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The Rise and Fall of the Centrality Concern in Free Exercise Jurisprudence

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Abstract. In 1990, *Smith* changed the landscape of free exercise jurisprudence and introduced what this Article describes as the "centrality concern": the principle that judges are in no place to determine the centrality of various activities to a particular religion. However, no legal scholar has recognized the extent to which the centrality concern has been undermined. This Article explains how *Lukumi*, *Locke* and most Circuits have undermined the centrality concern. Implications of this doctrinal anomaly will be illustrated with the example of the less often discussed religion of conservative Christianity, and the Article concludes with some initial recommendations.

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Introduction

According to free exercise of religion jurisprudence,[1] judges are not supposed to be determining what activities are central to a particular religion. Yet the legal literature has not taken notice of the extent to which courts and even the Supreme Court itself has undermined this principle.

In 1990, *Employment Division v. Smith*[2] changed the landscape of free exercise doctrine. *Smith*'s predecessor, *Sherbert v. Verner*,[3] had held that a law placing a substantial burden on religious activity was required to demonstrate a compelling government interest.[4] Justice Scalia, writing for the majority in *Smith*, criticized *Sherbert* because in requiring judges to determine whether there was a substantial burden on religion, judges had to, well, determine whether there was a substantial burden on religion. This required judges to declare by fiat what activities were and were not central to a religion, an inquiry that involved an inappropriate intrusion into matters of the soul. This principle will be referred to in this Article as the "centrality concern":

> What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? . . . Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims. . . . It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.[5]

Severely abrogating *Sherbert*, *Smith* established that regardless of their harmful effects on religion, laws that are neutral and of general applicability are presumptively constitutional.[6] As a result, a state regulation against the ingestion of peyote was upheld despite its destructive effects on the religion of the Native American Church because it was neutral and generally applicable.[7]

Scholars have debated the merits of the centrality concern. Several agree with *Smith*'s rejection of *Sherbert*'s substantial burden inquiry on this basis.[8] On the other hand, opponents of

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[1] The Free Exercise Clause of the First Amendment states that the government "shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend I.

[2] 494 U.S. 872 (1990).

[3] 374 U.S. 398 (1963).

[4] *Id*. at 402-03.

[5] Smith, 494 U.S. at 886-87 (citations and quotations omitted).

[6] "A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (summing up *Smith*). For discussions of the history and evolution of free exercise doctrine, see Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 851-52 (2001) (summarizing free exercise doctrine before and after Smith); Ernest P. Fronzuto, III, *An Endorsement for the Test of General Applicability: Smith II, Justice Scalia, and the Conflict Between Neutral Laws and the Free Exercise of Religion*, 6 SETON HALL CONST. L.J. 713, 723-39 (1996) (summarizing free exercise doctrine from 1878 to the present).

[7] Smith, 494 U.S. at 879-81. For a further discussion of the facts of *Smith*, see Catherine Maxson, Note, *"Their Preservation is Our Sacred Trust" – Judicially Mandated Free Exercise Exemptions to Historic Preservation Ordinances Under Employment Division v. Smith*, 45 B.C. L. REV. 205, 221-23 (2003).

[8] *See*, *e.g.*, Shira J. Schlaff, *Using an Eruv to Untangle the Boundaries of the Supreme Court's Religion-Clause Jurisprudence*, 5 U. PA. J. CONST. L. 831, 890 (2003) (citing centrality concern to reject return to *Sherbert*); Joanne

Smith's centrality concern argue that the *Sherbert* test only required courts to determine whether an activity is "religious," which is a noncontroversial judicial determination;[9] that courts can and should carry out a centrality analysis;[10] or that institutional balancing prevents the centrality concern's parade of horrors from coming into fruition.[11] Still, others argue that the reasonableness of the centrality concern is irrelevant, because it does not outweigh the harms resulting from *Smith*'s severe curtailment of religious freedom.[12]

No scholar, however, has recognized the extent to which the centrality concern has been eroded. As a result of the fall of the centrality concern, there is much room for interpretative ambiguity and doctrinal contradiction over the role of religion-analysis in free exercise cases. Such anomalies allow free exercise litigants to raise arguments concerning the centrality of religious practices, knowing that courts are still secretly or overtly sympathetic to those arguments despite *Smith*'s centrality concern.

Part I will describe how the 1993 Supreme Court case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[13] undermined the centrality concern in two subtle but significant ways. Part II will explain how, over a decade later, the next Supreme Court free exercise case of *Locke v. Davey*[14] further undermined the centrality concern by reanimating *Sherbert*. Part III will show how in the meantime, the majority of Circuit courts have also undermined the centrality concern. Part IV will illustrate the implications of these trends by applying the troubled free exercise doctrine to conservative Christianity, which is rarely discussed in the free exercise context. This Article concludes with some brief recommendations on how the doctrine should proceed.

I. HOW *LUKUMI* UNDERMINED THE CENTRALITY CONCERN

Lukumi subtly but significantly undermined the centrality concern in *Smith* by proposing two types of regulations that should be subject to strict scrutiny: selectively burdensome regulations and regulations motivated by legislative animus against a religion. In discerning whether a regulation falls into one of these two categories, courts must implicitly or explicitly undermine *Smith*'s centrality concern.

Because the *Lukumi* opinion itself was not a model of clarity, this Part must first demonstrate *how Lukumi* established the two types of regulations that were to be subject to strict scrutiny.

C. Brant, *Taking the Supreme Court at its Word: The Implications of RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 17 (1995) (defending centrality concern on basis of judicial right to self-restraint); Fronzuto, *supra* note 6, at 758-59 (citing centrality concern in defense of *Smith*).

[9] Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1952 (2001).

[10] Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505, 510 (1998); James M. Donovan, *Restoring Free Exercise Protections by Limiting Them: Preventing a Repeat of Smith*, 17 N. ILL. U. L. REV. 1, 31-35 (1996) (citing pre-*Smith* cases where Supreme Court had no problem conducting centrality analysis); Howard M. Friedman, *Rethinking Free Exercise: Rediscovering Religious Community and Ritual*, 24 SETON HALL L. REV. 1800, 1805-06 (1994) (decrying court insensitivity to the weightiness of activities to certain religions).

[11] Shivakumar, *supra* note 10, at 510.

[12] *See infra* note 102 (for scholars holding this view).

[13] 508 U.S. 520 (1993).

[14] 540 U.S. 712 (2004).

A. Rejecting the Empty Neutrality and General Applicability "Tests" in *Lukumi*

The facts of *Lukumi* were straightforward: the city of Hialeah passed a series of ordinances banning animal sacrifice, and several adherents of Santeria, a religion requiring animal sacrifice, challenged the ordinances on free exercise grounds.[15] And since *Smith* explained that neutral and generally applicable laws were presumptively constitutional but never explained how to apply those standards,[16] *Lukumi* was responsible for taking on the task.

A cursory structural analysis of the *Lukumi* opinion appears to show that *Lukumi* did accomplish this task. First, it concluded that the regulations were not neutral.[17] Second, it concluded that the regulations were not generally applicable.[18] Lastly, since the regulation was neither neutral nor generally applicable,[19] *Lukumi* subject the regulations to strict scrutiny.[20]

Going beneath the surface, however, it becomes increasingly unclear whether *Lukumi* really did explain the separate neutrality and general applicability standards. Justice Kennedy, writing for the majority, acknowledged, "Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied." Three concurring Justices questioned the relevance of the distinction,[21] Circuit courts have only adhered loosely to *Lukumi* language while ignoring or paying lip service to the distinction,[22] and legal scholars reviewing free exercise jurisprudence treat the distinction with varying levels of weight.[23] As one student note commented, "While

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[15] For a detailed account of the facts leading up to *Lukumi* as well as the disposition of the case, see generally Lino A. Graglia, *Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1 (1996).

[16] "In Smith, the Court assumed—without analysis—that the Oregon peyote law was 'an across-the-board criminal prohibition o[f] a particular form of conduct.' Thus, there was no need to distinguish and precisely define the concepts of neutrality and general applicability." Duncan, *supra* note 6, at 859 (citing Smith, 494 U.S. at 884). "The meaning of the general applicability principle was . . . not clearly developed in the governing cases [from 1997 onwards]. Smith did not explain how to identify laws that fail the test." Blackhawk v. Pennsylvania, 381 F.3d 202, 215 (3rd Cir. 2004).

[17] Neutrality was discussed in Section II-A. Lukumi, 508 U.S. at 532-42 (". . . In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion.").

[18] General applicability was discussed in Section II-B. *Id*. at 542-46 ("We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. . . .").

[19] Technically, a law that fails *either* neutrality *or* general applicability should be subject to strict scrutiny. So an even more straightforward application would have jumped to strict scrutiny immediately after concluding the regulations were not neutral.

[20] Strict scrutiny was applied in Section III. Lukumi, 508 U.S. at 546-47 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. . . .").

[21] "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." *Id*. at 557 (Scalia, J., concurring) (citations omitted). "[T]he Court, until today, has not used exactly that term ['general applicability'] in stating a reason for invalidation." *Id*. at 560 (Souter, J., concurring). *See also id*. at 577-80 (Blackmun, J., concurring) (rejecting the neutrality and general applicability analysis in favor of underinclusive/overinclusive analysis).

[22] *See, e.g.,* Am. Family Ass'n, Inc. v. Federal Communications Commission, 365 F.3d 1156, 1171 (D.C.Cir. 2004) (ignoring general applicability and focusing only on "extreme burdens" to religious faith); KDM v. Reedsport School District, 196 F.3d 1046, 1050-51 (9th Cir. 1999) (ignoring general applicability and focusing on existence of animus and/or an "impermissible burden" on religious faith); San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1031 (9th Cir. 2004) (briefly summarizing the entire Lukumi test without distinguishing between neutrality and general applicability); and Hartmann v. Stone, 68 F.3d 973, 978 (6th Cir. 1995) (same).

