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RULES OF GENERAL APPLICABILITY

by Jeffrey M. Shaman*

Introduction

As their name suggests, rules of general applicability have a broad scope considerably more comprehensive than laws specifically directed at a particular activity. In the context of constitutional adjudication, the concept of general applicability is commonly used to distinguish general laws being applied to regulate speech or religious activities from laws aimed specifically at those very activities. For example, a law requiring individuals to obtain a permit before conducting large-scale events in a public park is a general law that does not target speech,[1] whereas a law requiring individuals to obtain a permit before conducting a march or demonstration in a public park specifically targets speech. A law prohibiting animal cruelty is a general law that is not aimed at a religious practice, whereas a law prohibiting ritual animal sacrifice is specifically aimed at a religious practice.[2]

Laws of general applicability usually are characterized by neutrality toward speech or religion. As explained by the Supreme Court, the concepts of neutrality and general applicability are interrelated, and "failure to satisfy one requirement is a likely indication that the other has not been satisfied."[3] While the concepts are not identical,[4] a law that fails the requirement of neutrality invariably will fail the requirement of general applicability.[5] Thus, neutrality toward speech or religion is a necessary component of a law of general applicability.

The principle of general applicability parallels equal protection jurisprudence; to require laws to be generally applicable corresponds to the requirement of equal treatment under the law.[6] Along the same lines, in determining if a law is neutral, guidance can be found in equal protection discourse.[7] In fact, the Supreme Court has said that "[n]eutrality in its application requires an equal protection mode of analysis."[8]

Laws specifically directed to regulating speech or religion are subject to a heightened degree of judicial scrutiny under the First Amendment, which of course prohibits the government from making any law that abridges the free exercise of religion or freedom of speech.[9] Under this form of heightened scrutiny, laws aimed at expressive or religious activity will be struck

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[1] *See* Thomas v. Chicago Park District, 534 U.S. 316 (2002).

[2] *See* Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993).

[3] Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 531 (1993).

[4] *See* Richard Duncan, *Free Exercise is Dead, Long Live Free Exercise,* Lukumi *and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850, 865 (2001).

[5] However, the converse is not true; a law that is not generally applicable may be neutral in regard to speech or religion.

[6] *See Lukumi*, 508 U.S. at 542-45.

[7] *Lukumi*, 508 U.S. at 540.

[8] *Id*. (citing Walz v. Tax Commissioner of New City, 397 U.S. 664, 696 [1970] [Harlan, J., concurring]).

[9] U.S. Const., Amendment I (1791). The First Amendment provides that Congress shall make no law abridging the free exercise of religion or freedom of speech, and the Supreme Court has ruled that all of the provisions in the First Amendment are incorporated through the Fourteenth Amendment to apply to the states. *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

down as unconstitutional unless the government can demonstrate that they are carefully tailored to serve a strong state interest. In contradistinction, laws of general applicability, even when used to regulate speech or religious activities, may evade review under the First Amendment altogether. In some instances, the Court has held that, despite their restrictive effect upon speech or religion, rules of general applicability do not implicate the First Amendment.[10] For some cases, therefore, it is extremely important to determine whether the law in question is a rule of general applicability, neutral in regard to speech or religion.

Of course, the degree of a law's generality is a relative matter and one that can vary considerably subject to the point of view from which it is assessed. Determining whether a law is general or specific is a complicated matter that may depend upon the perspective from which a law is considered.[11] Along one dimension, a law may appear relatively general, while along another dimension less so.[12] To illustrate this phenomenon, Laurence Tribe and Michael Dorf posit a comparative analysis of a rule recognizing a right to procreate and a rule recognizing a right of intimate association.[13] At first glance, the former might seem more specifically delineated than the latter and certainly not broad enough to include a right to engage in sexual relations with a partner of the same sex. On the other hand, a rule recognizing a right to intimate association would not encompass a right to undergo anonymous artificial insemination or to supply an ovum for laboratory fertilization and subsequent incubation by a surrogate mother.[14] Viewed along the latter dimension, it is the rule recognizing a right to intimate association that appears more specifically delineated. In truth, neither rule can be said to be more or less general than the other; the comparative extent of each rule's generality varies according to the perspective from which it is appraised.

Moreover, the generality of a law is a matter of degree. All laws are selective to some extent,[15] but some more so than others. As a result, the determination of whether a law is general or specific can be rather subjective. At one extreme are broadly-worded laws, comprehensive in scope and neutral in regard to speech or religion; at the other extreme are specialized laws that categorically single out speech or religious activities for disfavored treatment. Richard Duncan maintains that between these extremes there is an "infinity of hard cases" involving laws not readily characterized as either general or specific.[16]

It should be mentioned that, although freedom of the press is expressly guaranteed by the First Amendment, the Supreme Court has consistently taken the position that the press is not immune from the application of general regulatory laws.[17] For example, the Court has ruled that

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[10] Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986); Employment Division v. Smith, 494 U.S. 872 (1990). *See also*, Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L.R. 1175 (1996).

[11] *See* Laurence H. Tribe and Michael C. Dorf, ON READING THE CONSTITUTION 76, 101-104 (1991).

[12] *Id*. at 76.

[13] *Id.*

[14] *Id.*

[15] *Lukumi*, 508 U.S. at 542.

[16] Richard Duncan, *Free Exercise is Dead, Long Live Free Exercise,* Lukumi *and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850, 859 (2001). Professor Duncan posits three laws to illustrate his point. The first is a law that totally prohibits the use of alcohol beverages; this is an easy case, clearly a law of general applicability. The second is a law that prohibits only the sacramental use of alcoholic beverages; this, too, is an easy case, clearly a law that specifically targets religion. The third law prohibits the use of alcoholic beverages but allows an exception permitting alcoholic beverages to be served with meals at restaurants; should this law be considered a neutral law of general applicability or does the exception render the law discriminatory toward religion? *Id*. at 859-60.

[17] Cohen v. Cowles Media Company, 501 U.S. 663, 670 (1991).

the press must obey copyright laws,[18] the National Labor Relations Act,[19] the Fair Labor Standards Act,[20] and antitrust laws.[21] Still, Erwin Chemerinsky asserts that in none of those cases was there proof that application of the law in question would undermine First Amendment values.[22] If the press could show in a particular situation that the application of a general regulatory law significantly burdened freedom of the press, it might be necessary for the Court to consider whether an exemption from the law was appropriate.[23]

Aside from the arena of freedom of the press, the Supreme Court's treatment of rules of general applicability has been anything but consistent. In cases involving equal protection of the law, freedom of speech, and the free exercise of religion, the Court's treatment of rules of general applicability has wavered from one extreme to the other, leaving a perplexing body of constitutional doctrine.

Equality

The principle of general applicability is similar to the principle of equality that underlies the Equal Protection Clause of the Fourteenth Amendment.[24] Laws that selectively impose a burden on expressive or religious activities are a form of discrimination antithetical to the principle of equality.[25] Neutral laws of general applicability appear to be nondiscriminatory, although in some instances they may have a discriminatory impact.

The notion that rules of general applicability are nondiscriminatory traces back to a dissenting opinion written by Justice Harlan in *Douglas v. California*.[26] In that case, the Supreme Court held that in a criminal case where a state grants a first appeal as a matter of right, it must provide free counsel for indigent defendants. A state's failure to do so, the Court ruled, amounts to invidious discrimination between the rich and the poor that violates the Equal Protection Clause of the Fourteenth Amendment.[27] Equality was lacking, the Court explained, because the rich enjoy the benefit of counsel, while the poor do not.[28] Justice Harlan dissented, arguing that the Equal Protection Clause was not apposite to the case because, as he saw it, the state's failure to provide counsel for indigent persons was not a discriminatory act.[29] While agreeing that the Equal Protection Clause prohibits discrimination between the rich and the poor "as such" in the formulation and application of laws, Justice Harlan contended that "it is a far different thing to suggest that (the Equal Protection Clause) prevents the State from adopting *a law of general applicability* that may affect the poor more harshly than it does the rich…."[30] By Justice Harlan's account, the state has no affirmative duty to "lift the handicaps flowing from

[18] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).
[19] Associated Press v. NLRB, 301 U.S. 103 (1937).
[20] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).
[21] Associated Press v. United States, 326 U.S. 1 (1945).
[22] Erwin Chemerinsky, CONSTITUTIONAL LAW-PRINCIPLES AND POLICIES 1169 (3d ed. 2006).
[23] *Id*.
[24] *See* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J.L. & Pub. Pol'y 627, 637-39 (2003).
[25] *See Lukumi*, 508 U.S. at 542-43.
[26] Douglas v. California, 372 U.S. 353 (1963).
[27] *Id*. at 355-58.
[28] *Id*. at 357-58.
[29] *Id*. at 361-62 (Harlan, J., dissenting).
[30] *Id*. (emphasis added.)

differences in economic circumstances," and therefore laws of general applicability such as the one in *Douglas* "do not deny equal protection to the less fortunate…."[31]

Justice Harlan's reasoning in *Douglas* reduces the Equal Protection Clause to a shield against facial discrimination but little else. As he sees it, so long as a law is generally applicable, whatever discriminatory impact it may have is irrelevant. His suggestion that the Equal Protection Clause does not prevent a state from enacting a law of general applicability "that may affect the poor more harshly than it does the rich" sounds eerily reminiscent of Anatole France's pronouncement that "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[32] Of course, Anatole France was being ironic; Justice Harlan was not.

