Korean Buddhist Dae Won Sa Temple of Hawai`i v. Sullivan: Unconscious Christian-based Preferences

James C. Hitchingham

Asian-Pacific Law & Policy Journal

- - - - -

http://www.hawaii.edu/aplpj

Copyright © 2000 APLPJ

***Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*: Unconscious Christian-Based Preferences**

I. INTRODUCTION

In 1998, the Supreme Court of Hawai`i heard a Free Exercise of Religion claim for the first time in eleven years in *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*[1] (*Korean Temple*). When the court had last heard arguments regarding the freedom of religion in 1987, the only standard used in either in the Hawai`i or Federal courts for Free Exercise claims was strict scrutiny. In the interim, however, the United States Supreme Court, in *Employment Division, Department of Human Resources of Oregon v. Smith*,[2] held that rational basis was the

[1] 87 Haw. 217, 953 P.2d 1315 (1998).

[2] 494 U.S. 872 (1990), *reh'g denied*, 496 U.S. 913 (1990). In *Employment Division, Department of Human Resources of Oregon v. Smith*, Native Americans were fired for using peyote, though they ingested the peyote for sacramental purposes. *See id.* at 874-76. Having been fired for using a controlled substance, the Native Americans were ineligible for state unemployment compensation, because using a controlled substance was found to constitute misconduct under Oregon's unemployment laws and being fired for misconduct precluded unemployment benefits. *See id.* The Supreme Court held that, "[b]ecause [the Native Americans'] ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny [Peyotists] unemployment compensation when their dismissal results from use of the drug." *Id.* at 890.

appropriate standard where a neutral and generally applicable regulation incidentally infringed on a believer's free exercise of religion. The Hawai`i Supreme Court thus had an opportunity to determine whether *Smith* was applicable to Free Exercise of Religion claims in its jurisdiction. The court held, however, that it would not determine whether rational basis was applicable in Hawai`i at this time.[3] According to the court, *Smith*, which dealt with a neutral law, was inapposite to *Korean Temple*, because in permitting height exemptions, the zoning regulation at issue in *Korean Temple* was not neutral.[4]

Because the zoning regulation was not generally applicable, the Hawai`i Supreme Court applied its traditional strict scrutiny standard.[5] Before applying strict scrutiny, though, the court evaluated the constitutionality of the regulation at issue under a two-tiered threshold test from *Grosz v. City of Miami Beach, Florida.*[6] Under its new Free Exercise of Religion analysis, the *Korean Temple* court first found that the challenged provisions of the zoning code withstood the *Grosz* threshold test, because the "height restrictions regulate[d] the Temple's conduct and not its beliefs, and [because] the regulations have a clear secular purpose and effect."[7] The court then dismissed the Temple's Free Exercise claim, first because any burden on the Temple's free exercise of religion was "self-inflicted,"[8] and further because the burdens of complying with the regulations were "of expense and inconvenience[,]" which did not demonstrate a substantial burden.[9]

Finally, the court addressed whether the City had acted in a discriminatory manner toward the Temple in denying the variance.[10] The *Korean Temple* court found no indication that

---

[3] *See Korean Temple*, 87 Haw. at 246 n.31, 953 P.2d at 1344 n.31.

[4] *See id*.

[5] *See id.*

[6] 721 F.2d 729, 733 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984) (after having found that the blanket prohibition on religious structures in a residential neighborhood constitutionally valid, the court further found that the state had a compelling government interest in maintaining its blanket prohibitions in certain zones).

[7] *Korean Temple*, 87 Haw. at 246, 953 P.2d at 1344.

[8] *Id.* at 248, 953 P.2d at 1346.

[9] *Id*.

[10] *See id*. at 249, 953 P.2d at 1347.

the City had discriminated against the Temple based on the beliefs practiced in it.[11] Importantly, however, the court apparently did not realize that its various prior interpretations of the zoning code taken collectively permitted Christian religions a right of expression not available to non-Christian religions.[12]

This article first analyzes to what extent Hawai`i's new strict scrutiny standard, as applied to the free exercise of religion, is consistent with its original standard and to what extent it can protect religious belief, in particular minority religious belief. Part II examines the evolution of Hawai`i's strict scrutiny standard in Free Exercise of Religion claims prior to the *Korean Temple* holding. Part III explains the procedural and historical background upon which the *Korean Temple* court's standard, analysis, and holding rest. Part IV analyzes (1) the court's new two-part threshold test to its strict scrutiny standard; (2) the difficulty in separating belief from conduct in non-Protestant religions; and (3) a possible explanation how the sectarian effect of the zoning code eluded the *Korean Temple* court. Finally, Part V suggests how the court might better handle future Free Exercise of Religion claims, particularly those brought by Native and minority religions.

II. HAWAI`I'S STANDARD FOR FREE EXERCISE CLAIMS

Prior to *Korean Temple*, the last occasion on which the Supreme Court of Hawai`i analyzed a Free Exercise claim was in 1987.[13] At that time, the Federal and Hawai`i courts applied strict scrutiny to Free Exercise of Religion claims exclusively. In 1990, however, the Supreme Court, in *Smith*, held that rational basis was an appropriate standard in certain instances.[14]

Today, Federal courts apply either rational basis or strict scrutiny to evaluate infringements on religion. Strict scrutiny applies "where the State has in place a system of individual exemptions" for a general law to analyze whether a State has constitutionally refused

---

[11] *See id*.

[12] *See infra* Part IV.B.

[13] *See infra* Part II.A discussing *Dedman*.