[23] *See, e.g.,* Duncan, *supra* note 6, at 863 (noting *Lukumi*'s distinction without explaining it); Renee Skinner, Note, *The Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah: Still Sacrificing Free Exercise*, 46 BAYLOR L. REV. 259 (1994) ("Kennedy refused to address what would be a generally applicable law and instead provided a

the overall vote reflects a 9-0 decision, the internal reasoning was far from unanimous or even cohesive."[24]

Therefore, it is less helpful to mechanically dissect the opinion to discern when a regulation is considered "neutral" or "generally applicable" and therefore constitutional. Instead, this Part will describe the two types of regulations that *Lukumi* described throughout its byzantine opinion as *unconstitutional*.[25]

B. Two Types of Unconstitutional Regulations

Kennedy's characterization of the type of regulations that are unconstitutional relies a great deal on seemingly intuitive terminology and concepts without specifically explaining what they mean, and unfortunately, much of the legal literature reviewing *Lukumi* interpret it by parroting this meandering approach.[26] Therefore, this section will specify the underlying concept behind much of Kennedy's terminology.

1. "Selectively burdensome regulations"

Most of the repeated concepts and terms are employed to denounce regulations that are unconstitutional because the activity they proscribe is almost entirely made up of activity practiced for religious reasons. (This Article will refer to such regulations as "selectively burdensome regulations" for the sake of simplicity.) Determining whether a regulation is selectively burdensome first requires an examination of the sphere of activity being regulated. Then, the portion of this sphere of regulated activity that comprises actions motivated by religion is measured. If this portion nearly encompasses the entire sphere of regulated activity, then the regulation is selectively burdensome.[27] This type of regulation was illustrated by Kennedy in a myriad of ways.

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simple conclusory assertion that these ordinances are not generally applicable"); Maxson, *supra* note 7, at 224-25 (summarizing *Lukumi* without making clear distinction between neutrality and general applicability); Gabrielle Giselle Davidson, Note, *The "Extreme and Hypothetical" Come to Life: Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 43 CATH. U. L. REV. 641, 662-668 (1994) (treating neutrality and general applicability separately).

[24] Skinner, *supra* note 23, at 260. "Imprecision of statement fostered confusion in the Court's discussion of the applicable law." Graglia, *supra* note 15, at 33.

[25] This Article adopts the general assumption that regulations subject to strict scrutiny will fail the test and therefore be unconstitutional, primarily for the sake of rhetorical efficiency. While not all regulations subject to strict scrutiny will fail, the strict scrutiny concept is doctrinally independent of the issues examined in this Article.

[26] *See, e.g.,* Kenneth Karst, *Religious Freedom and Equal Citizenship: Reflections on* Lukumi, 69 TUL. L. REV. 335, 341-43 (1994); R. Ted Cruz, *Animal Sacrifice and Equal Protection Free Exercise:* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S.Ct. 2217 (1993)*, 17 HARV. J. L. & PUB. POL'Y 262, 265-67 (1994); Laura A. Colombell, Note, *Retracting First Amendment Jurisprudence Under the Free Exercise Clause: Culmination in* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah *and Resolution in the Religious Freedom Restoration Act*, 27 U. RICH. L. REV. 1127, 1144-47 (1993). The lack of specificity is probably due to the easy nature of the case. *See infra* note 85.

[27] In this scenario, it does not matter what the stated or hidden purpose of the legislators were; in fact, it is assumed that the purposes are legitimate. "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." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993) (emphasis added).

First, this concept was supported by the line of First Amendment cases that Kennedy cited as models for determining whether a regulation was generally applicable.[28] In each case, the regulated activity was entirely practiced by a constitutionally protected group. For example, a law imposing a use tax on the use of "paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication"[29] was subject to strict scrutiny, because it "singled out the press for special treatment."[30] Another law exempting religious organizations that received more than half of their total contributions from members or affiliated organizations from a regulation was subject to strict scrutiny, because "[i]t is plain that the principal effect of the fifty per cent rule . . . is to impose the registration and reporting requirements of the Act on some religious organizations but not on others."[31]

Second, this concept was captured by the "religious gerrymander" doctrine that Kennedy repeatedly invoked: "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."[32] This term was originally penned by Justice Harlan, who described religious gerrymandering as a way to determine "whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter."[33] Again, the focus was on the activities that the regulation prohibits and whether those activities are predominantly practiced by religious institutions. As applied in *Lukumi*: "[A]lmost the only conduct subject to Ordinances 87-40, 87-52, and 87-71 is the religious exercise of Santeria church members. . . . The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice."[34]

Third, Kennedy repeatedly denounced regulations that "target" religion or regulations whose "object" is the suppression of religion. Kennedy employed the terms "target" and "object" interchangeably and frequently throughout the opinion without defining them. In some cases, these terms were employed to communicate the concept of selectively burdensome regulations.[35] In other instances, Kennedy employed the terms to illustrate the *process* for determining whether a regulation is selectively burdensome – examining both the text of the

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[28] "The principle underlying the general applicability requirement has parallels in . . . First Amendment jurisprudence." *Id*.

[29] Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. 575, 578 n.2 (1983).

[30] *Id*. at 582.

[31] Larson v. Valente, 456 U.S. 228, 253 (1982).

[32] Lukumi, 508 U.S. at 534 (citing Walz v. Tax Commission of City of New York, 90 S.Ct. 1409, 1425 (1970) (Harlan, J., concurring)).

[33] Walz, 90 S.Ct. at 1425 (Harlan, J., concurring).

[34] Lukumi, 508 U.S. at 535-36.

[35] "There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct." *Id*. at 533. "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." *Id*. at 534. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id*. "The design of these laws accomplishes instead a 'religious gerrymander,' an impermissible attempt to target petitioners and their religious practices." *Id*. at 535 (internal citations omitted). "It would be implausible to suggest that the three other ordinances, but not Ordinance 87-72, had as their object the suppression of religion." *Id*. at 540. "The ordinances had as their object the suppression of religion." *Id*. at 542. "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." *Id*. at 546.

regulation (to see which activities are proscribed) and how the text is applied (to see whether the activities actually proscribed comprise solely religious activity).[36]

Lastly, at one point Kennedy specifically cited *Smith*'s characterization of unconstitutional regulations,[37] which also illustrated the concept of the selectively burdensome regulation. The section of *Smith* cited by Kennedy held that a state would be violating free exercise if it banned activities "only when they are engaged in for religious reasons, or only because of the religious belief that they display."[38] Therefore, regulations which restrict *only* activities that are religious are constitutionally suspect. *Smith* gave the examples of a regulation forbidding the "casting of statues that are to be used for worship purposes, or to prohibit bowing down before a golden calf."[39] In each of those examples, Scalia specifically inserted a religious component ("used for worship purposes" and "bowing down") in the hypothetical regulations such that it would *only* encompass activities that were religious.

In sum, the bulk of the *Lukumi* opinion was devoted to castigating selectively burdensome regulations.[40]

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[36] "To determine the object of a law, we must begin with its text" *Id*. at 533. "[T]hough use of the words 'sacrifice' and 'ritual' does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion." *Id*. at 534. "There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria." *Id*. "Apart from the text, the effect of a law in its real operation is strong evidence of its object." *Id*. at 535. "It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered." *Id*. "[A]dverse impact will not always lead to a finding of impermissible targeting." *Id*. "[T]the ordinances by their own terms target this religious exercise" *Id*. at 542.

[37] It is worth noting that the bulk of *Smith* described regulations that were *constitutional*, so that what *Smith* considered to be *unconstitutional* was not immediately apparent, excluding the two now well-known exceptions to the *Smith* rule. If a regulation contains a system of individualized exemptions, or if the regulation implicates the free exercise of religion in addition to another constitutional right (the "hybrid" rights doctrine), then strict scrutiny applies. The bulk of free exercise literature discussing the inconsistency of the free exercise doctrine focuses on these exemptions. "Is the exempted secular activity really analogous to the religious claimant's activity? The literature is dominated by the incarnations of this question; it usually takes the form of a commentator pondering how numerous and severe the secular exceptions have to be before the law is considered not generally applicable. This question is one that has dominated the free exercise literature." Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. L.J. & PUB. POL'Y 627, 639 (2003). *See also id*. at 639-44 (surveying the literature on the individualized exemptions exception). "The hybrid-rights doctrine has been routinely criticized as untenable, and its adoption has often been viewed as the way the Smith Court chose to avoid having to overrule previous cases. Some circuit courts, believing it fatally flawed, have ignored it completely. A whole generation of student notes has followed the hybrid-rights exception closely; the consensus seems to be that the doctrine is of little use to religious claimants. Lastly, even its originator, Justice Scalia, seems to have given up on the idea." *Id*. at 630-31 (citing cases and scholars). Therefore, this Article does not discuss them.

[38] Employment Division v. Smith, 494 U.S. 872, 877 (1990).

[39] *Id*. at 878.