Despite its dismissive attitude-or perhaps because of it-Justice Harlan's line of thought in *Douglas* was embraced in another dissenting opinion some years later, this one written by Justice Thomas in *M.L.B. v. S.L.J.*[33] This case concerned the dismissal of a mother's appeal from a Chancery Court order permanently terminating her parental rights. Her appeal was dismissed because she could not afford to pay the fee for preparation of a trial record required in advance for an appeal.[34] In approaching the issue presented by the case, the Court stressed the gravity of the situation, pointing out that a state's authority to permanently sever a parent-child bond "demands the close consideration the Court has long required when a family association so undeniably important is at stake."[35] Noting that the case involved both equal protection and due process concerns, the Court concluded that it violated the Fourteenth Amendment to deny the mother's right to appeal the termination of her parental rights solely because she could not afford to pay the fee for preparation of the record.[36] Justice Thomas, however, felt otherwise. In a dissenting opinion relying heavily on the Harlan dissent in *Douglas* as well as a similar Harlan dissent in *Griffin v. Illinois*,[37] Justice Thomas argued that there was no equal protection violation when the right to appeal is denied by a "facially neutral law" requiring a person to pay a fee for the preparation of a trial record.[38] In his view, the Equal Protection Clause "seeks to guarantee equal laws, not equal results."[39]

For supporting authority, Justice Thomas turned to *Washington v. Davis*, in which the Supreme Court upheld a government employment test that was challenged as racially discriminatory because a considerably greater proportion of black applicants failed the test than did white applicants.[40] In upholding the test, the Court ruled that proof of discriminatory intent

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[31] *Id.* at 362.
[32] Anatole France, LE LYS ROUGE (THE RED LILY) ch. 7 (1894).
[33] M.L.B. v. S.L.J., 519 U.S. 102 (1996).
[34] The fee was $2,352.36. *Id.* at 109.
[35] *Id.* at 117. Quoting several cases, the Court also said that:

> "A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child .... *Santosky* held that a 'clear and convincing' proof standard is constitutionally required in parental termination proceedings. In so ruling, the Court again emphasized that a termination decree is '*final* and irrevocable.' 'Few forms of state action,' the Court said, 'are both so severe and so irreversible.' As in *Lassiter*, the Court characterized the parent's interest as 'commanding,' indeed, 'far more precious than any property right.'" *Id.* at 118-19.

[36] *Id.* at 120.
[37] Griffin v. Illinois, 351 U.S. 12 (1956).
[38] M.L.B., 519 U.S. at 135-38 (Thomas, J., dissenting).
[39] *Id.* at 135 (quoting Personnel Administrator of Mass. V. Feeney, 442 U.S. 256, 273 [1979]). Justice Thomas advanced a similar position in Lewis v. Casey, 518 U.S. 343, 373-78 (Thomas, J., concurring).
[40] Washington v. Davis, 426 U.S. 229 (1976).

or purpose was required to trigger strict scrutiny under the Equal Protection Clause.[41] The Court also ruled that while the disproportionate impact of a law was not irrelevant, standing alone it was not sufficient to establish purposeful discrimination.[42] Using a deferential form of minimal scrutiny, the Court went on to approve the test, despite the fact that the test had never been validated to establish its reliability for measuring job performance.[43] For Justice Thomas, then, the lesson of *Davis* was that the Equal Protection Clause prohibits only purposeful discrimination and that a disparate impact, even upon members of a racial minority, does not violate equal protection.[44]

By this account, unless a malevolent intent can be shown to underlie a law, facial neutrality will be considered dispositive. If a law is neutral on its face or generally applicable, that it may affect one group of persons more harshly than another is of no consequence. According to this view, facially neutral laws of general applicability are not considered discriminatory despite any disparate impact they may have; the requirements of equal protection are satisfied so long as a law is neutral on its face and has a general application.

Davis, however, involved a situation significantly different than the one in *M.L.B.* As noted in the majority opinion in *M.L.B.*, written by Justice Ginsburg, in *Davis*, although there certainly was a disparate impact along racial lines, the disparity was not absolute; successful test takers included members of both races, as did the group of unsuccessful test takers.[45] In contrast, the governmental action at issue in *M.L.B.* resulted not merely in a disproportionate impact, but one that was "wholly contingent on one's ability to pay and thus 'visit[ed] different consequences on two categories of persons.'"[46] In other words, the disparate impact in *M.L.B.* was absolute, applying to all indigent persons and to no one outside that class. Thus, the discriminatory effect in *Davis* was less acute than in *M.L.B.*, and therefore less indicative of a need for heightened judicial scrutiny.

Even so, the decision in *Davis* is questionable.[47] Charles Lawrence maintains that by requiring proof of discriminatory intent or purpose, *Davis* places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute.[48] Discriminatory purpose may be covert or unconscious, and improper motives often are easy to hide.[49] Because laws usually are enacted through the interaction of multiple motives, governmental officials frequently will be able to argue that neutral considerations prompted their actions.[50] Moreover,

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[41] *Id*. at 239-40.
[42] *Id*. at 241-42.
[43] *Id*. at 229.
[44] M.L.B., 519 U.S. 135 (Thomas, J., dissenting). Along similar lines, Justice Scalia has stated that absent proof of discriminatory intent, a generally applicable law that has a disparate impact is not unconstitutional. In his view, "The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*." Crawford v. Marion County, 553 U.S. 181, 207 (2008) (Scalia, J., concurring).
[45] M.L.B., 519 U.S. at 126.
[46] *Id*. At 126-27 (quoting Williams v. Illinois, 399 U.S. 235, 242 [1970]).
[47] *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan. L. Rev. 1105 (1989); David Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. Chi. L. Rev. 935 (1989).
[48] Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L.Rev. 317, 319 (1987).
[49] *Id*. at 322-23, 354-55.
[50] *Id*. at 319. *See also*, Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265 (1977): "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."

discriminatory treatment, whether intentional or not, is harmful.[51] In *Davis* itself, persons were denied employment in a discriminatory manner on the basis on a test that had never been validated to establish its reliability for measuring job performance. By discounting the significance of the disproportionate impact of the test, the Court in *Davis* condoned governmental action that resulted in the denial of equal treatment. Unwilling to deal with the complexities of discrimination, the Court simply denied its existence.

In *Davis*, the Court did allow that the disparate impact of a law, if so extreme as to be systematic, may be sufficient in itself to establish unconstitutional discrimination.[52] So, for example, in a case like *Gomillion v. Lightfoot*, where government officials redrew the boundaries of a city, transforming it from a square shape to a "strangely irregular" 28-sided figure and thereby placing all but a few black persons, but not a single white person, outside the city limits, there could be no doubt that the redistricting plan amounted to purposeful racial discrimination in violation of the Equal Protection Clause.[53]

The Court further recognized in *Davis* that an invidious discriminatory purpose may be inferred from the totality of relevant facts, including the fact that a law has a disproportionate impact.[54] Accordingly, in *Hunter v. Underwood* the Court found that the Equal Protection Clause was violated by a state law permanently denying the right to vote to anyone convicted of a "crime involving moral turpitude."[55] Although the law was racially neutral on its face, evidence conclusively demonstrated that the law was enacted with racial animus, which, in conjunction with the law's racially disparate impact, established the presence of invidious racial discrimination.[56]

Whatever else might be said about *Davis*, it is clear that it did not overrule *Douglas*. While Justice Thomas argued in his dissenting opinion in *M.L.B.* that *Davis* adopted Justice Harlan's (dissenting) view in *Douglas*,[57] a majority of the Court thought otherwise, explicitly stating that *Davis* "does not have the sweeping effect" attributed to it.[58] And, while Justice Thomas frankly admitted in *M.L.B.* that he was inclined to overrule *Douglas* and its progeny,[59] a majority of the Court reaffirmed their continuing vitality.[60]

Notwithstanding the exhortations of Justice Thomas or Justice Harlan, few other justices have been so willing to overlook the discriminatory impact of facially neutral laws. In fact, the Court has acknowledged on several occasions that "A law nondiscriminatory on its face may be grossly discriminatory in its operation."[61] Nor have apologetics for facially neutral laws deterred the Court from finding a number of such laws to violate the Equal Protection Clause. Neither the Harlan dissent in *Douglas* nor the Thomas dissent in *M.L.B.* was able to dissuade a majority of the Court from finding violations of the Equal Protection Clause. In other cases, too, the Court

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[51] *See* Kenneth Karst, *The Costs of Motive-Centered Inquiry*, 15 San Diego L.Rev. 1163, 1165 (1978).
[52] Washington v. Davis, 426 U.S. at 241.
[53] Gomillion v. Lightfoot, 364 U.S. 339, 340-41 (1960).
[54] Washington v. Davis, 426 U.S. at 242.
[55] Hunter v. Underwood, 471 U.S. 222 (1985).
[56] *Id*. 229-32 (1985).
[57] M.L.B., 519 U.S. at 135 (Thomas, J., dissenting).
[58] *Id*. at 126.
[59] *Id*. at 139 (Thomas, J., dissenting).
[60] *Id.* at 110-12, 126-27.
[61] Griffin, *supra* note 37, at 17, n. 11; M.L.B., *supra* note 33, at 127 (quoting Griffin).

has seen fit to strike down facially neutral laws of general applicability due to their disparate impact.[62]

Freedom of Speech

In the course of interpreting the First Amendment, the Supreme Court has developed a network of rules to protect freedom of speech. Within this structure, regulations of speech are subject to searching judicial scrutiny, which allows speech to be restricted only when it is the cause of serious harm.[63] The harm must be real and demonstrably so.[64] The expression of an idea may not be prohibited merely because it is disagreeable or offensive.[65] A regulation of speech must be narrowly tailored to accomplish its purpose, and an overbroad regulation of speech may be declared unconstitutional on its face.[66] Content-based regulations of speech are subject to strict judicial scrutiny and will be struck down as unconstitutional unless shown to be necessary to achieve a compelling state interest.[67] Content-neutral regulations of speech[68] are subject to an intermediate level of scrutiny and will be struck down as unconstitutional unless shown to be carefully tailored to achieve an important state interest.[69]

In *Arcara v. Cloud Books, Inc.*, however, the Supreme Court abandoned these principles. *Arcara* involved a New York statute authorizing the closure of an adult bookstore on the ground that it was a public health nuisance because it was being used as a place for prostitution and lewdness.[70] Before the case reached the Supreme Court, the New York Court of Appeals had ruled that the closure order violated the First Amendment by interfering with the right of the owners of the bookstore to sell books on the premises of the store. The New York court followed the four-part test set forth by the Supreme Court in *United States v. O'Brien* that governs cases involving regulations of expressive conduct.[71] As the New York court viewed the situation, the closure order failed the fourth part of the *O'Brien* test, which requires that a statute incidentally restricting expressive activity be no broader than necessary to achieve its purpose. The court reasoned that the order was much broader than necessary to achieve its purpose of curbing illicit sexual activity and that an injunction against continuing the illegal activity on the premises could achieve the same effect without restricting respondents' bookselling activity.[72]

On appeal, however, the Supreme Court saw things quite differently and, reversing the New York court, ruled that the closure order did not violate the First Amendment. In an opinion

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[62] *E.g.,* Griffin v. Illinois*, supra* note 33; Williams v. Illinois, 399 U.S. 235 (1970); Mayer v. City of Chicago, 404 U.S. 189 (1971); Little v. Streater, 452 U.S. 1 (1981); Halbert v. Michigan, 545 U.S. 605 (2005).

