He, along with Mr. Echevarria, advanced socially as well; both were among those attending a 2001 reception in Miami for the King and Queen of Spain.[147]

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9. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

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11. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

12. For example, the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§2000bb-2000bb-4 (attempting to restore the *Sherbert* test to state actions now covered under *Smith* in connection with both state and federal legislation) rejected on grounds of lack of authority under Section 5 of the 14th Amendment in City of Boerne v. Flores, 521 U.S. 507 (1997).

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15. *Id.*

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