[40] Many interpretations of *Lukumi* focus on its tests of "underinclusivity" and "overinclusivity." *See, e.g.,* Duncan, *supra* note 6, at 868-89 (describing underinclusivity); Colombell, *supra* note 26, at 1147 (describing overinclusivity). In these tests, the court examines the proffered legislative interest behind the regulation and decides whether the interest is overinclusive in that it restricts more activity than necessary, or whether it is underinclusive in that it does not restrict enough activity. These analyses are meant to expose the proffered legislative interests as a sham. However, since the selectively burdensome inquiry *assumes* that the legislative interests are legitimate, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993) ("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") (emphasis added), it does not appear as necessary to prove underinclusivity or overinclusivity. Furthermore, it is relatively easy to proffer legitimate legislative interests. Lastly, these concepts often blend into *Smith*'s "individualized exemptions" doctrine, which is outside the scope of this Article. *See* Duncan, *supra* note 6, at

2. Regulations motivated by animus towards religion

The second type of regulation is unconstitutional because the legislators drafting the regulateon had specific animus towards a religion. Completely unlike the first type of regulation, the motives of the legislators matter. And under this analysis, it does not matter what the regulation *actually* regulates (although it is fair to assume that if an entire legislature has animus towards a religion, they will focus the regulation on the activities of that religion).

This is perhaps the clearest part of the opinion, since Kennedy explicitly devoted a separate section, Section II-A-2, to describe this inquiry.[41] Incorporating the animus doctrine from Equal Protection jurisprudence, he described a series of comments from city council members displaying manifest animus against the Santeria religion.[42] (Confusingly, the word "object," used earlier to describe selectively burdensome regulations, was used in this section to describe animus as well.)[43]

The animus concept made its appearance in other parts outside Section II-A-2 as well. "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[44] Kennedy acknowledged that the regulation "does implicate, of course, multiple concerns unrelated to religious animosity,"[45] and in summing the neutrality test, he reiterated, "The pattern we have recited discloses animosity to Santeria adherents and their religious practices."[46] His conclusion also strictly warned that such regulations would be suspect "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices."[47]

It is also possible that at the point where Kennedy cited *Smith*'s characterization of unconstitutional regulations, he actually construed *Smith* to be denouncing regulations motivated by animus.[48] Kennedy's adaptation of *Smith*'s formulation was slightly different: "if the object of a law is to infringe upon or restrict practices *because of their religious motivation*, the law is not neutral."[49] In Kennedy's adaptation, "because of" modifies the act of restricting, so if a legislature restricts practices "because of" the "religious motivation" behind the practices, then it

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872-74 (describing Newark, 170 F.3d 359 (3d Cir. 1999), which applies underinclusivity analysis as conflated with the individualized exemptions doctrine). *See also supra* note 37 (describing individualized exemptions doctrine).

[41] Lukumi, 508 U.S. at 540-42.

[42] *See id*.

[43] "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." *Id*. at 540. "Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence." *Id*. "These objective factors bear on the question of discriminatory *object*." *Id*.

[44] *Id*. at 534.

[45] *Id*. at 535.

[46] *Id*. at 542.

[47] *Id*. at 547.

[48] If this was Kennedy's interpretation of *Smith*, it would be wrong, since Scalia, the author of *Smith*, has repeatedly denounced the animus inquiry. "As I have noted elsewhere, it is virtually impossible to determine the singular 'motive' of a collective legislative body." *Id*. at 558 (Scalia, J., concurring) (citing Edwards v. Aguillard, 482 U.S. 578, 636-639 (1987) (Scalia, J., dissenting)). "The Court does not explain why the legislature's motive matters, and I fail to see why it should." Locke v. Davey, 540 U.S. 712, 732 (Scalia J., dissenting). Of course, the Supreme Court often reinterprets past decisions.

[49] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993). This adaptation is repeated twice. "[T]he protections of the Free Exercise Clause pertain if the law . . . regulates or prohibits conduct because it is undertaken for religious reasons." *Id*. at 532. "[A suspect regulation] seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation" *Id*. at 538.

means that something about the religious motivation incited the legislature to restrict the activity. In other words, the legislature possesses an *animus* towards that religion. This interpretation's validity is strengthened by the fact that Kennedy then explicitly adopted the "because of" phraseology in Section II-A-2.[50]

C. How Each Type of Inquiry Undermines the Centrality Concern

Having established the two types of regulations that *Lukumi* denounced as unconstitutional, this Part now turns to how challenging regulations as falling into one of these two categories undermines the centrality concern.

1. Challenging selectively burdensome regulations requires a centrality inquiry to determine what activities are religious

When a class of persons claims that a regulation is selectively burdensome, they claim that the regulation has encircled a set of activities that is exclusively "religious." However, in hearing this very claim, the court must determine, implicitly or explicitly, whether such "religious" activities are central to the corresponding religion, directly undermining the centrality concern in *Smith*. A religion is not an indivisible unit; it invariably consists of activities that are central and activities that are not. Activities central to a religion tend to be undisputedly a part of that religion by both insiders and outsiders of that religion,[51] whereas activities that are not central to a religion are more contested, again by both insiders and outsiders of that religion.[52] If a regulation restricts activities that are a part of religion but not central to it, it is difficult to show that such a regulation is selectively burdensome when even adherents within that religion are not clear on the religiosity of the action.

It is telling that Kennedy felt compelled to justify the centrality of animal sacrifice to Santeria. Looking to religious tradition, Kennedy specifically noted that "[t]he sacrifice of animals as part of religious rituals has ancient roots."[53] "Given the historical association between animal sacrifice and religious worship, petitioners' assertion that animal sacrifice is an integral part of their religion cannot be deemed bizarre or incredible."[54] In other words, he was

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[50] *Id*. at 540 ("That the ordinances were enacted 'because of,' not merely 'in spite of' their suppression of Santeria religious practice . . ."); *id*. at 542 ("This history discloses the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation."). Regardless of whether Kennedy used "because of" to describe selectively burdensome regulations or regulations motivated by animus, this Article covers both interpretations. This dual interpretation of "because of" has been articulated in the race context. In interpreting the terms "because of race," the Seventh Circuit stated: "The narrow view of the phrase is that a party cannot commit an act 'because of race' unless he intends to discriminate between races [similar to animus]. . . . The broad view is that a party commits an act 'because of race' whenever the natural and foreseeable consequence of that act is to discriminate between races, regardless of his intent [similar to selectively burdensome regulations]." Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

[51] For instance, the veneration of Mary is arguably central to Catholicism, as evidenced by the fact that few self-identified Catholics would dispute her veneration.

[52] For instance, the ban on the use of birth control is arguably not central to Catholicism, as evidenced by the fact that Catholicism's official ban on the use of birth control is often ignored by many Catholics. *See generally* Frank D. Royland, *Many Catholics Who Loved Pope Ignored His Ban on Birth Control*, THE BALTIMORE SUN, April 17, 2005, *at* http://www.postgazette.com/pg/05107/489014.stm.

[53] Lukumi, 508 U.S. at 524.

[54] *Id*. at 531 (citations omitted).

determining whether animal sacrifice was sufficiently *central* to the Santeria religion. He did not stop there, however; while giving tradition tremendous weight in determining what activities were sufficiently religious in Santeria, he granted a special dispensation to Islam, noting that animal sacrifice was also a part of "*modern* Islam."[55] Perhaps Kennedy felt that it was entirely within the "judicial ken"[56] to determine what activities carry weight in different religions. Regardless of Kennedy's motivations for this section, establishing the centrality of animal sacrifice to Santeria was necessary to hold the Hialeah ordinances to be selectively burdensome.

It is true that there is an uncontroversial "sincerity" inquiry in cases involving religion. The plaintiff often has to meet a threshold test showing that her religious claims are genuine and not a sham. For instance, in *Hartmann v. Stone*,[57] a Sixth Circuit case, the plaintiff had to show a "sufficient interest" in their free exercise right to send their children to a Christian day care center.[58] *Lukumi* itself also alluded to such an inquiry.[59] However, the sincerity inquiry is an *individual* inquiry – it examines whether the individuals are sincere in their claim. Claiming that a regulation is selectively burdensome requires showing that it restricts not activities practiced by one person,[60] but activities central to the religion of a *collective* religious body. Furthermore, *Lukumi* had little to do with sincerity – Kennedy did not remand the case to determine whether or not every Santeria adherent in the city of Hialeah had sincere religious beliefs, for instance. Instead, he determined that animal sacrifice was central to the operation of Santeria. "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."[61]

2. Challenging regulations motivated by animus towards religion requires determining the centrality of actions or ideology to religion

Furthermore, challenging regulations motivated by anti-religion animus also requires courts to determine what is central to a religion. As stated previously, Kennedy imported the animus doctrine from Equal Protection jurisprudence to describe the second type of unconstitutional regulation. Specifically, he cited *Personnel Administrator of Mass. v. Feeney*,[62] a sex discrimination case that ruled that regulations passed "because of" its "adverse effects upon an identifiable group [here, women]" were unconstitutional, whereas regulations passed "in spite of" the harm towards women were constitutional.[63] Applied to free exercise cases, regulations passed "because of" their suppression of a religious practice would be subject to strict scrutiny.[64]

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[55] *Id*. at 525 (emphasis added).
[56] Employment Division v. Smith, 494 U.S. 872, 886 (1990).
[57] 68 F.3d 973 (6th Cir. 1995).
[58] *Id*. at 979 n.4 (determining that involving children in activities with religious content is a sufficient interest). *See also* Tenafly Eruv Association v. Borough of Tenafly, 309 F.3d 144, 170 (3rd Cir. 2002) (determining that inability to attend synagogue on the Sabbath without an eruv "easily suffices" for purposes of the sufficient interest test).
[59] "Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners' First Amendment claim." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).
[60] Claiming that a regulation was so designed as to restrict the activities of a single person is more akin to a "class of one" Fourteenth Amendment equal protection claim. *See* Village of Willowbrook v. Olech, 528 U.S. 562 (2000).
[61] Lukumi, 508 U.S. at 534.
[62] 442 U.S. 256 (1979).
[63] *Id*. at 279.
[64] This formulation is borrowed directly from *Lukumi*: "[T]he ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice." Lukumi, 508 U.S. at 540 (quotations omitted).