[63] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[64] Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969).

[65] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397. 414 (1989).

[66] Gooding v. Wilson, 405 U.S. 518 (1972); United States v. Stevens, 559 U.S. ___, 130 S. Ct. 1577, 1587-88(2010).

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

[68] As used in this sense, a content-neutral regulation of speech is one that is aimed at speech in general but is neutral in regard to the message conveyed by speech, in other words, that does not discriminate on the basis of the content of speech. A neutral law of general applicability, on the other hand, is one that is aimed more broadly at conduct and is neutral in regard to speech generally. For example, a law that prohibits handbills is content-neutral (because it prohibits all handbills regardless of their content), but is not a neutral law of general applicability (because it is aimed at a form of speech, handbills).

[69] Turner Broadcasting System v. Federal Communications Commission, 512 U.S. 622, 662 (1994).

[70] Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986).

[71] United States v. O'Brien, 391 U.S. 367 (1968).

[72] Arcara, 478 U.S. at 701-702.

written by Chief Justice Burger, the Court took the position that the *O'Brien* test had no relevance to the case because the imposition of the closure order was not directed to expressive conduct.[73] From the high court's perspective, the First Amendment was not implicated by the enforcement of "a public health regulation of general application against the physical premises in which respondents happen to sell books."[74] Dismissing any constitutional concerns, the Court declared, "(N)either the press nor booksellers may claim special protection from government regulations of general applicability simply by virtue of their First Amendment protected activities."[75]

Chief Justice Burger's opinion for the majority insisted that the First Amendment was not implicated by a rule of general applicability merely because it had a restrictive effect upon expressive conduct. He rebuffed the claim for First Amendment protection as asking for too much, "since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities."[76] In a concurring opinion, Justice O'Connor made a similar point, arguing that any other conclusion would lead to the "absurd result" that any governmental action having some conceivable inhibitory effect upon speech, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment.[77]

The approach taken by Chief Justice Burger in *Arcara* diminishes the scope of protection afforded by the First Amendment for freedom of expression. In his view, rules of general applicability that "happen" to restrict expressive activities are not subject to First Amendment requirements.[78] So long as a law is directed generally to conduct, the fact that it imposes "an incidental burden" on free speech is irrelevant.[79] By this account, even when they have a restrictive effect upon freedom of expression, rules of general applicability are exempt from review under the First Amendment.

Chief Justice Burger was willing to acknowledge that under some circumstances rules of general applicability were not exempt from First Amendment review. Scrutiny under the First Amendment may be evoked where a general law imposes a disproportionate burden upon parties engaged in expressive activity.[80] This occurred in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* where the Court ruled that a use tax assessed on the cost of paper and ink products violated the First Amendment by imposing a significant burden on freedom of the press.[81] In addition, scrutiny under the First Amendment may be triggered where a general law restricts conduct that has a significant expressive element.[82] This occurred in *United States v. O'Brien*, where an individual was convicted of burning his draft card in violation of a federal statute that made it a crime to destroy, mutilate, or otherwise alter a draft registration card. [83]

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[73] *Id*. at 705, n2, 707.
[74] *Id*. at 707.
[75] *Id*. at 705.
[76] *Id*. 705-706.
[77] *Id*. at 708 (O'Connor, J., concurring).
[78] "…(W)e conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." Arcara, 478 U.S. at 707.
[79] *Id*. at 705.
[80] *Id*. 704-707.
[81] Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983).
[82] Arcara, 478 U.S. 704-707.
[83] United States v. O'Brien, 391 U.S. 367 (1968). *See also*, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (using heightened First Amendment scrutiny to review a federal regulation prohibiting camping in

Although it upheld the conviction, the Court applied First Amendment scrutiny because the law in question restricted conduct (burning a draft card to protest the Viet Nam war) that had a substantial expressive element.

In *Arcara*, however, Chief Justice Burger insisted that the situation involved neither the *Minneapolis Star* nor *O'Brien* paradigm, and therefore First Amendment concerns were not implicated.[84] He professed that "unlike the symbolic draft card burning in *O'Brien*, the sexual activity carried on in (*Arcara*) manifests absolutely no element of protected expression."[85] This misguided attempt to distinguish *Arcara* from *O'Brien* disregards the fact that the closure order in *Arcara* was directed not merely to the sexual activity occurring in the bookstore, but to the entire operation of the bookstore. By dictating closure of the bookstore (for a year, no less), the order restricted conduct--the selling and buying of books--that undeniably had a strong expressive element. In narrowing his focus to the particular conduct that prompted the closure order and thereby ignoring the extent of the conduct actually encompassed within the scope of the order, Chief Justice Burger was able to pretend that there was no restriction of expressive activities protected by the First Amendment.

Justice Blackmun entered a dissenting opinion in *Arcara*, asserting that the First Amendment provided protection against all laws that abridge freedom of speech, not just those specifically directed at expressive activity.[86] He maintained that the Court had never previously suggested that a state may suppress speech without justification so long as it does so through a generally applicable regulation not directed to expressive conduct.[87] Justice Blackmun admitted that at some point the impact of state regulation on freedom of speech may become so attenuated that it is easily outweighed by a countervailing state interest.[88] But when a state directly and substantially impairs First Amendment activities, such as by shutting down a bookstore, he thought that the state must show, at a minimum, that it has chosen the least restrictive means of pursuing its legitimate objectives.[89]

Chief Justice Burger's opinion in *Arcara* was not persuasive to the New York Court of Appeals, which, when the case was remanded to it, reinstated its former ruling that the closure order was improper, this time, however, basing its ruling on the guarantee of freedom of speech set forth in the New York Constitution rather than the Federal Constitution.[90] While the New York court recognized that it was bound to follow the decision in *Arcara* in determining the scope and effect of the First Amendment of the Federal Constitution, the court made it clear that it possessed independent authority to interpret the state constitutional guarantee of free speech more expansively than the federal guarantee.[91] Noting New York's long history and tradition of fostering freedom of expression, the court reasoned that the "minimal national standard" established by the Supreme Court for First Amendment rights could not be taken as dispositive in determining the scope of the state constitutional guarantee of freedom of expression.[92] Under

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certain parks as applied to restrict a group of demonstrators from sleeping in Lafayette Park and the Mall to call attention to the plight of the homeless.)

[84] *Id*. at 707.

[85] *Id*. at 705.

[86] *Id*. at 709 (Blackmun, J., dissenting).

[87] *Id*.

[88] *Id* at 710.

[89] *Id*.

[90] People ex rel. Arcara v. Cloud Books, Inc. 503 N.E.2d 492 (N.Y. 1986).

[91] *Id*. at 494-95.

[92] *Id*.

the New York Constitution, there was no doubt that bookselling was a constitutionally protected activity or that closing a bookstore may have a substantial impact on that activity.[93] While a bookstore of course cannot claim an exemption from statutes of general operation aimed at preventing nuisances or hazards to the public health and safety, bookstores are entitled to "special protection" under the state guarantee of freedom of expression.[94] Because the closure order was broader than necessary to achieve its purpose of curbing illicit sexual activity, the Court concluded that it violated the New York constitutional guarantee of freedom of speech.

The New York court also took the occasion to respond to Justice O'Connor's assertion in *Arcara* that to accept the bookseller's claim of First Amendment protection would lead to the "absurd result" that any governmental action having some conceivable inhibitory effect upon speech would require analysis under the First Amendment.[95] Not so, the New Court explained, because not every government regulation of general application that has some impact on free speech implicates constitutional guarantees.[96] Arresting a newspaper reporter for a traffic violation, the example noted by Justice O'Connor, does not rise to the level of a constitutionally cognizable claim.[97] "But closing a bookstore for a year, as is required by this statute, cannot be said to have such a slight and indirect impact on free expression as to have no significance constitutionally."[98]

Chief Justice Burger's approach in *Arcara* has not found much favor in subsequent Supreme Court cases involving freedom of expression. The Court rarely, if ever, mentions it as a reason for rejecting First Amendment free speech claims. In *Barnes v. Glen Theatre, Inc.*, despite the exhortations of Justice Scalia, the Court declined to adopt the *Arcara* approach.[99] *Barnes* involved the prohibition of nude dancing under a public indecency statute proscribing nudity. By a vote of 5-4, with no majority opinion in the case, the Court found that the prohibition of nude dancing did not violate the First Amendment. Although fully eight of the justices agreed that nude dancing was expressive conduct entitled to some degree of protection under the First Amendment, they differed sharply as to whether the prohibition of nude dancing could be squared with relevant First Amendment principles.[100] Of all the justices, only Justice Scalia thought that the First Amendment had no application to the case. The challenged regulation must be upheld, he proclaimed, "because as a general law regulating conduct and not

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[93] *Id*. at 495.
[94] *Id*.
[95] Arcara, 478 U.S. at 708 (O'Connor, J., concurring).
[96] Arcara, 503 N.E.2d at 495.
[97] *Id.*
[98] *Id.*
[99] Barnes v. Glen Theatre, Inc., 501 U.S.560 (1991).
[100] Chief Justice Rehnquist wrote a plurality opinion joined by Justices O'Connor and Kennedy, which grudgingly admitted that the nude dancing involved in the case was expressive conduct entitled to some degree of protection under the First Amendment. Purporting to apply the *O'Brien* four-part test that obtains in cases concerning expressive conduct, Chief Justice Rehnquist upheld the prohibition of nude dancing on the ground that it served the state interest in protecting social order and morality. Justice Souter entered a concurring opinion noting that nude dancing was inherently expressive. Applying the *O'Brien* test, Justice Souter found the prohibition of nude dancing was justifiable as a means of preventing the secondary effects of prostitution, sexual assault, and other criminal activity. Justice White authored a dissenting opinion, joined by Justices Marshall, Blackmun, and Stevens, asserting that nude dancing was inherently expressive and that the prohibition of it failed under the *O'Brien* test. It further should be noted that in a subsequent case Justice Souter continued to maintain that nude dancing was inherently expressive, but repudiated the part of his *Barnes* opinion arguing that nude dancing could be prohibited in order to prevent the secondary effects of prostitution, sexual assault, and other criminal activity. City of Erie v. Paps A.M., 529 U.S. 277, 310 (2000) (Souter, J., dissenting).

specifically directed at expression, it is not subject to First Amendment scrutiny at all."[101]

Echoing the Burger and O'Connor opinions in *Arcara*, Justice Scalia argued in *Barnes* that virtually every law restricts conduct and virtually any prohibited conduct can be performed for an expressive purpose.[102] In Scalia's view, therefore, it was not reasonable to implement First Amendment review for every restriction of expression incidentally produced by a general law regulating conduct.[103] This argument, however, was not enough to sway any other justice, perhaps because it cuts such a deep swath in the scope of the First Amendment and allows freedom of speech to be suppressed without requiring any justification for the suppression. To exempt general rules that have a restrictive effect upon speech activities from any First Amendment scrutiny at all, as Justice Scalia would do, would grant the government *carte blanche* to restrict freedom of speech through general rules without showing a proper reason for doing so.