In the sex context, the target of the animus can either be women themselves or the actions of women. The latter type of animus is not focused upon as much, but it applies most often in the employment context, when supervisors expect female employees to act in a way that conforms to a gender stereotype.[65] The contours of this doctrine are outside the scope of this Article, but it is sufficient to note that in this latter inquiry, courts must make an implicit determination of whether the expectation is a gender stereotype. This implicit determination is not always acknowledged perhaps because it is usually apparent when such a stereotype exists.[66]

The religion context is similar, though there are three possible targets of the animus – the adherents of a religion,[67] the actions of that religion, and the ideology[68] of that religion. For instance, when one of the Hialeah council members stated that in prerevolution Cuba, "people were put in jail for practicing [Santeria]" and the audience applauded,[69] this was an example of animus towards the adherents of a religion. The part of the Hialeah resolution stating that "[t]his community will not tolerate religious practices which are abhorrent to its citizens . . ."[70] was an example of animus towards the actions of a religion. And the comment by the police department chaplain that Santeria was a "sin, foolishness, an abomination to the Lord, and the worship of demons"[71] was an example of animus towards the ideology of a religion. It is the latter two forms of animus that undermine the centrality concern.

Assume that in a free exercise case, a class of plaintiffs presents a series of comments made by legislators to support their claim of animus. In response, the defendants claim that they did not desire to harm the adherents of the religion or hate the religion *per se*, but that they merely opposed the *actions* of the religion as against public morals. Furthermore, they claim that they opposed its *ideology* as a political matter, just as they might oppose the ideology of a political party. After all, even the most vitriolic hostility towards the tenets of the Republican Party, for instance, does not render a regulation unconstitutional.

In response to this defense, the plaintiffs can state that there is simply no practical difference in stating that animus was exhibited "merely" towards the actions and ideology of a religion and not the religion itself (or its adherents, for that matter). After all, in *Lukumi*, Kennedy did not make these distinctions. Like many reasonably minded people, he recognized that animus towards an action or ideology of a religion is practically inseparable from animus towards the adherents of that religion. The following statement from *Lukumi* illustrates this inseparability: "Although the *practice* of animal sacrifice may seem abhorrent to some, religious *beliefs* need not be acceptable, logical, consistent, or comprehensible to others in order to merit

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[65] *See, e.g.,* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[66] "Judge Gesell also found, however, that sexual stereotyping influenced the firm's decision to deny her partnership. One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school. Most critically, Thomas Beyer, the partner who explained to Hopkins why the Policy Board had shelved her candidacy for partnership, told her that she should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 871 (2004) (quotations omitted).

[67] This Article assumes functional inseparability between "the religion itself" and the adherents of that religion, similar to the functional inseparability between "the female gender" and women.

[68] Ideology is defined in this Article as a "set of doctrines or beliefs that form the basis of a political, economic, or other system." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th ed. (2000), *available at* http://dictionary.reference.com/search?q=ideology (last visited Apr. 20, 2005).

[69] Lukumi, 508 U.S. at 541.

[70] *Id*. at 542.

[71] *Id*. at 541 (quotations omitted).

First Amendment protection."[72] To hold otherwise would be to validate the cliché, "hate the sin, love the sinner."[73] The evidence in the *Lukumi* case simply reinforces the point; even if each statement of animus were placed in separate categories, they were all cut from the same unconstitutional cloth of animus toward religion.

The plaintiff response is reasonable, but it makes a key assumption: that the actions and ideology being attacked by the legislators are *central* to the religion. Animus towards actions (i.e. public nudity) or animus towards ideology (i.e. Republican Party example) *in and of themselves* is perfectly legitimate. In order to create the critical link between this legitimate animus to the illegitimate animus against the religious adherents, there *must* be an existing link between the actions/ideology and the religion itself that is so constitutive of the religion as to be inseparable. In other words, the actions or ideology must be *central* to that religion.

The path to determining whether a regulation is unconstitutional under *Lukumi* requires a centrality analysis, and how *Lukumi* undermined the centrality concern in this way was subtle but significant. However, the next Supreme Court free exercise case was much bolder.

II. HOW *LOCKE* UNDERMINED THE CENTRALITY CONCERN

The erosion of the centrality concern was further advanced with the Court's next post-*Smith* free exercise case over a decade later, *Locke*. Decided in 2004, *Locke* held that a Washington statute creating a college scholarship program was constitutional despite the fact that it explicitly excluded students pursuing a degree in devotional theology.[74] In order to understand the Court's continuing erosion of the centrality concern in *Locke*, one must realize that the underlying concern behind *Sherbert* is just as intuitively appealing as it was before *Smith* significantly curtailed its operation. The concern behind *Sherbert* was simply that it would be wrong to force someone to endure a burden on their religion so great as to make them abandon the very precepts of their religion, which is hereinafter noted as the "preservation concern".[75]

Although this preservation concern motivated the creation of the substantial burdens test of *Sherbert*,[76] *Smith*'s virtual burial of *Sherbert* was unable to keep the preservation concern in its grave.

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[72] *Id*. at 531 (quoting Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 714 (1981), quotations omitted) (emphasis added).

[73] This statement is sometimes employed by Christians who believe that homosexuality is a sin. In response to some gay rights activists who accuse such Christians as harboring hatred towards gay people, some Christians will respond with the cliché, "hate the sin, love the sinner." In other words, they "hate" the sin of homosexuality but nonetheless "love" the practitioner of the sin, that is, the homosexual. Some gay people find this distinction irrelevant.

[74] Locke v. Davey, 540 U.S. 712, 716 (2004). For a more detailed discussion of the facts of *Locke*, see Martha McCarthy, *Room for "Play in the Joints" – Locke v. Davey*, 33 J.L. & EDUC. 457, 457-58 (2004).

[75] *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (discussing the religious burden on plaintiff). On the other hand, Kenneth Karst posits that neutrality is the intuition driving Sherbert. Karst, *supra* note 26, at 344 ("people who are harmed are sure to appeal to the nation's general aspirations toward equal treatment, toward neutrality. Sherbert's 'strict scrutiny' requirement responded to just such an appeal"). *But see* Alan Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values – a Critical Theory of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 246-47 (1999) (critiquing neutrality theory). Karst's neutrality intuition examines the *relative* weight of burdens amongst different religions, whereas the preservation intuition examines the *absolute* weight of a burden on a religion.

[76] "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable." Sherbert, 374, U.S. at 404.

A. *Locke*'s Resurrection of the Preservation Concern

Locke encompassed several constitutional doctrines, as evidenced by the variety of interpretations made by the legal community. Some have interpreted it as primarily a funding case,[77] while scholars viewing it as a free exercise case focus on the way *Locke* appeared to change the definition of neutrality[78] or the way it narrowed the entire free exercise inquiry into the issue of animus.[79]

However, the literature has not recognized the most glaring feature of *Locke*: its virtual transformation of *Smith-Lukumi*'s neutrality test into *Sherbert*'s substantial burdens test. When it supposedly applied *Lukumi*'s neutrality test, *Locke* analyzed the extent of the regulation's burden on the claimant's religion, a blatant *Sherbert*-style substantial burdens kind of analysis. The Court held that the Washington regulation did not lack facial neutrality because the burden placed upon [the Christian?] religion in *Locke* was far less than the burden that was placed upon Santeria in *Lukumi*:

> In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. 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 type of *religious service or rite*. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has *merely* chosen not to fund a distinct category of instruction.[80]

The preservation concern won out: the burden was just not that bad.

While plenty of scholars and treatises have recognized this curious use of burden-differentiation to determine facial neutrality,[81] they either gloss over this use[82] or conflate it with

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[77] *See, e.g.,* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 162 (2004) ("Davey is a funding case. It authorizes discriminatory funding, but it does not authorize discriminatory regulation, and it does little to clarify the [religious] regulation cases."); Susanna Dokupil, *Function Follows Form: Locke v. Davey's Unnecessary Parsing*, 2004 CATO SUP. CT. REV. 327 (2004) ("[P]rivate parochial schools remain at the center of the debate [over school choice]. . . . Locke v. Davey is a case at the heart of that debate.").

[78] "They read Lukumi to mean that any time a statute even mentions religion, or uses religion or houses of worship as a separate category within its framework, strict scrutiny must automatically be applied. This position was always wrong, and the Court was right to repudiate it in Locke." Marci Hamilton, *The Supreme Court Issues a Monumental Decision: Equal State Scholarship Access for Theology Students Is Not Required by the Free Exercise Clause,* FINDLAW (Feb. 27, 2004), *at* http://writ.news.findlaw.com/hamilton/20040227.html (last visited Jan. 27, 2005). "Locke should be just the sort of rare case contemplated in Smith. The scholarship program is anything but generally applicable as applied to Davey." Bernard James, *First Amendment*, THE NATIONAL LAW JOURNAL, Aug. 2, 2004, at S10.

[79] *See, e.g.,* Andrew A. Beerworth, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise,* 26 T. JEFFERSON L. REV. 333, 385 (2004); Hamilton, *supra* note 78.

[80] Locke v. Davey, 540 U.S. 712, 720-21 (citations omitted, emphasis added).