Moreover, the contention that virtually any conduct can be performed for an expressive purpose and therefore may be used to seek First Amendment shelter seems hyperbolic. As Justice Blackmun explained in his dissenting opinion in *Arcara*, at some point the impact of state regulation on freedom of speech will become so attenuated that it is easily outweighed by a countervailing state interest,[104] if not dismissed altogether as not presenting a claim under the First Amendment. Not every government regulation that has some impact on speech, no matter how slight or indirect, implicates First Amendment concerns.[105]

Occasionally, the Court may refer to the concept of general applicability, when a challenged law is not one of general applicability, so as to provide all the more justification for the use of heightened scrutiny or particular rules designed to protect freedom of speech. For instance, in *Lakewood v. Plain Dealer Publishing Co.*, the Court allowed a facial challenge to a law restricting the placement of newspaper vending racks on public property.[106] The Court explained that a facial challenge was appropriate because the law in question operated as a licensing system that gave government officials substantial discretion, which could be utilized to discriminate on the basis of the content or viewpoint of speech.[107] In addition, the Court noted a second feature of the licensing system that further supported a facial challenge: the licensing system was "directed narrowly and specifically at expression or conduct commonly associated with expression."[108] Thus, it was unlike "laws of general application that are not aimed at conduct commonly associated with expression and…carry with them little danger of censorship."[109]

The Court's statement in *Lakewood* might be dismissed as mere *obiter dictum*; nonetheless it suggests a lingering belief that laws of general applicability pose less threat to First Amendment concerns than laws specifically aimed at expressive activities. That is not to say, however, that when used to restrict expressive activities, laws of general applicability are exempt from review under the First Amendment.

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[101] *Id*. at 572 (Scalia, J., concurring).
[102] *Id* at 576.
[103] *Id*.
[104] *Id*. at 710 (Blackmun, J., dissenting).
[105] People ex rel. Arcara v. Cloud Books, Inc. 503 N.E.2d 492, 495 (N.Y. 1986).
[106] Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988).
[107] *Id*. at 759.
[108] *Id*. at 760.
[109] *Id*. at 761.

In a recent case, *Holder v. Humanitarian Law Project*, the Court rejected the notion that First Amendment requirements are downgraded where speech is being regulated through a law of general applicability.[110] *Holder* involved a constitutional challenge to a federal statute that made it a crime to knowingly provide material support to any entity designated by the Secretary of State as a foreign terrorist organization. The statute defined material support to include property, money or other financing, equipment, facilities, weapons, training, and expert advice or assistance. The plaintiffs, who wanted to advise certain terrorist organizations how to achieve their goals through legal channels such as using international law to resolve disputes peacefully or to petition the United Nations for relief, challenged the constitutionality of the statute as applied to their activities. In defending the statute, the government argued that rather than using the form of strict scrutiny that ordinarily would be employed to review statutes such as this one that are content-based, the Court should reduce the degree of scrutiny to an intermediate level because the statute "generally functions as a regulation of conduct."[111] In refusing to downgrade the level of scrutiny, the Court pointed out that the government's argument was contrary to a number of precedents, most prominently *Cohen* v. *California*.[112] The Court explained that *Cohen* also involved a generally applicable law regulating conduct (a breach of the peace statute) but when Mr. Cohen was convicted under the statute for wearing a jacket bearing a profane epithet ("Fuck the Draft"), the Court did not see fit to apply a reduced level of scrutiny.[113] To the contrary, the Court recognized that the breach of the peace statute, though a generally applicable law, had been directed at Cohen because of the message conveyed by his speech.[114] That is, he had been found to violate the breach of the peace statute due to the offensive content of his particular message. The Court therefore applied strict scrutiny and reversed Cohen's conviction.[115]

In the Court's view, the situation in *Holder* fit the same category as *Cohen*. The law in question was directed generally at conduct, but was being applied to regulate expressive conduct—speech. As a result, strict rather than intermediate scrutiny was the appropriate standard of review. Using strict scrutiny, the Court upheld the constitutionality of the statute as applied to the plaintiffs' activities on the ground that there was a compelling state interest in protecting national security from the threats posed by foreign terrorist organizations. In *Holder*, though, the Court squarely ruled that the full force of the First Amendment pertains to rules of general applicability when they are employed to regulate expressive activities.

Free Exercise of Religion

In 1963, the Supreme Court decided *Sherbert v. Verner*,[116] ruling that laws that burden the free exercise of religion were subject to strict judicial scrutiny and had to be justified by a showing of a compelling state interest. Under that approach, the Court ruled in *Sherbert* that the government violated the Free Exercise Clause by denying unemployment benefits to a member of the Seventh Day Adventist Church who quit her job rather than work on Saturday, which she observed as the Sabbath. Noting that the appellant had been forced to choose between following the precepts of her religion and forfeiting unemployment benefits, the Court concluded that the

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[110] Holder v. Humanitarian Law Project, ___ U.S. ___, 130 S. Ct. 2705 (2010).
[111] *Id*. at 2724.
[112] *Id*. [citing Cohen v. California, 403 U.S. 15 (1971)].
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] Sherbert v. Verner, 374 U.S. 398 (1963).

state's imposition of such a choice upon the appellant was a significant burden on the free exercise of religion that was not supported by a compelling state interest.[117] Adhering to the ruling in *Sherbert*, the Court applied strict scrutiny in several other cases in holding that the Free Exercise Clause was violated where persons were denied unemployment benefits for quitting their jobs for sincerely-held religious reasons.[118]

In *Wisconsin v. Yoder*, the Court extended the ruling in *Sherbert* in holding that the Free Exercise Clause was violated by requiring Amish children to comply with a compulsory school attendance law contrary to their religious beliefs.[119] The Court stated in *Yoder* that the case could not be disposed of on the ground that the compulsory attendance law applied uniformly to all children and did not facially discriminate against religions or a particular religion, or that it was motivated by legitimate secular concerns.[120] "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[121] After finding that the impact of the compulsory attendance law was severe and undeniably at odds with the fundamental tenets of Amish religious beliefs, the Court concluded that the Amish were constitutionally entitled to an exemption from the law.[122]

In *Yoder*, the Court unqualifiedly stated that a neutral law of general applicability may, as applied, violate the Free Exercise Clause. It should be noted, however, that aside from *Yoder* and the unemployment benefits cases, from 1960 through 1990 the Court has never upheld a free exercise claim when the law at issue was one of general applicability.[123] Reviewing the Court's record in free exercise cases during this period of time, one commentator declaimed that the *Sherbert* free exercise doctrine was "more talk than substance."[124] Although perhaps a bit histrionic, that statement nonetheless accurately reflected that the Supreme Court rarely sided with free exercise claimants.[125]

Even though free exercise claimants rarely won before the Supreme Court, there were those who argued that the *Sherbert* doctrine went too far in upholding the right to free exercise of religion.[126] Critics of *Sherbert* pointed out that in effect it granted an exemption for religiously-motivated conduct from neutral laws that otherwise were constitutionally valid.[127] It was said that this "promotes its own form of inequality: a constitutional preference for religious over non-religious belief systems."[128]

Whatever the merits or demerits of *Sherbert*, free exercise doctrine changed severely in 1990 when the Supreme Court decided *Employment Division, Department of Human Resources*

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[117] *Id*. at 719

[118] Thomas v. Review Board, 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987); Frazee v. Illinois Department of Income Security, 489 U.S. 829 (1989).

[119] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[120] *Id*. at 220.

[121] *Id*.

[122] *Id*. at 218.

[123] Erwin Chemerinsky, *supra* note 22, at 1254.

[124] Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1109 (1990).

[125] *Id*.

[126] William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 Case W. Res. L. Rev. 357 (1989-90).

[127] *Id*. at 357-58.

[128] William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 319 (1991).

v. Smith.[129] This case arose in Oregon when two Native Americans were fired from their jobs at a drug rehabilitation clinic for ingesting peyote, a hallucinogenic substance, for sacramental purposes at a ceremony of the Native American Church. After being denied unemployment compensation by the Employment Division of the Oregon Department of Human Resources, the Native Americans filed suit, claiming that the denial of unemployment compensation violated their right to the free exercise of religion.[130] Eventually the case reached the Supreme Court, which ruled against the claimants, holding that there was no violation of the Free Exercise Clause. In so ruling, the Court set forth a new test to govern free exercise claims, according to which the Free Exercise Clause cannot be used to challenge a neutral law of general applicability. Abandoning the compelling state interest test of *Sherbert*,[131] the Court held that the Free Exercise Clause does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability" on the ground of religious belief.[132] That is, religious beliefs do not excuse an individual from compliance with an otherwise valid law prohibiting conduct that is within state authority to regulate.[133]

The Court distinguished *Sherbert* and the other unemployment cases on the ground that the conduct at issue in those cases was not prohibited by law, whereas the use of peyote was prohibited by Oregon law.[134] Building on that distinction, Justice Scalia's majority opinion declared that "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[135] Thus, the Court ruled that religious motivation for using peyote did not exempt individuals from a neutral criminal law that was concededly constitutional as applied to those who use peyote for other reasons.[136]

The Court took a different tack in distinguishing *Yoder*, asserting that it involved not only a free exercise claim, but also another constitutionally protected claim, namely, the right of parents to direct the upbringing of their children.[137] In contrast, *Smith* did not present "such a hybrid situation," and therefore did not evoke the enhanced constitutional protection that was appropriate in *Yoder*.[138] So, the Court concluded that where a free exercise claim is unconnected to another constitutionally protected right, such as the right of parents to direct the upbringing of their children or the right to freedom of speech, a religious exemption from a neutral law of general applicability will not be granted.[139]

Critics of the Scalia opinion in *Smith*, including some who agreed with the decision itself, were especially scornful of its treatment of *Yoder* and the *Sherbert* line of cases. Michael

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

[130] "There is no dispute that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion." Smith, 494 U.S. at 903 (O'Connor, J., concurring).

[131] "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." Smith, 494 U.S. at 884. The Court abandoned the compelling state interest test by a vote of 5-4. Justice O'Connor concurred in the judgment on other grounds. Justice Blackmun, joined by Justices Brennan and Marshall, dissented.

[132] *Id*. at 879, quoting United States v. Lee, 455 U.S. 252, 263 n 3 (Stevens, J., concurring).

[133] *Id*. at 878-79.

[134] *Id*. at 876.

[135] *Id*. at 878-79.

[136] *Id*. at 878.

[137] *Id*. at 881.

[138] *Id*. at 882.

[139] *Id*.

McConnell found *Smith*'s use of precedent "troubling, bordering on the shocking."[140] Douglas Laycock declared that the Court's reading of precedent in *Smith* was "transparently dishonest."[141] And William Marshall described the use of precedent in *Smith* as "border(ing) on fiction."[142]

Moreover, as Justice Souter explained in a later case, the "hybrid-rights" exception announced in *Smith* is ultimately untenable.[143] If a hybrid claim is merely one in which another constitutional right is implicated, then the exception would probably be so vast as to swallow the *Smith* rule and certainly would encompass the activity in *Smith* itself, as free speech and associational rights were clearly implicated in the peyote ritual.[144] On the other hand, if a hybrid claim is one in which a litigant would actually be exempt from a generally applicable law under another constitutional provision, then there would be no reason in a supposedly hybrid case to evoke the Free Exercise Clause at all.[145] Commentators have been routinely disdainful of the hybrid-rights exception, viewing it as a bungled attempt to distinguish disagreeable precedent,[146] and the Sixth Circuit refused to follow it on the ground that it was "completely illogical."[147] Other circuits have similarly declined to follow the exception[148] and even its progenitor, Justice Scalia, seems to have abandoned it.[149]

Whatever the flaws of Justice Scalia's reasoning in *Smith*, however, the Court's ruling that the Free Exercise Clause may not be used to challenge a neutral law of general applicability prevailed as a constitutional ruling that defines the extent of religious liberty.[150] The ruling in *Smith* significantly reduced the scope of constitutional protection accorded to religious conduct. In *Smith*, the Court abandoned the use of strict scrutiny to review the regulation of religious practices under neutral laws of general applicability. This granted the government considerably more leeway to regulate religious activities than previously existed. Under the *Smith* calculus, as long as a law is neutral toward religion, it application to religious conduct will be accepted as constitutional with little or no justification for the law. Although *Smith* leaves standing the use of strict scrutiny to review laws that target religious practices, laws that are neutral toward religion are allowed to fly under the constitutional radar, escaping any sort of meaningful judicial review, even when applied to regulate religious activity.

Justice O'Connor believed this was a serious mistake that truncated the First Amendment. She asserted that the First Amendment does not distinguish between laws that are generally applicable and those that target particular religious practices.[151] From her perspective, a general law that prohibits certain conduct—conduct that happens to be an act of worship for

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[140] Michael McConnell, *supra* note 124, at 1120.
[141] Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Crt. Rev. 1, 2-3 (1990).
[142] William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 309 (1991).
[143] Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring).
[144] *Id*.
[145] *Id*.
[146] *See* Christopher C. Lund, *supra* note 24, at 630 and sources cited in n. 19.
[147] Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993).
[148] *See* Combs v. Homer-Center School Dist., 540 Fed.3d 231, 244-47 (3rd Cir. 2008); Jacobs v. Clark County School Dist., 526 F.3d 419, 440, n. 45 (9th Cir. 2008).
[149] *See* Christopher C. Lund, *supra* note 24, at 631-32.
[150] State courts, though, are free to interpret their state constitutions independently of federal constitutional doctrine, and a number of state courts, in interpreting their own state constitutional religion clauses, have rejected *Smith* and continued to follow the approach in *Sherbert*. *See, e.g.*, Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994); Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000).
[151] Smith, 494 U.S. at 894 (O'Connor, J., concurring).

someone--manifestly prohibits that person's free exercise of religion and therefore should be subject to strict scrutiny.[152] The majority's repudiation of strict scrutiny "has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides."[153] In Justice O'Connor's view, the Court's ruling was a dramatic departure from settled First Amendment jurisprudence and was incompatible with the nation's fundamental commitment to individual religious liberty.[154]

In certain corners *Smith's* revisionist jurisprudence was viewed with apprehension, not to say alarm. There were those who described *Smith* as a "sweeping disaster for religious liberty."[155] One commentator went so far as to suggest that if the Court intended to defer to any formally neutral law restricting religion, it has created "a legal framework for persecution."[156]

At the opposite extreme, *Smith* had its defenders, who maintained that, despite the sundry flaws of the Scalia opinion, the Court had reached the right result.[157] The defenders of *Smith* asserted that to create exemptions from neutral laws for religious practices amounted to government favoritism of religion that raised serious constitutional concerns under both the Free Speech Clause and the Establishment Clause.[158]

In 1993, Congress attempted to reverse the ruling in *Smith* by enacting the Religious Freedom Restoration Act (RFRA), the stated purpose of which was to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[159] RFRA expressly provided that "Government shall not substantially burden a person's exercise of religion *even if the burden results from a rule of general applicability*" except where the government can demonstrate that the burden is necessary to further a compelling state interest and is the least restrictive means of doing so.[160] RFRA, however, was short-lived: In *City of Boerne v. Flores*, the Supreme Court, defending its prerogative to have the final say on the meaning of the nation's highest law, ruled that the Act was beyond Congressional authority and therefore unconstitutional.[161]

The ruling in *Smith* was not particularly well-received among state courts, a number of which, in interpreting free exercise guarantees in their own state constitutions, expressed

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[152] *Id.*at 893 (O'Connor, J., concurring).

[153] *Id*. at 894 (O'Connor, J. concurring) [quoting Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136, 141-42 (1987); Bowen v. Roy, 476 U.S. 693, 727 (1986) (O'Connor, J. concurring in part and dissenting in part)].

[154] *Id* at 891 (O'Connor, J., concurring. Justice Blackmun asserted that the Court's decision "effectuate(d) a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. *Id*. at 908 (Blackmun, J. dissenting).

[155] Edward M. Gaffney, Douglas Laycock & Michael W. McConnell, "An Open Letter to the Religious Community," First Things, March 1991, at 44, 44.

[156] Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Crt. Rev. 1, 4 (1990).

[157] *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308 (1991).

[158] *Id*. at 320; *See also*, Mark Tushnet, *Of Church and State and the Supreme Court: Kurland Revisited*, 1989 Sup. Crt. Rev. 373, 390.

[159] 42 U.S.C. §2000bb(b)(1).

[160] 42 U.S.C. §2000bb-1(a), (b). (Emphasis added.)

[161] City of Boerne v. Flores, 521 U.S. 507 (1997). Congressional authority to enact RFRA was based on §5 of the Fourteenth Amendment, but the Supreme Court ruled that in enacting RFRA Congress had exceeded its authority under §5. The Court's ruling, however, only pertains to state regulations of religious practices and not federal ones. RFRA remains in effect in regard to federal regulations. *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).

disagreement with the decision and declined to adopt it at the state level.[162] The Supreme Court of Minnesota flatly declared that it would not follow the "limited analysis" in *Smith* and instead would continue to apply strict scrutiny to laws challenged under the Minnesota free exercise clause.[163] Similarly, the New York Court of Appeals rejected what it described as "the inflexible rule of *Smith*."[164] In addition, several state legislatures enacted state RFRAs mandating that the state may burden the free exercise of religion only if it demonstrates that the application of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.[165]

In the federal realm, however, despite the criticism leveled against it, the ruling in *Smith* remained firm. And in time, the criticism of *Smith* diminished, if for no other reason than the decision was a *fait accompli* that would not be reversed.[166] At that point, the focus in free exercise litigation became determining the boundaries of neutrality and general applicability.[167]

Three years after *Smith*, the Court turned its attention to delineating those boundaries in *Church of the Lukumi Babalu Aye v. Hialeah*.[168] There, in an opinion written by Justice Kennedy, the Court struck down several ordinances prohibiting ritual sacrifice of animals.[169] In examining the ordinances, the Court treated neutrality and general applicability as separate matters and found that the ordinances were neither neutral nor of general applicability.[170] Regarding neutrality, the Court pointed to several aspects of the ordinances indicating that they targeted religious conduct. First, the Court noted that the words "sacrifice" and "ritual," used in the text of the ordinances, have a religious origin but also admit of secular meaning.[171] Although the use of those words supported a claim of facial discrimination, it did not conclusively demonstrate that claim.[172] The Free Exercise Clause, however, extends beyond facial discrimination to forbid "subtle departures from neutrality" and "covert suppression of particular religious beliefs."[173] Government action that targets religious conduct for differential treatment "cannot be shielded by mere compliance with the requirement of facial neutrality."[174]

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[162] *E.g.*, Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274 (Alaska 1994); Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000). A state court is free to interpret its own state constitution independently of federal constitutional doctrine. While decisions of the United States Supreme Court are entitled to respect, they are not binding on a state court as it interprets its own state constitutional provisions, even when state and federal provisions are similarly worded. As long as state constitutional protection does not fall below the federal floor, a state court may interpret it own state constitution as it chooses, irrespective of federal law. Clearly, a state is free as a matter of its own law to grant more expansive rights than is afforded by federal law. Jeffrey M. Shaman, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 136 (2008).