[81] Even though Laycock argues that Locke is not a free exercise case along the lines of Smith-Lukumi, he still arrives at the same conclusion: "[F]acial discrimination against religion is presumptively unconstitutional if, and only if, the discrimination burdens a religious practice. There are multiple ways to show such a burden, but . . . a mere refusal to fund does not impose a *substantial burden*." Laycock, *supra* note 77, at 214 (emphasis added).

a finding of animus,[83] even though animus is not mentioned in this section at all. None have made the implicit connection to *Sherbert*.

Animated by the preservation concern, *Locke* essentially placed itself on one end and *Lukumi* on the other end of a spectrum of religious burdens. On the one end is a harmless regulation; one that prevents some members of a religion from obtaining some money to help them become clergy. On the other end is a regulation that outright prohibits a religion from conducting worship services central to its functioning as a faith. *Locke*'s facial neutrality test became *Sherbert*'s substantial burdens test: Regulations on the *Locke* end of the spectrum are mild and permissible, while those on the *Lukumi* end are harsh and impermissible.

B. Tracing the Preservation Concern from *Smith* to *Lukumi* to *Locke*

Locke's reanimation of *Sherbert*'s preservation concern and its disregard of *Smith*'s centrality concern can be traced to the curious operation of *Smith* vis-à-vis *Lukumi*.

Smith was a difficult case. An Oregon regulation banned the use of peyote, despite the fact that peyote use was central to the religion of the Native American church. While an ordinary person might not wish to see the Native American church virtually eliminated by the regulation (the preservation concern),[84] *Smith* held that a judge would have to rise above this natural concern, see that the regulation was neutral and generally applicable, and rule that it was therefore valid, for it is inappropriate for judges to act as clergy (the centrality concern).

Lukumi was not a difficult case. In one sense, *Lukumi* "spoiled" the Court – it was the Court's first opportunity to implement *Smith*'s difficult new dynamic, but the facts of the case were so easy[85] that the Court did not have to. As Lino Graglia notes, "The Justices' purported finding of religious persecution by the people of Hialeah certainly made for an easy case, essentially leaving nothing for the Court to decide. Specifically, it enabled the Court to avoid considering the application of its unpopular Smith decision of three years earlier."[86] Both the preservation concern—the intuitive desire to prevent the elimination of the Santeria church—*and*

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[82] "Seven Justices, in Locke, did not believe that the denial of aid imposed *any real burdens on persons* based on their religious beliefs." 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW – SUBSTANCE & PROCEDURE § 21:6 (4rd ed. Supp. 2005) (emphasis added). *See also* Beerworth, *supra* note 79, at 382 ("Evidently, a longing to obtain a theological degree does not qualify as a 'religious conviction.'"); Carlos S. Montoya, *Locke v. Davey and the "Play in the Joints" Between the Religion Clauses*, 6 U. PA. J. CONST. L. 1159, 1165, 1173 (2004) (citing *Locke*'s limiting of neutrality to when "a statute was enacted to burden religion").

[83] *Id*. at 1173 (citing *Locke*'s limiting of neutrality to "cases where there is evidence of animus towards religion"). *See also* Hamilton, *supra* note 78 (interpreting this as using the weightiness of the burden as evidence of whether animus existed). Though I ultimately agree that animus is a determining factor, I disagree with Hamilton's reasoning. Her interpretation ignores the fact that this paragraph makes no mention of animus and takes place prior to the discussion on taxpayer-funded clergy, which is prior to a specific discussion on animus.

[84] "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 . . . judges weigh the social importance of all laws against the centrality of all religious beliefs." Employment Division v. Smith, 494 U.S. 872, 890 (1990).

[85] "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." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 580 (Blackmun, J., concurring) (citation omitted). "In Hialeah, however, the Court not only reached the surprising conclusion that the city's ban on animal sacrifice was unconstitutional, but it did so unanimously and with apparent ease. The decision was so easy . . ." Graglia, *supra* note 15, at 3.

[86] *Id*. at 30.

the centrality concern—restraint from judging whether animal sacrifice was central to Santeria—could be satisfied, and they were not at odds. Because the regulation was so blatantly unconscionable, *Smith* allowed the Court to save Santeria without a guilty conscience; as judges, they stayed the course and did not act inappropriately as clergy.[87]

Ten years after *Lukumi*, *Locke* arrived with a set of facts that exactly fit the sort of difficult case that *Smith* sought to equip the Court to handle. A regulation prevented a student from receiving a few funds to help him become a minister. Even though judges were not allowed to determine what activities were central to a religion, an ordinary observer would not be able to help but notice how light of a burden the *Locke* regulation imposed as compared to the one in *Lukumi*.[88] *Smith*'s centrality concern required the Court to ignore the obvious lightness of the burden and strike down the law for not being facially neutral. Nonetheless, the Court failed the test – without any experience over the past 14 years in suppressing the preservation concern, the Court apparently could not resist allowing the preservation concern to dominate the centrality concern in *Locke*.

III. HOW CIRCUIT COURTS HAVE UNDERMINED THE CENTRALITY CONCERN

Lower courts have not fared much better at suppressing the preservation concern. A pattern of *Sherbert*-style inquiries into substantial burdens existed in lower courts even after *Smith*.

The Third Circuit has tattled on its sister Circuits' post-*Smith* disregard of the centrality concern: "Notwithstanding the Supreme Court's admonition in *Smith* against judicial inquiries into the centrality of religious practices, a number of circuit courts persist in imposing a substantial burden requirement in various contexts."[89] The court's list of circuits guilty of this violation included the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh, and the D.C. Circuits. These cases smuggled in the substantial burden requirement through various cloaks: a threshold requirement,[90] an exception for non-regulatory state actions,[91] state constitutional requirements,[92] and an exception for non-generally applicable regulations.[93] Some blatantly ignored *Smith* or *Lukumi* altogether, imposing its own version of *Sherbert*.[94]

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[87] At least not explicitly. As demonstrated earlier, *Lukumi* still managed to reanimate the centrality concern in subtle ways. *See supra* Part I.

[88] One commentator, just before the Supreme Court decided Locke, recommended taking such an intuition into account:

> [The Scholarship's] revocation did not restrict Davey's right to pursue his religion or coerce him from its practice. Rather, revoking the Scholarship made Davey's choice of major slightly more expensive; after the revocation, Davey had to work fewer than three additional hours a week. During these three hours, Davey could not go to class, study, or associate with his fellow believers for worship.

Katie Axtell, Note, *Public Funding for Theological Training Under the Free Exercise Clause: Pragmatic Implications and Theoretical Questions Posed to the Supreme Court in Locke v. Davey*, SEATTLE U. L. REV. 585, 602 (2003). *See also* Dokupil, *supra* note 77, at 340 ("in *Lukumi*, the law in question made a particular religious exercise illegal, while here, Washington merely excluded theology from a funding program, leaving Davey and other theology majors free to believe or worship however they wished").

[89] *See* Tenafly Eruv Association v. Borough of Tenafly, 309 F.3d 144, 171 n.31 (3d Cir. 2002) (listing post-Smith Circuit cases implementing substantial burden requirement). *See also* Laycock, *supra* note 77, at 212 n.371-72 (listing state cases applying pre-*Smith* law).

[90] Levitan v. Ashcroft, 281 F.3d 1313, 1320 (D.C.Cir. 2002).

[91] Am. Family Ass'n, Inc. v. City and County of San Francisco, 277 F.3d 1114, 1124 (9th Cir. 2002).

[92] Altman v. Minn. Dep't of Corrections, 251 F.3d 1199, 1204 (8th Cir. 2001) (applying state constitutional free exercise provision that only applies to state action that "excessively burdens" religious beliefs).

This Article will review a few cases that were not placed on the Third Circuit's extensive catalogue of violations, and they should suffice to illustrate this point. In 2004, the D.C. Circuit, ruling on a FCC radio broadcasting license policy, used the religious gerrymandering concept to examine both the extent of a burden on religion as well as whether the activity was "inherent" in the character of the religion. "[T]he burden the point system foists on religious organizations is *relatively modest*. . . . [N]othing inherent in their religious character forces them to structure their networks in this way."[95]

In 1999, the Ninth Circuit created its own amalgamation of free exercise and establishment clause doctrine in order to evaluate whether a regulation would place an impermissible burden on a family's religion. KDM, a visually impaired student attending a sectarian school, was denied special education services. However, the court felt that KDM's situation wasn't so detrimental to his religion, since the district was willing to provide adequate special education services at a fire hall down the street twice a week for ninety minutes. Furthermore, "he could safely travel there—indeed, the vision specialist comes to KDM's school, picks him up and then returns him to his school. . . . In sum, there is no showing that application of the regulation to KDM's case burdens KDM's or his parents' free exercise of their religion."[96]

Although the Eleventh Circuit specifically applied *Smith-Lukumi* in a 1994 case,[97] it also concurrently examined the regulation's burden on religion by applying its own circuit-specific free exercise doctrine as established by the older case of *Grosz v. City of Miami Beach*.[98] The *Grosz* test required the court to balance the competing governmental and religious interests,[99] forcing the court to weigh the extent a government regulation was hurting a religion:

> The *burden* on First Assembly to either conform its shelter to the zoning laws, or to move the shelter to an appropriately zoned area, *is less than the burden* on the County were it to be forced to allow the zoning violation. Thurs, under the *Grosz* test, First Assembly's right to free exercise of religion is not violated by the County's zoning ordinances.[100]

While *Sherbert*'s substantial burdens test is certainly not being applied in its full form today, the preservation concern that animated *Sherbert* is still a significant undercurrent both in the Supreme Court and in most Circuits. Defendants have an interest in depicting such regulated

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[93] Goodall by Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 173 (4th Cir. 1995) (stating that non-generally applicable laws must substantially burden religion to be struck down); and Church of Scientology v. City of Clearwater, 2 F.3d 1514, 1542-49 (11th Cir. 1993) (holding regulation to not be generally applicable and to be under the category of regulations imposing substantial burdens).