[163] Hill-Murray Federation of Teachers v. Hill-Murray High School, 487 N.W.2d 857, 865 (Minn. 1992).

[164] Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 466 (N.Y. 2006).

[165] *E.g.*, Connecticut General Statutes, Title 52, §52-571b.

[166] Christopher C. Lund, *supra* note 24, at 628.

[167] Richard Duncan, *supra* note 16, at 859 ("Thus, the key issue in religious liberty litigation has become locating the borders of neutrality and general applicability."); Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 Cardozo L. Rev. 565, 572 (1999) ("The key to the *Lukumi Babalu Aye* line of cases involves the scope of what constitutes general applicability….")

[168] Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993).

[169] Justice Kennedy wrote for a majority of the Court in most, but not all, parts of the opinion.

[170] In a concurring opinion, Justice Scalia asserted that it was unnecessary to treat neutrality and general applicability as separate matters and that the Court should acknowledge that the terms substantially overlap. *Id*. at 557 (Scalia, J., concurring in part).

[171] *Id*. at 533-34.

[172] *Id*. at 534.

[173] *Id*. (quoting Gillette v. United States, 401 U.S. 437, 452, [1971] and Bowen v. Roy, 476 U.S. 693, 703[1986]).

[174] *Id*.

In further assessing the ordinances, the Court described them as a "religious gerrymander" drafted in tandem to target a particular religion, the Santeria religion, which engages in animal sacrifice as a central element of worship.[175] Indeed, virtually the only conduct subject to the ordinances was the religious exercise of Santeria church members.[176] The ordinances excluded almost all killing of animals except for religious sacrifice and further exempted the killing of animals, such as kosher slaughtering, by other religions.[177] The net result of the gerrymander was that few if any killings of animals were prohibited other than Santeria sacrifice, leading the Court to conclude that the Santeria religion was the exclusive target of the ordinances.[178]

The ordinances were discriminatory in other aspects, as well. While purporting to ban only the "unnecessary" killing of animals, the ordinances allowed hunting, slaughtering of animals for food, eradication of pests, and euthanasia on the ground they were "necessary."[179] Even the use of live rabbits to train greyhounds for racing was permitted.[180] Thus, the ordinances deemed religious reasons for killing animals less important than nonreligious reasons, and thereby singled out religious practice for discriminatory treatment.[181]

As revealed by the legislative record in the case, the discriminatory effect of the ordinances was no accident.[182] Members of the city council and other city officials, as well as residents of the city, exhibited profound hostility toward the Santeria religion and its practice of animal sacrifice.[183] At meetings of the city council, the Santeria religion was described as "abhorrent," "an abomination to the Lord," and "in violation of everything this country stands for."[184] The president of the city council asked, "What can we do to prevent the Church from opening?"[185] When a member of the city council stated that in prerevolutionary Cuba people were put in jail for practicing the Santeria religion, the audience applauded.[186] Given this record, there was no doubt that the ordinances were motivated by deep animosity toward the Santeria religion.

Clearly, then, the ordinances were anything but neutral. Motivated by religious hostility, targeted at a particular religious ritual, and gerrymandered to proscribe religious but not secular killing of animals, the ordinances were aimed at suppressing the Santeria religion.[187]

Turning to the requirement of general applicability, the Court found that the ordinances also fell short of that standard. This was apparent through an examination of the two interests advanced by the city in support of the ordinances, protecting the public health and preventing cruelty to animals.[188] The ordinances were underinclusive as a means of achieving those ends, because they failed to prohibit nonreligious conduct that endangered those interests in a similar

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[175] *Id*. at 535 (quoting Walz v. Tax Commissioner of New York City, 397 U.S. 664, 696 [1970]).
[176] *Id*.
[177] *Id*. at 536.
[178] *Id*.
[179] *Id*. at 537.
[180] *Id*.
[181] *Id*.
[182] The record showed that the ordinances were enacted "because of, not merely in spite of" suppression of Santeria religious practices. *Id*. at 540.
[183] *Id*. at 541.
[184] *Id*. at 541-42.
[185] *Id*. at 541.
[186] *Id*.
[187] *Id*. at 542.
[188] *Id*. at 543.

or greater degree than Santeria animal sacrifice did.[189] Despite the city's claimed interest in preventing cruelty to animals, the ordinances forbade few killings other than those for religious sacrifice. In fact, many types of animal killing for nonreligious reasons were either not prohibited or expressly allowed under the ordinances.[190]

The Court also found that the ordinances were underinclusive in regard to the city's interest in public health, which was threatened by the unsanitary disposal of animal carcasses and the consumption of uninspected meat.[191] Neither of those harms was addressed by regulation except in connection with religiously-motivated conduct, despite the fact that the health risks posed by improper disposal of animal carcasses are the same whether preceded by religious sacrifice or non-religious killing of animals.[192] Neither hunters nor restaurants were subject to the ordinances. Although unsanitary disposal is a general problem that causes substantial health concerns, the ordinance only addressed it when resulting from religious conduct.[193]

The ordinances further were underinclusive as a means of deterring consumption of uninspected meat. The goal of preventing consumption of uninspected meat was not addressed in situations similar to religious animal sacrifice. Hunters were not prohibited from eating their kill, nor fishermen from eating their catch. No law required the inspection of meat from animals raised for the use of their owner, household members, or guests and employees.[194] One of the ordinances even granted an exemption to any person, group, or organization that slaughters or processes "small numbers" of hogs or cattle "for sale."[195]

The ordinances, then, were substantially underinclusive, and as such failed the requirement of general applicability. Motivated by animosity and selectively targeting a disfavored religion, the ordinances were afflicted by the precise evil that the requirement of general applicability was designed to prevent.[196]

After concluding that the ordinances were neither neutral nor generally applicable, the Court went on to apply strict scrutiny to them. As the Court said, a law burdening religious practice that is neither neutral nor generally applicable must undergo "the most rigorous of scrutiny."[197] This means that the law under question must advance interests of "the highest order" and must be "narrowly tailored in pursuit of those interests."[198] As might be expected, the city ordinances challenged in *Lukumi* could not pass that test. Clearly, the ordinances were not drawn in narrow terms to effectuate their purported objectives of protecting the public health and preventing cruelty to animals.[199] To the contrary, all of the ordinances were either severely overbroad or underinclusive.[200] Their claimed objectives were not pursued in regard to similar non-religious conduct, rendering the ordinances underinclusive to a substantial degree.[201] Given those circumstances, the ordinances could not be regarded as protecting a compelling state

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[189] *Id*.
[190] *Id*. at 543-44.
[191] *Id*. at 544.
[192] *Id*. at 545.
[193] *Id*.
[194] *Id*.
[195] *Id*.
[196] *Id*. at 545-46.
[197] *Id*. at 546.
[198] *Id*.
[199] *Id*.
[200] *Id*.
[201] *Id*. at 546-47.

interest, and the Court therefore invalidated the ordinances on the ground that they violated the Free Exercise Clause.[202]

There are several important lessons to be taken from *Lukumi*. One is that a close affinity exists between the requirement of general applicability and the requirement of equal protection. In discussing the principle of general applicability, the Court explicitly stated in *Lukumi* that "The Free Exercise Clause protects religious observers against unequal treatment."[203] Moreover, Justice Kennedy's opinion pointedly noted that in free exercise cases to determine if the object of a law is neutral, guidance can be found in equal protection cases.[204] In fact, "[n]eutrality in its application requires an equal protection mode of analysis."[205]

Throughout the Court's opinion in *Lukumi* several equal protection concepts played a prominent role. The Court stressed that the ordinances were improperly selective and underinclusive. Religious conduct was singled out for discriminatory treatment that was motivated by ill will and animosity. In sum, there was a denial of equal protection of the law and therefore the law was neither generally applicable nor neutral.

Another significant lesson to be taken from *Lukumi* is that neutrality is not to be determined simply from the text of a law. "Facial neutrality is not determinative…. Apart from the text, *the effect of a law in its real operation* is strong evidence of its object."[206] In finding that the ordinances were not neutral, Justice Kennedy's opinion in *Lukumi* underscored the discriminatory impact of the ordinances, which belied their benign appearance. Justice Kennedy's analysis, directed to assessing the effect of the ordinances in the real world, reaffirmed that impermissible discrimination may occur through disparate impact, as well as through statutory directives overtly designed to discriminate.

Moreover, legislative motive also is relevant to the determination of neutrality. Justice Kennedy's opinion[207] explained that relevant evidence of non-neutrality includes, among other things, the historical background of the law in question, the specific series of events leading to enactment of the law, and contemporaneous statements made by members of the body that enacted the law[208]—all of which are matters that go to legislative motive. And, of course, the Kennedy opinion relied upon the presence of hostile legislative motive in concluding that the ordinances were not neutral.

Although Justice Scalia joined the lion's share of the Kennedy opinion, he entered a separate concurring opinion taking issue with Justice Kennedy's position in regard to the use of motive to show non-neutrality.[209] Justice Scalia objected to the use of legislative motive because he believes that it is "virtually impossible to determine the singular 'motive' of a collective legislative body."[210] In spite of Justice Scalia's claim that the Court has a long tradition of refraining from inquiries concerning legislative motive,[211] it is a tradition that the Court has

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[202] *Id*.
[203] *Id*. at 542 (citing Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 148, [1987]).
[204] *Id*. at 540.
[205] *Id*. (citing Walz v. Tax Commissioner of New City, 397 U.S. 664, 696 [1970] [Harlan, J., concurring]).
[206] *Id*. at 534-35 (emphasis added).
[207] This part of Justice Kennedy's opinion was joined only by Justice Stevens.
[208] *Id*. at 540.
[209] Justice Scalia entered an opinion concurring in part and concurring in the judgment that was joined by Chief Justice Rehnquist. *Id*. at 557.
[210] *Id*. Justice Scalia previously made a similar argument in Edwards v. Aguillard, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting).
[211] Lukumi, 508 U.S. at 558 (Scalia, J., concurring in part).

honored more in its breach than its observance.[212] In fact, there are a number of areas in which the Court regularly assesses legislative motive in reviewing the constitutionality of laws.[213] As for legislative motive being difficult or impossible to determine, that is not invariably so. To the contrary, by the Court's own admission, there are times when the dominant motive of the legislature can be determined with a good deal of certainty from the legislative record.[214] In *Lukumi*, the dominant legislative motive—suppression of the Santeria religion—comes across loud and clear. Even if legislative motive may be difficult to determine in some cases, there is no reason to preclude its examination in cases such as *Lukumi* where that difficulty simply does not exist.

Justice Souter entered a concurring opinion in *Lukumi*, offering a further refinement on the matter of neutrality. Justice Souter believes that it is important to distinguish between a requirement of formal neutrality, which bars deliberate discrimination, and a requirement of substantial neutrality, which requires the government to justify any serious burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.[215] As Justice Souter reads it, the Scalia opinion in *Smith* plainly assumed that the Free Exercise Clause required nothing more than formal equality.[216] As a result, in *Smith* the Court adopted what Justice Souter described as a "narrow conception of free-exercise neutrality" that should be re-examined in an appropriate case.[217] *Lukumi*, however, was not that case, because the ordinances in question there were not neutral under any definition of neutrality.[218] And since *Lukumi* the Court has not shown any inclination to reexamine its ruling in *Smith*.

The Court barely mentioned *Smith* in *Locke v. Davey*, which involved a State of Washington scholarship program that excluded students pursuing a degree in devotional theology.[219] A student who wished to use a scholarship to train for the ministry challenged the exclusion on the ground that it violated the Free Exercise Clause. In an opinion written by Chief Justice Rehnquist, the Court ruled that the exclusion of devotional studies from the scholarship program did not violate the Free Exercise Clause. Noting that the case involved the tension that frequently exists between the Free Exercise and Establishment Clauses, the Court made it clear at the outset that the Federal Constitution did not preclude Washington from allowing the scholarships to be used to study for the ministry, if it chose to do so.[220] The Supreme Court of Washington, however, had interpreted its own constitution as barring even indirect funding of religious instruction in preparation for the ministry.[221] The student who challenged the program contended that under *Lukumi* the program was presumptively unconstitutional because it was not

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[212] Jeffrey M. Shaman, CONSTITUTIONAL INTERPRETATION—ILLUSION AND REALITY (2001) 166.
[213] *Id*. at 155-64.
[214] *See* Hunter v. Underwood, 471 U.S. 222, 228-29 (1985).
[215] *Id*. at 561-63. Justice Souter also differentiates between formal neutrality and facial neutrality: "While facial neutrality would permit discovery of a law's object or purpose only by analysis of the law's words, structure, and operation, formal neutrality would permit enquiry also into the intentions of those who enacted the law…. For present purposes, the distinction between formal and facial neutrality is less important than the distinction between those conceptions of neutrality and substantive neutrality." *Id*. at 562, n.3.
[216] *Id*. at 562.
[217] *Id*. at 559.
[218] *Id*. at 563.
[219] Locke v. Davey, 540 U.S. 712 (2004).
[220] *Id*. at 718-19.
[221] *Id*. at 719.

facially neutral in regard to religion.[222] The Court rejected that argument, stating that to do otherwise would extend *Lukumi* well beyond both its facts and reasoning.[223] In an attempt to distinguish *Lukumi*, Chief Justice Rehnquist asserted that in *Locke* "the State's disfavor of religion (if it can be called that) is of a far milder kind" that imposed neither criminal nor civil sanction on a religious activity.[224] This purported distinction is not especially convincing. That the State's disfavor of religion in *Locke* is milder than it was in *Lukumi* hardly makes it neutral; whether subject to a harsh or mild sanction, discrimination is nonetheless discrimination.

Chief Justice Rehnquist also maintained that in *Locke* the State "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."[225] This, too, is a flawed argument, one of those false dichotomies to which Chief Justice Rehnquist often fell prey.[226] That the State has chosen to fund a distinct category of instruction does not preclude the possibility that the State also has required students to choose between their religious beliefs and receiving a government benefit. To the contrary, in choosing to fund a certain category of instruction the State has in fact required students to choose between their religious beliefs and receiving a grant.

Chief Justice Rehnquist further professed that the Washington scholarship program did not evince the hostility toward religion that was manifest in *Lukumi*.[227] In his view, the program went "a long way toward including religion in its benefits," by permitting students to attend pervasively religious schools and to take devotional theology courses so long as they were not studying for the ministry.[228] While it is correct that the Washington program in *Locke* did not embody the sort of hostility to religion that abounded in *Lukumi*, whether this was sufficient to distinguish the two cases is debatable.[229]

The true basis for distinguishing the cases, however, lies not in their comparative neutrality, but rather in the justification offered for the laws in question in each case. As the Court amply demonstrated in *Lukumi*, the ordinances there were not rationally related to any compelling state interest. On the other hand, in *Locke* the exclusion of scholarships to train for the ministry was adopted in order to avoid the use of taxpayer funds to subsidize religious institutions, as required by the Establishment Clause of the Washington Constitution.[230] As Justice Rehnquist noted, many state constitutions prohibit the use of tax moneys to fund religious activities.[231] On the federal level, adherence to these state proscriptions makes for an appropriate accommodation of the Free Exercise and Establishment Clauses.

Whatever the flaws of the Rehnquist opinion in *Locke*, the Court seemed to reach the right result. As Erwin Chemerinsky has said, a converse ruling would have dramatically changed the law and meant that any time a state provides assistance to secular entities it would

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[222] In a dissenting opinion, Justice Scalia argued that the program was facially discriminatory toward religion because it withheld a benefit from some individuals solely on the basis of religion. *Id*. at 726-27 (Scalia, J., dissenting).
[223] *Id.* at 720.
[224] *Id.*
[225] *Id*. at 720-21.
[226] *See* Jeffrey M. Shaman, *supra* note 212, at 43-44 (2001).
[227] Locke v. Davey, 540 U.S. at 724.
[228] *Id*. at 724-25.
[229] Justice Scalia thought it was not sufficient to distinguish the cases. *See id*. at 732-33 (Scalia, J., dissenting).
[230] *Id*. at 721-23.
[231] *Id*. at 722-23.

be required to give the same aid to religious institutions.[232] Surely a better result, and one that accommodates both Free Exercise and Establishment Clause concerns, is to allow states discretion to fund religious activities along with secular ones if they so choose, but not compel them to do so if they choose otherwise. This, after all, is consistent with the principle that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[233]

Justice Scalia dissented in *Locke*, taking a strange position in regard to neutrality. While insisting that the Washington program violated the Free Exercise Clause because it facially discriminated against religion, he allowed that this constitutional infirmity could be remedied by eliminating the facial aspect of the discrimination.[234] Justice Scalia asserted that this could be done in any number of ways, such as making the scholarships redeemable only at public universities or only for select courses of study.[235] "Either option would replace a program that facially discriminates against religion with one that just happens not to subsidize it."[236] In other words, although Justice Scalia is adamantly opposed to facial discrimination, he finds no fault with discriminatory impact. This, of course, is the other side of the coin to his position in *Smith*; so long as a rule is generally applicable on its face, its disparate impact is of no concern.[237] This position seems to invite subterfuge; by cleansing the face of discrimination, its insidious effect in the real world is allowed to persist.

Conclusion

Laws of general applicability are neutral on their faces in regard to religion and speech, but may have a restrictive effect that impinges upon First Amendment religious or expressive activities. Nonetheless, the Supreme Court has taken the position in some cases that, even when they restrict religion or speech, rules of general applicability do not implicate First Amendment concerns. In *Arcara v. Cloud Books, Inc.*, the Court ruled that the Free Speech Clause was not violated by a rule of general applicability even where it had a restrictive effect upon expressive activity.[238] And in *Employment Division v. Smith*, the Court ruled that the Free Exercise Clause was not violated by a neutral law of general applicability, even where it had a restrictive effect upon religious activity.[239] These rulings had the effect of nullifying the constitutional status of religious and expressive activities when regulated under a general law and thereby removing them from the scope of protection afforded by the First Amendment. *Arcara*, however, seems to be an isolated decision that the Court has ignored in subsequent decisions involving freedom of speech.[240] In contrast, *Smith* established a relatively firm precedent for free exercise of religion cases that effectuated a major doctrinal revision to the Free Exercise Clause.[241]

In *Church of the Lukumi Babalu Aye v. Hialeah*, the Court formulated an important boundary to the ruling in *Smith*, namely that the neutrality of a law is not to be determined

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[232] Erwin Chemerinsky, *supra* note 22, at 1263.
[233] Locke v. Davey, 540 U.S. at 719.
[234] *Id*. at 729 (Scalia, J., dissenting).
[235] *Id*.
[236] *Id*.
[237] At another point in his opinion, Justice Scalia, citing *Smith*, declares that the Court is no longer "in the business of reviewing facially neutral laws that merely happen to burden some individual's religious exercise." *Id*. at 731.
[238] *See supra*, at notes 70-80.
[239] *See supra*, at notes 129-35.
[240] *See supra*, at notes 98-115.
[241] *See supra*, at notes 159-67.

simply from its text.[242] Aside from its text, the effect of a law in its actual operation may be cogent evidence that the law is aimed at religious activities.[243] The discriminatory impact of a law may disprove its benign appearance. Moreover, legislative motive may also be relevant to the determination of neutrality.[244] The legislative motivation underlying a law, as well as its impact in the real world, must be assiduously examined to determine if the law is, in fact, neutral. A law that is neutral on its face, but is shown by its impact or underlying motivation to be aimed at religion will not be exempt from oversight under the First Amendment.