[94] Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49, 79 (2nd Cir. 2001) (stating that when a neutral law incidentally restricts religion, apply the substantial burden test); Strout v. Albanese, 178 F.3d 57, 65 (1st Cir. 1999) (applying test examining whether government placed a substantial burden on a central belief or practice); Fleischfresser v. Dirs. Of Sch. Dist. 200, 15 F.3d 680, 689-90 (7th Cir. 1994) (same); and United States v. Grant, 117 F.3d 788, 793 (5th Cir. 1997) (applying a substantial burden test). Carol Kaplan claims that Grant was an application of the Religious Freedom Restoration Act (RFRA), *see* Carol Kaplan, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1064 n.81 (2000), but I believe that Grant is at most ambiguous on this point. *See* Grant, 117 F.3d at 792 n.6 (discussing the RFRA issue).

[95] Am. Family Ass'n, Inc. v. Federal Communications Commission, 365 F.3d 1156, 1171 (D.C.Cir. 2004) (emphasis added).

[96] KDM v. Reedsport School District, 196 F.3d 1046, 1050(9th Cir. 1999).

[97] First Assembly of God of Naples, Florida, Inc. v. Collier County, 20 F.3d 419 (11th Cir. 1994).

[98] 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984).

[99] First Assembly of God of Naples, 20 F.3d at 424.

[100] *Id*. (emphasis added).

activities as having only a minimal *Locke*-level impact on the practitioners' religion. In light of *Smith*'s articulation of the centrality concern, one can infer that *Smith* never intended the doctrine to grow in this way. Indeed, Scalia, the author of *Smith*, wrote the dissent in *Locke* which reinforced this point:

> The Court makes no serious attempt to defend the program's neutrality, and instead 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.[101]

IV. IMPLICATIONS

With such a significant erosion of the centrality concern, there are innumerable implications for the right to free exercise of religion in the United States. Most of free exercise literature focuses on the impact of free exercise doctrine as applied to religious minorities.[102] This Article, therefore, will illustrate the implications of the fall of the centrality concern by applying the doctrine to conservative Christianity, which is often unconsidered.[103]

A. Sanctifying the Secular to Force Selectively Burdensome Regulations

The erosion of the centrality concern creates a perverse incentive: activities that are traditionally secular may be characterized with enough religiosity to force a law that regulates the activity to constitute a selectively burdensome regulation. And it can also appeal to the preservation concern that animates various courts. While all religions may attempt this endeavor, conservative Christianity, as a majoritarian[104] religion with the resources and resolve[105] to influence mainstream culture, is most able to accomplish this task.

1. Subjecting a homosexual child to reparative therapy

Reparative therapy, the practice by many licensed psychologists of "curing" homosexuals of their homosexuality, serves as a good example. Although reparative therapy started as a

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[101] Locke v. Davey, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting).

[102] *See*, *e.g.*, Gregory D. Wellons, *Employment Division, Department of Human Resources v. Smith: The Melting of Sherbert Means a Chilling Effect on Religion*, 26 U.S.F. L. REV. 149, 173 (1991); Theodore Y. Blumoff, *The New Religionists' Newest Social Gospel: On the Rhetoric and Reality of Religions' 'Marginalization' in Public Life*, 51 U. MIAMI L. REV. 1, 54 (1996) (citing *Smith*'s negative impact on minority religions despite reasonableness of centrality concern); Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 753-54 (2001) (despite centrality concern, anti-polygamy laws place unacceptable religious burden on some Mormons).

[103] Christianity has become more divided between conservative and liberal than it has amongst denominations. Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 BUFFALO L. REV. 127, 141-44 (2003) (tracing the development of the conservative-liberal split and the decline of denominationalism).

[104] The word "majoritarian" is used loosely. In this case, it can either mean a numerical majority or simply possessing the political power that a minority religion would not otherwise have.

[105] French, *supra* note 103, at 144 (noting the trend that fundamentalist religions tend to adopt modern methods of operation).

secular and scientific endeavor in the 1930's,[106] it has become increasingly religious in part because of the way reparative therapy has been marginalized by the scientific community.[107] The strongest piece of evidence that secular reparative therapy exists in any substantial form today is the only secular organization mentioned by both proponents and opponents of reparative therapy – the National Association for Research and Treatment of Homosexuality (NARTH).[108] Although it would be speculative to surmise the extent to which NARTH members integrate religion in their reparative therapy, it is notable that "[t]he vast majority of its members are believed to be from the conservative wings of Christianity and Judaism,"[109] that NARTH's website devotes a section to "theological" perspectives,[110] and that Joseph Nicolosi, the president of NARTH, is a ministry leader of the largest ex-gay ministry, Exodus International.[111]

Karolyn Ann Hicks argues that parental attempts to change a child's sexual orientation can legally constitute child abuse.[112] Relying on *Parham v. J.R.*,[113] which held that a parent may commit a child to a mental institution as long as a neutral fact finder employing medical standards permits it, Hicks suggests that because the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, and the American Academy of Pediatrics all reject reparative therapy; and because homosexuality has not been classified as a mental illness since 1973, a neutral fact finder can rely on established practice to find a parent's use of reparative therapy on a child to be child abuse.[114]

Under Hicks' child abuse scenario, the strength of a parent's free exercise claim depends on how religious reparative therapy is, since the neutral fact finder relies on position statements

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[106] *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 794-98 (Jan 2002) (discussing history of reparative therapy starting in 1938).

[107] As Yoshino notes: "[T]he most high-profile contemporary purveyors of reparative therapy tend to be religious organizations. These include fundamentalist Christian groups such as Homosexuals Anonymous, Metanoia Ministries, Love in Action, Exodus International, and EXIT of Melodyland." *Id*. at 800. *See also* Karolyn Ann Hicks, *"Reparative" Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse*, 49 AM. U.L. REV. 505, 531 (1999). In 2000, the American Psychiatric Association recognized that "[i]n recent years, noted practitioners of 'reparative' therapy have openly integrated older psychoanalytic theories that pathologies homosexuality with traditional religious beliefs concerning homosexuality." *Fact Sheet*, AMERICAN PSYCHIATRIC ASSOCIATION 5, *at* http://www.psych.org/public_info/gaylesbianbisexualissues22701.pdf (last updated May 2000).

[108] *See, e.g.*, Yoshino, *supra* note 106, at 799 n.144; Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Reparative therapy and Liability*, 8 B.U. PUB. INT. L.J. 219, 226 (1999) (referring generally to both "religious and secular practitioners" and citing NARTH as its only example of a secular organization). NARTH itself tries to maintain its scientific independence with the following disclaimer: "NARTH welcomes the support of all lay organizations, including religious groups, which turn to us for scientific evidence which may support their traditional doctrines. We remain, however, a professional organization devoted to scientific inquiry." *Our Track Record*, NARTH, *at* http://www.narth.com/menus/history.html (last visited Jan. 27, 2005)

[109] B.A. Robinson, *Reparative Therapy: The National Association for Research and Therapy of Homosexuality*, RELIGIOUS TOLERANCE.ORG, *at* http://www.religioustolerance.org/hom_nart.htm (last updated May 11, 2001).

[110] For a list of such articles, see http://www.narth.com/menus/ethical.html (last updated Dec. 30, 2004).

[111] Joseph Nicolosi sits on the "Speakers Bureau" of Exodus International, which comprises "[a] wide variety of Exodus ministry leaders." *Speakers Bureau*, EXODUS INTERNATIONAL, *at* http://exodus.to/speakers.shtml (last visited Jan. 27, 2005).

[112] Hicks, *supra* note 107, at 531.

[113] 442 U.S. 584 (1979).

[114] Hicks, *supra* note 107, at 537-38. Hicks further argues that the Free Exercise Clause provides no refuge for these parents, relying on Wisconsin v. Yoder, 206 U.S. 205 (1972). *Smith* interpreted *Yoder* to be a "hybrid" rights case, which is outside the scope of this Article.

by professional associations targeted explicitly at reparative therapy.[115] Even if reparative therapy is found not to be predominantly religious at this stage, under this paradigm, religious organizations have the incentive to rely less on a cloak of science and more upon religious characterizations of reparative therapy in the long run. By cementing reparative therapy as a religious practice, this would provide talismanic protection from government regulation[116]—any regulation against reparative therapy would immediately constitute a selectively burdensome regulation.

2. White supremacist literature

Although racial supremacy is no longer a part of conservative Christianity, one case involving racial supremacy serves to illustrate this anomalous incentive to sanctify the secular. One recent Sixth Circuit decision struck down a federal statute partly on the grounds that it was encouraging such behavior.[117] Although it was not a free exercise case, it still illustrates a parallel situation. A provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits the government from imposing a substantial burden on prisoners' exercise of religion without a compelling interest. This "has the effect of encouraging prisoners to become religious in order to enjoy greater rights."[118] For instance, to borrow the court's hypothetical, a prison may have a policy of confiscating white supremacist literature. Under the provision, one prisoner is allowed to keep white supremacist literature because of his membership of the Church of Jesus Christ Christian, Aryan Nation. Another prisoner, on the other hand, has his white supremacist literature confiscated because of his anti-Semitic views. In the long run, the latter supremacists will have an incentive to join the Church or claim religiously motivated belief in order to gain protection.

3. Teaching "intelligent design"

Lastly, consider the debate over whether a public school should teach "intelligent design" in conjunction with evolution, a debate currently raging across the country.[119] If a local school board specifically decides to teach only evolution and reject the teaching of intelligent design, such a move prohibits conservative Christian teachers who want to teach evolution as simply a

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[115] It is constitutional for states to rely on the standards promulgated by private professional associations. *See* Board of Trustees v. City of Baltimore, 317 Md. 72, 96-97 (1989), *cert. denied*, 493 U.S. 1093 (1990) (noting that "courts have sometimes upheld legislative adoption of private organizations' standards which are periodically subject to revision, in limited circumstances such as where the standards are issued by a well-recognized, independent authority, and provide guidance on technical and complex matters within the entity's area of expertise. These cases usually involve accreditation or similar programs by established professional organizations"); Lucas v. Maine Com'n of Pharmacy, 472 A.2d 904, 909 (Me. 1984) (applying the principle that, "'statutes whose operation depends upon private action which is taken for purposes which are independent of the statute' usually pass constitutional muster") (quoting Kenneth C. Davis, *Administrative Law Treatise* § 3:12 (2d ed. 1978)).

[116] This scenario does not apply to Christian Scientist parents whose use of faith healing on their children results in death, because they are generally prosecuted under state manslaughter statutes, which are neutral and generally applicable. Where child neglect is at issue, Christian Scientists are often protected by explicit statutory exemptions for faith healing. *See generally* Daniel Vaillant, *The Prosecution of Christian Scientists: A Needed Protection for Children or Insult Added to Injury?*, 48 CLEV. ST. L. REV. 479 (2000).

[117] Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003).

[118] *Id*. at 266.

[119] *See* Jerry Adler, *Doubting Darwin*, NEWSWEEK, Feb. 7, 2005, *available at* http://www.msnbc.msn.com/id/6884904/site/newsweek/ (last visited Apr. 19, 2005).

theory or who also want to teach intelligent design. Despite the history of teaching evolution in public schools, if a conservative Christian teacher can establish the questioning of evolution or the teaching of intelligent design as central to conservative Christianity, then such a school policy can be construed as a selectively burdensome regulation.[120]

4. Disingenuous claims?

One might object that despite the fact that the sincerity inquiry does not apply,[121] as a general matter, judges can still easily see through disingenuous characterizations of various activities as religious for the sake of forcing a selectively burdensome regulation.[122] However, this objection overlooks two important facts. First, even the most "disingenuous" characterization of an act as predominantly religious is still based on substantial actual facts. It is difficult to imagine a situation whereby religious lawyers conspire with religious organizations to transform wholesale historically secular activities into religious ones over a period of years in order to win on an obscure legal point. On the contrary, such activities are already becoming increasingly religious on their own accord – the incentive of the selectively burdensome regulation doctrine is simply for lawyers to *characterize* such acts as predominantly religious, rather than to actually effectuate the "religionizing" of previously secular activities, were that to even be possible for lawyers to do. In the end, such "disingenuous" characterizations are just as "disingenuous" as the creative lawyering that already occurs in litigation.

B. Construing Political Disagreement as Religious Animus

The erosion of the centrality concern by *Lukumi*'s denunciation of regulations motivated by animus creates a similar incentive.[123] As stated previously, if there is evidence of legislative "animus" against a set of actions and/or ideologies, no religious animus exists unless the plaintiff can show an integral link between those actions/ideologies and the religion itself. In other words, plaintiffs must construe, whether in good faith or otherwise, those actions/ideologies as central to their religion. The implications of this anomaly may not be as clear with a relatively unfamiliar minority religion, because one does not know enough about the religion to differentiate between activities that are central and activities that are not central to that religion. For example, in *Lukumi*, that the action/ideology of animal sacrifice was inextricably linked with the religion of Santeria was not controversial.

The link between a religion's actions/ideology and the religion itself is not as obvious, however, when it comes to majoritarian religions such as conservative Christianity. Every religion possesses a worldview that is meant to color every aspect of daily life, yet it is only as the religion becomes more familiar and its adherents more numerous that society actually begins to notice and feel the nuanced implications of that worldview. At this point, two trends naturally

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[120] If there are other teachers of other religions who wish to teach intelligent design or publicly question evolution, they too would have to show that those activities were central to their religion (i.e. conservative Islam, etc.).

[121] *See supra* Part I.C.1. (discussing difference between sincerity inquiry and inquiry into the claim that a regulation is selectively burdensome).

[122] *See*, *e.g.*, United States v. Meyers, 95 F.3d 1475, 1484 (10th Cir. 1996) ("Meyers' professed beliefs have an ad hoc quality that neatly justify his desire to smoke marijuana.").

[123] Some of the examples used in this section are interchangeable with the examples in the previous section, since all involve some kind of incentive to portray an activity as central to religion. The use of example is simply to illustrate how this incentive is applied in these two separate doctrinal contexts.

occur. First, as the actions or ideologies of the religion increasingly influence mainstream society, opponents emerge. Second, as the actions and ideologies increasingly pervade spheres of daily life where secularism traditionally reigned, the link between such actions or ideologies and the religion becomes more attenuated from the perspective of the religious outsider, because she is used to seeing such a sphere in secular terms. Given these two conditions in a democratic society, opponents will then attack the actions or ideology emanating from the religion. If the religious adherents raise a free exercise charge of animus, it is precisely at this point where they must construe those actions or ideologies as *central* to their religion to prevail.[124]

1. The ideology that homosexuality is sin

One ideology that is commonly attacked is the belief that homosexuality is wrong, and the denunciation of this ideology motivates some state actions. However, once again, conservative Christians can make out animus claims by construing such beliefs as being central to their religion. For instance, San Francisco city officials passed resolutions in 1998 denouncing a full-page advertisement created by religious organizations claiming that homosexuals could walk out of homosexuality with the help of Jesus Christ.[125] Although the city resolutions focused its attacks on the specific ideology that homosexuality was wrong, Judge Noonan, citing the animus section of *Lukumi*, still construed such resolutions as a "direct attack" against conservative Christians.[126]

Consider also the nascent development of state antidiscrimination laws for private voucher schools. Michael Kavey argues that state antidiscrimination laws prohibiting private voucher schools from discriminating against students based on sexual orientation can survive a free exercise challenge.[127] However, the political situation surrounding the development of these antidiscrimination laws provides a fertile ground for potential animus counterarguments. Kavey notes that only four states have voucher antidiscrimination statutes on the books, and that civil rights groups are pushing for increased protection.[128] If conservative Christians could obtain

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[124] The principle that natural disagreement can be easily confused with animus finds a parallel in antitrust law. Just as a democracy encourages competitive, sometimes fierce, political debate, the free market also encourages competitiveness. Arguing against the proposition that courts should look at intent in antitrust law, Judge Easterbrook noted: "[A] drive to succeed lies at the core of a rivalrous economy. A desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition. If courts use the vigorous, nasty pursuit of sales as evidence of a forbidden 'intent', they run the risk of penalizing the motive forces of competition. Finally, looking for intent also complicates litigation. Lawyers rummage through business records seeking to discover tidbits that will sound impressive (or aggressive) when read to a jury." THOMAS D. MORGAN, CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS 678 (2001) (paraphrasing A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989).

[125] "What happened to Matthew Shepard is in part due to the message being espoused by your groups . . . . It is not an exaggeration to say that there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians." Am. Family Ass'n, Inc. v. City and County of San Francisco, 277 F.3d 1114, 1119 (9th Cir. 2002).

[126] "To assert that a group's religious message and religious categorization of conduct are responsible for murder is to attack the group's religion. . . . The way that the city found to rebuke the plaintiffs was to assert that their message was murderous. It is difficult to think of a more direct attack." *Id*. at 1126-27 (Noonan, J., dissenting).

[127] Michael Kavey, *Private Voucher Schools and the First Amendment Right to Discriminate*, 113 YALE L.J. 743 (2003).

[128] *Id*. at 746-47.

evidence of comments directed against the ideology of homosexuality's sinfulness, an animus argument could be made by establishing the link between that ideology and the religion.

2. The action of proselytizing

An action that is often the source of regulatory controversy in the conservative Christian context is proselytizing, usually in the workplace, where it is discouraged or prohibited.[129] This includes proselytizing to clients[130] or coworkers.[131] Proselytizing can also take various forms, each of which has elicited different levels of opprobrium. A conservative Christian may seek to verbally convert someone to one's faith, either on the Christian's own initiative[132] or in the context of a deeply personal conversation initiated by someone else.[133] Proselytizing can include the use of music or media[134] or it may take the simple form of a religious greeting.[135] Policies against proselytizing justify themselves on varying rationales such as protecting clients from "distress,"[136] "avoiding a disruption of the workplace, maintaining efficiency in the workplace,"[137] maintaining "appropriate" interactions with customers,[138] satisfying customer preferences,[139] and protecting coworkers from "harassment."[140]

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[129] The right to proselytize in the name of religious freedom and its potentially harmful effects is an important legal and ethical controversy worldwide. *See generally* John Witte, Jr., *Human Rights and the Right to Proselytize: Inherent Contradictions?*, 94 AM. SOC'Y INT'L L. PROC. 182 (2000). The right to proselytize is usually associated with Title VII employment discrimination on the basis of religion or freedom of speech, not the free exercise of religion. *See, e.g.,* Michael D. Moberly, *Bad News For Those Proclaiming the Good News?: The Employer's Ambiguous Duty to Accommodate Religious Proselytizing*, 42 SANTA CLARA L. REV. 1 (2001) (discussing right to proselytize in context of Title VII); Zachary E. Pelham, Comment, *Constitutional Law—Freedom of Speech: Door-to-Door Permit Requirements for Noncommercial Canvassers, Domestic Threat or Freedom of Speech?*, 79 N.D. L. REV. 369 (2003) (discussing proselytizing door-to-door as freedom of speech issue). Since this Article adopts the position of much of legal scholarship that the "hybrid-rights" doctrine is (or should be) impotent, *see supra* note 37, this Article does not discuss the possibility of raising a "hybrid" free exercise-free speech claim for proselytizing. *See* Ryan M. Akers, *Begging the High Court for Clarification: Hybrid Rights Under Employment Division v. Smith*, 17 REGENT U. L. REV. 77, 89-90 (2004) (discussing lower court's essential rejection of hybrid rights doctrine in proselytizing case).