Still, there are laws that are genuinely neutral, designed to further valid secular ends. Under the approach taken in *Smith*, truly neutral rules of general applicability, even when used to regulate religious or expressive activities are removed from First Amendment oversight and, as a result, are subject to no more than minimal judicial scrutiny under either the Due Process Clause or Equal Protection Clause. This relegates First Amendment values to the barest level of constitutional protection.[245] Minimal scrutiny is the least demanding of the three tiers of scrutiny—strict, intermediate, and minimal—formulated by the Supreme Court. In fact, minimal scrutiny (also referred to as "rationality review") usually operates as virtually no scrutiny at all. When utilizing minimal scrutiny, the Supreme Court purports to require that legislation be rationally related to a legitimate state interest, but in most instances the Court blindly accepts the legislative judgment under review with no genuine examination.[246] In the vast majority of cases, minimal scrutiny functions as a rubber stamp for legislation, providing little more than a pretense of rationality.[247]

In *Smith*, in withdrawing First Amendment protection from the plaintiff's claim, the Court explicitly refused to follow the ruling in previous cases that strict scrutiny should be used to review free exercise claims.[248] Justice Scalia, who wrote the majority opinion in *Smith*, was averse to the use of strict scrutiny, fearful that many rules of general applicability that affect religious practices would be unable to meet the high standard that it sets.[249]

In response, it should be pointed out that strict scrutiny, though rigorous, is not an impossible hurdle to overcome. In fact, laws specifically directed at religious or expressive activities that are subject to strict scrutiny do not invariably fail to pass constitutional muster. A number of laws regulating religion or speech reviewed under strict scrutiny have been found to be constitutionally justified by being narrowly tailored to achieve a compelling state interest. For example, in a free speech case, *Burson v. Freeman*, the Court used strict scrutiny in upholding a state law that prohibited the solicitation of votes or the display or campaign materials within 100 feet of the entrance of a polling place.[250] The Court concluded that the law was constitutionally justified because it served the compelling state interest of preventing voter

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[242] *See supra*, at notes 168-96, 206.
[243] *Id*.
[244] *See supra*, at notes 182-87, 207.
[245] Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136, 141-42 (1987) [quoting Bowen v. Roy, 476 U.S. 693, 727 (1986) (O'Connor, J. concurring in part and dissenting in part)].
[246] Jeffrey M. Shaman, *supra* note 162 at 9 (2008).
[247] *Id.*
[248] "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." Smith 494 U.S. at 884.
[249] *Id*. at 888.
[250] Burson v. Freeman, 504 U.S. 191 (1992). *See also* Buckley v. Valeo, 424 U.S. 1 (1974) (upholding under strict scrutiny a law imposing various ceilings on campaign contributions made to candidates for federal office on the ground that it served the compelling state interest of prohibiting the actuality and appearance of corruption.

intimidation and election fraud. In a more recent case (discussed previously),[251] *Holder v. Humanitarian Law Project*, the Court employed strict scrutiny in sustaining a federal statute making it a crime to give advice to foreign terrorist organizations. The Court found that the statute, even as applied to expressive conduct concerning lawful, nonviolent activities, was constitutionally justified by the compelling state interest in protecting national security from the threats posed by foreign terrorist organizations.

In religion cases, also, strict scrutiny is not invariably insurmountable. For instance, in *United States v. Lee*, a case decided prior to *Smith* when generally applicable rules that burdened religious practices were still subject to strict scrutiny, the Court upheld a federal law requiring the payment of Social Security taxes that was challenged by an Amish individual on the ground that the law violated his First Amendment right to the free exercise of religion. [252] Although the Court acknowledged that the payment or receipt of taxes was forbidden by the Amish faith, the Court nonetheless found that the tax law was justified, even as applied to the Amish, because the law was essential to accomplish the overriding governmental interest of providing a comprehensive insurance system for all Americans.[253] In *Smith* itself, Justice O'Connor entered a concurring opinion maintaining that the prohibition of peyote, even when used for sacramental purposes, was constitutionally justified because it was narrowly tailored to achieve a compelling state interest in enforcing laws that control the possession and use of harmful drugs.[254] In Justice O'Connor's view, although there was no question that the prohibition of peyote placed a serve burden on the plaintiffs' ability to freely exercise their religion, the state had an overriding interest in preventing drug abuse, "one of the greatest problems affecting the health and welfare of our population."[255] Justice O'Connor's opinion in *Smith* as well as the opinions of the Court in *Burson* and *Lee* illustrate that strict scrutiny is not as insurmountable as Justice Scalia believes it to be.

Moreover, a more lenient, though still meaningful standard of review, intermediate scrutiny, is also available in cases involving religious or expressive activities. Whereas strict scrutiny requires the showing of a compelling state interest to sustain a law, intermediate scrutiny prescribes a less demanding standard that calls for the showing of an important or substantial state interest to sustain a law.[256] And while strict scrutiny requires that legislative means be absolutely necessary to accomplish their ends, intermediate scrutiny expects that legislative means be carefully tailored, though not absolutely necessary, to accomplish their ends.[257] In practice, intermediate scrutiny has proven to be less severe than strict scrutiny and in numerous cases when using intermediate scrutiny the Court has upheld laws challenged on First Amendment grounds.[258]

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[251] *Supra* at notes 110-15.
[252] United States v. Lee, 455 U.S. 252 (1982).
[253] *Id*. at 256-59.
[254] Smith, 494 U.S. at 904 (O'Connor, J., concurring).
[255] *Id*. *But see* Justice Blackmun's dissenting opinion in *Smith*, arguing that under strict scrutiny the state's interest in enforcing its drug laws against the religious use of peyote was not sufficiently compelling to outweigh the individuals' right to the free exercise of their religion. Smith, 494 U.S. at 909-921 (Blackmun, J., dissenting).
[256] Jeffrey M. Shaman, *supra* note 162, at 10.
[257] *Id.*
[258] *E.g.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding under intermediate scrutiny a municipal law prohibiting the posting of signs on public property on the ground that the law prevented "visual clutter."); Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding under intermediate scrutiny a regulation prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident on the ground that the regulation served to protect the privacy and

Intermediate scrutiny would seem to be an appropriate standard of review to assess rules of general applicability that have a restrictive effect upon religious activities. While rules of general applicability have valid secular ends and therefore are less constitutionally suspect than laws specifically aimed at religion, if their effect is to restrict religious activities, they should not be entirely exempt from meaningful review. Intermediate scrutiny offers a happy medium for reviewing laws where neither strict nor minimal scrutiny is warranted.

In fact, intermediate scrutiny was originally devised in a First Amendment case involving a neutral law of general applicability. The case was *United States v. O'Brien*, in which an individual was convicted of burning his draft card in violation of a federal statute prohibiting the mutilation or destruction of a draft card. [259] As described by the Court, the statute was directed on its face to conduct having no connection with speech and therefore plainly did not abridge free speech on its face.[260] In fact, the Court stated that "A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records."[261] In other words, the statute was a law of general applicability neutral in regard to speech. Be that as it may, Mr. O'Brien, who had burned his draft card as an act of symbolic expression to protest the war in Viet Nam, argued that the statute was unconstitutional as applied to him because it penalized his First Amendment right to freedom of speech.[262]

The case, then, presented a dilemma of what level of scrutiny the Court should use to resolve the issue at hand. At the time of the case, only two levels of scrutiny, minimal and strict, had been formulated. The conduct in question in the case—burning a draft card—had elements of both speech and action. On one hand it expressed an idea—in fact, a political idea—that, if presented in a more pure form of speech such as the printed page or the spoken word, would be entitled to the protection of strict scrutiny under the First Amendment. On the other hand, O'Brien had engaged in action—burning a draft card—that ordinarily would evoke only minimal constitutional protection. Why not compromise, then, and follow a middle course, a level of scrutiny intermediate to strict and minimal? And that is exactly what the Court did in *O'Brien* by articulating what was then a new constitutional standard of review that required the government to show an "important or substantial" governmental interest in justification of the law in question, that is, a higher standard than the mere rationality of minimal scrutiny but lower than the compelling state interest of strict scrutiny.[263] Thus, in *O'Brien* the Court charted an intermediate course of constitutional review.

In *O'Brien*, the Court created an intermediate level of scrutiny as a compromise to resolve the dilemma of what level of scrutiny to use in cases involving conduct that combines elements of speech and action. But *O'Brien* also can be seen as a case adopting an intermediate level of scrutiny to deal with constitutional challenges to laws of general applicability that have a restrictive effect on freedom of speech. The Court emphasized in *O'Brien* that the statute in question was not on its face directed to expressive activities; i.e., it was a neutral law of general

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tranquility of accident victims from invasive conduct by lawyers); Doe v. Reed, __ U.S. __, 130 S. Ct. 2811 (2010) (upholding under intermediate scrutiny a law requiring disclosure of the names and addresses of persons who sign referendum ballot petitions on the ground that the law preserved the integrity of the electoral process by preventing fraud, detecting invalid signatures, and fostering government transparency and accountability.)

[259] United States v. O'Brien, 391 U.S. 367 (1968).

[260] *Id*. at 375.

[261] *Id.*

[262] *Id*. at 376.

[263] *Id*. at 376-77.

applicability. But the Court did not think minimal scrutiny was the appropriate standard to utilize in the case, precisely because, as applied, the statute had a restrictive impact upon freedom of expression.

The intermediate course chartered in *O'Brien* seems to provide a particularly suitable means for assessing rules of general applicability that restrict religious activities. Because they are not specifically aimed at religious or expressive activities, rules of general applicability may not be considered presumptively unconstitutional, as is the practice under strict scrutiny. Still, when employed to regulate religious activities, rules of general applicability should not enjoy the extreme tolerance allowed under minimal scrutiny, which in practice operates as virtually no scrutiny at all. Intermediate scrutiny, then, seems to be an appropriate compromise by which to evaluate rules of general applicability that are brought to bear on religious activities.

The notion that rules of general applicability should escape meaningful judicial review even when they infringe religious or expressive activities is a dubious proposition that runs counter to the understanding that a law that is constitutional on its face may be unconstitutional as applied in a particular situation. *Smith* and *Arcara* are problematic decisions that retract the scope of First Amendment protection afforded to religious and expressive activities and give constitutional immunity to general laws that restrict the free exercise of religion and freedom of speech. To say, as some justices have, that the First Amendment is not implicated by a general law that "just happens" to restrict speech or religion[264] or that imposes an "incidental" burden on speech or religion[265] is a dismissive attitude that disregards the reality that general laws may place severe burdens on First Amendment activities. In most circumstances, the Supreme Court has recognized that, although a law appears innocent on its face, it may have harmful effects in the real world that raise serious constitutional concerns. Rules of general applicability, clothed in neutrality, may appear to be innocent, but appearances, after all, can be deceiving.

[264] Arcara, 478 U.S. at 707; Locke v. Davey, 540 U.S. at 729 (Scalia, J., dissenting.)
[265] Arcara, 478 U.S. at 705; Barnes, 501 U.S. at 576 (Scalia, J., concurring).