[130] *See, e.g.,* Knight v. Connecticut Department of Public Health, 275 F.3d 156 (2d Cir. 2001) (nurse consultant and sign language interpreter fired for proselytizing to clients).

[131] *See, e.g.,* Bodett v. Coxcom, Inc., 366 F.3d 736 (9th Cir. 2004) (evangelical Christian employee fired for violating company policy of "harassment" by proselytizing to coworker).

[132] *See, e.g.,* Knight, 275 F.3d at 161 (describing Knight's experiencing a "strong sense of compassion for both men and a 'leading of the Holy Spirit' to talk with the men regarding salvation") (some quotations omitted); *id*. at 162 ("During a break in the interpreting session, Quental spoke with the client about smoking. She told the client that the Lord had delivered her from smoking. She asked the client if she could pray for him so that he might also quit smoking.") (some quotations omitted).

[133] *See, e.g.,* Bodett, 366 F.3d at 741 (describing incident where coworker, in a "state of emotional distress," asked for advice of the evangelical Christian plaintiff, at which point the plaintiff "made [the coworker] born again").

[134] *See, e.g.,* Baz v. Walters, 782 F.2d 701, 703 (7th Cir. 1986) (hospital chaplain "preached and encouraged musical participation in a manner that [employer] interpreted as proselytizing" and failed to requisition a presumably inappropriate religious film).

[135] *See, e.g.,* Banks v. Service America Corp., 952 F.Supp. 703. 707 (D. Kansas 1996) (employer "directed plaintiffs not to say 'God bless you,' 'Praise the Lord' or other similar phrases to food service customers").

[136] Knight, 275 F.3d at 161.

[137] *Id*. at 163.

[138] Banks, 952 F.Supp. at 708.

[139] *Id*. at 709 n.5 ("Service America argues that its customers 'may well and likely do include Christians, Jews, Moslems, atheists, and others, many of whom prefer not to be subjected to plaintiffs' religious beliefs'").

[140] Bodett, 366 F.3d at 744.

If these justifications are used by government employers[141] to attack proselytizing, these justifications can be used to make an animus claim by construing proselytizing as being central to the conservative Christian religion.[142] The plausibility of such a scenario should not be underestimated, especially since *Lawrence v. Texas*[143] suggested that moral disapproval could constitute animus.[144] The problem with all of these justifications is that the harm they seek to protect against is *offense*. It is *offense* that causes the distress, that disrupts workplace morale, that makes customers uncomfortable, and that makes proselytizing inappropriate. It would not be difficult to construe an action that so offends people, particularly a societal majority, as moral disapproval.

However, because "proselytizing" is quite a broad term and can take many forms, a slightly more practical approach from the perspective of conservative Christians would be to construe a *specific* type of proselytizing action as central to the conservative Christian religion, rather than proselytizing in general. For example, in *Henderson v. Kennedy*,[145] a group of evangelical Christians were prohibited from selling t-shirts on the National Mall. They successfully persuaded the judge that proselytizing was central to their religion. "[Plaintiffs] are obligated by the Great Commission to preach the good news, the gospel, of salvation through Jesus Christ to the whole world . . . by all available means."[146] However, because they did not "suggest that their religious beliefs demand that they sell t-shirts in every place human beings occupy or congregate," their claim was rejected.[147]

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[141] "In most of the cases alleging religious discrimination under Title VII, the employer is a private entity rather than a government, and the first amendment to the Constitution is therefore not applicable to the employment relationship." Brown v. Polk County, 61 F.3d 650, 654 (8th Cir. 1995). *But see* Marsh v. Alabama, 326 U.S. 501, 506 (1946) ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.").

[142] Note the link between the action of proselytizing and the religion created by construing the action as central to the religion. *See, e.g.,* Baz, 782 F.2d at 703 ("The crux of the plaintiff's problems lay in his relationship with the patients and with the medical staff and in plaintiff's view of his ministry and his calling to preach the Gospel"); Banks, 952 F.Supp. at 707 ("Plaintiffs are Christians who feel strongly that because of what God has done for them and the joy He has given them by changing their lives dramatically, they must say things that are positive, uplifting and inspirational to people with whom they speak, and their religious greetings emanate from this belief").

[143] 539 U.S. 558 (2003).

[144] *See generally* Suzanne Goldberg, *Morals-Based Justifications For Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004). Kennedy has given strong indications that he does not believe that moral disapproval is sufficient to justify a law. This is evidenced by his imputation of animus on the Hialeah city council's moral disapproval in *Lukumi*. the equal protection case of *Romer v. Evans*, 517 U.S. 620 (1996) (construing Colorado's moral disapproval of homosexuality as animus), and his views expressed in *Lawrence,* which rejected an anti-sodomy statute because it was based on the rationale that homosexuality was immoral. *See* Lawrence v. Texas, 539 U.S. 558, 560 (2003) ("The fact that a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."). O'Connor more explicitly stated that under equal protection law, morals-based rationales are doctrinally equivalent to animus: "Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id*. at 582 (O'Connor, J., concurring). Such equal protection rulings are relevant since *Lukumi* held that equal protection cases could serve as guidance for free exercise cases. Church of Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 540 (1993).

[145] 253 F.3d 12 (D.C.Cir. 2001).

[146] Henderson, 253 F.3d at 16.

[147] *Id*. This case was not a free exercise case, but a case based on the Religious Freedom Restoration Act (RFRA), which prohibited the state or federal government from placing a substantial burden on religion without a compelling state interest. Because this statute was passed after *Smith* in order to resurrect the *Sherbert* test, the reasoning of this case is relevant since it has been shown that *Sherbert*'s preservation concern is alive and well today. (The Supreme

In sum, with *Lukumi*'s animus doctrine undermining the centrality concern and the fact that majoritarian religions' influence may be felt in all manner of daily life, there are numerous possible opportunities in a democracy for members of majoritarian religions to make plausible animus claims by construing various actions and ideologies as central to their religion.

CONCLUSION

It is time for the Court to realize that regardless of the intellectual appeal of the centrality concern, it is simply not sustainable, if only because lower courts and the Supreme Court itself do not even seem to have the desire nor the will to sustain it. Rather than replacing *Smith* with a new test that could potentially lead to more chaos, a temporary return to *Sherbert*'s test would be the best short-term solution since judges are apparently still under its influence.

This should be immediately followed by an effort to define "religion" in the free exercise context. There is no reason why courts are entirely comfortable interpreting what "religion" means in federal law[148] and yet abdicate their interpreter role when it comes to the supreme law of the land. Scholars and judges alike should make a concerted effort to pursue such a definition,[149] which will also help curtail the anomalous incentive for majoritarian religions to rhetorically construe any manner of activity as central to their religion. Defining religion would also prevent the legitimate fear that "professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[150]

The animus inquiry must also be expelled from free exercise doctrine. As we have seen, a flourishing democracy inevitably results in a plethora of attacks against the actions and ideologies of innumerable political, philosophical, or special interest groups. Religion, majoritarian or not, does not deserve special protection in this context. Policymakers should be free to criticize the actions[151] and ideologies that might emanate from religion without fearing that their comments would be construed to attacking the religion itself or its adherents by an inappropriate centrality claim. Otherwise, debate will be significantly chilled.

Court struck down RFRA as it applied to state governments in City of Boerne v. Flores, 521 U.S. 507 (1997), but did not reach the issue of RFRA as it applied to the federal government, which is why this case proceeded).

[148] *See*, *e.g.*, United States v. Seeger, 380 U.S. 163 (1965) (defining "religion" in Universal Military Training and Service Act); Welsh v. United States, 398 U.S. 333 (1970) (same); Brown v. Pena, 441 F.Supp. 1382 (S.D.Fla. 1977) (defining "religion" in Title VII); Peterson v. Wilmur Communications, Inc., 205 F.Supp.2d 1014 (E.D.Wis. 2002) (same); and United States v. Meyers, 95 F.3d 1475, 1483-84 (10th Cir. 1996) (defining "religion" in Religious Freedom Restoration Act).

[149] There are a few appropriate starting points for such an endeavor. The most popular legal definition of religion is the "functionalist" definition. *See also* Lawrence Tribe, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1075 (1978). *But see* John C. Knechtle, *If We Don't Know What It Is, How Do We Know If It's Established?*, 41 BRANDEIS L.J. 521, 527 (2003) (criticizing functionalist definition). Another starting point would be Judge Adams' concurrence in Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) and a more modern application in Meyers, 95 F.3d at 1483-84 (listing 15-factor test).

[150] Reynolds v. United States, 98 U.S. 145, 166-67 (1879).

[151] As previously stated, animus towards a gender can also include animus towards the gender's "actions" in the form of gender stereotyping. This can also be applied to race, where animus towards a set of actions that are inextricably tied to race can be construed as animus against that race. This Article does not address those instances, but it is worth observing that unlike religion, gender or race does not possess an "ideology."