[14] *See Smith*, 494 U.S. at 879-81.

to extend the benefits of that law to one facing religious hardship.[15] Under strict scrutiny, the courts determine whether the applicant's conduct is based on true religious conviction, whether denying the applicant the benefits of the law forces him to choose between his religious beliefs and statutorily-imposed conduct contrary to those beliefs, and whether the government has a compelling reason to deny the benefits.[16] In contrast, the Federal courts, in applying rational basis, can now uphold a valid, neutral, and generally applicable regulation if it is rationally related to a legitimate government purpose, though the regulation unduly burdens a believer's free exercise of his religion.[17]

Because the Temple challenged the applicability of height exemptions for certain structures in the Comprehensive Zoning Code (CZC),[18] a generally applicable regulation was not

---

[15] *Korean Temple*, 87 Haw. at 246 n.31, 953 P.2d at 1344 n.31 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963), *infra* note 16; *Thomas v. Review Board, Indiana Employment Security Division*, 450 U.S. 707, 718-19 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 141 (1987) ("infringements [that force an adherent to choose between the precepts of his religion and the forfeiture of unemployment compensation benefits] must be subjected to strict scrutiny and c[an] only be justified by proof by the State of a compelling interest").

[16] *See, e.g., Sherbert*, 374 U.S. 398. In *Sherbert*, the Supreme Court held that an unemployment agency needed a compelling reason to deny constitutionally benefits to a Seventh Day Adventist who was released from her job, because she refused to work on Saturday in violation of her Sabbath. *See id.* at 406. The agency denied her unemployment benefits, because she did not reject work for good cause. *See id.* at 401. In the first inquiry of its strict scrutiny analysis, the *Sherbert* Court found that "appellant's conscientious objection to Saturday work constitute[d] no conduct prompted by religious principles of a kind within the reach of state legislation." *Id.* at 403. Then, it stated that to deny the applicant unemployment benefits, the State must show that either (1) the disqualification did not infringe on the appellant's Free Exercise rights, or (2) the burden placed on her religious beliefs was but incidental to a compelling state interest. *See id*. The Court held that South Carolina could not deny the appellant monetary benefits "so as to constrain a worker to abandon his religious convictions[.]" *Id.* at 410.

See also Yoder v. Wisconsin, 406 U.S. 205 (1972) *infra* note 24.

[17] *See Smith*, 494 U.S. at 879-81. Applying rational basis, the Supreme Court, in *Smith*, upheld denial of unemployment benefits to members of the Native American Church who had been fired for using peyote, because the Oregon law prohibiting all peyote use was a "neutral, generally applicable regulatory law." *Id.* at 880. Distinguishing its prior exemptions, the Court held that *Sherbert* and its progeny did not involve illegal conduct. *See id.* at 876. For a contrary view, see *People v. Woody*, *infra* note 24.

The Court stated that the only occasion where it would exempt a claimant from compliance with a neutral, generally applicable law was where that law not only implicated the Free Exercise Clause, but also another guaranteed freedom, such as the freedom of speech or of the press. *See Smith*, 494 U.S. at 881. *See also Yoder*, 406 U.S. at 214 (involving religion and the fundamental right of parents to direct their child's education and religious upbringing); *infra* note 24 and accompanying text; *Cantwell v. Connecticut*, 310 U.S. 296, 304-307 (1940) (involving religion and free speech).

[18] Comprehensive Zoning Code (1978) [hereinafter CZC].

at issue.[19] Consequently, the Hawai`i Supreme Court held that *Smith* was inapposite to *Korean Temple*, and the court reserved for a later date its determination of whether rational basis applied in Hawai`i to Free Exercise claims.[20]

A. *Evolution of Hawai`i's Strict Scrutiny Standard for Free Exercise of Religion Claims prior to Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*

In 1982, the Supreme Court of Hawai`i first analyzed a Free Exercise claim under strict scrutiny in *Minami v. Andrews*.[21] In *Andrews*, a private school run by the Fellowship of Christian Pilgrims contended that a statute requiring all schools to be licensed infringed on the church's religious liberty,[22] because "the church and the school [we]re one and the same."[23] The court drew the following strict scrutiny standard from *Wisconsin v. Yoder*:[24]

---

[19] *See infra* note 98.

[20] *See Korean Temple*, 87 Haw. at 246 n.31, 953 P.2d at 1344 n.31. "Normally, pursuant to *Smith*, an ordinance of general applicability, such as the one at bar, would not be subject to first amendment attack." *Id.* (citing *Smith*, 494 U.S. at 882-90). "However . . . where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 1344 n.31 (citing *Bowen*, 476 U.S. at 708 (1986)). Yet, "[b]ecause Smith's prohibitory rule denying any application of free exercise analysis to laws of general application does not apply in this case, we need not and do not reach the question whether there is such a rule under the Hawai`i Constitution." *Id.*

[21] 65 Haw. 289, 651 P.2d 473 (1982).

[22] *See Andrews*, 65 Haw. at 290, 651 P.2d at 474.

[23] *Id.* at 292, 651 P.2d at 475.

[24] *See Yoder*, 406 U.S. 205. In *Yoder*, an Amish family sought to carve out an exception "from a general obligation of citizenship" mandating high school education until age sixteen. *Id.* at 221. The *Yoder* Court found that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." *Id.* at 215. For the state to prevail, the Supreme Court held that, "it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id.* at 214. Notably, today, following *Smith*, federal courts would apply rational basis to *Yoder*'s case, because the system does not provide for exemptions.

The *Yoder* Court found the Amish practice of educating their young by learning-through-doing to be "not merely a matter of personal preference, but one of deep religious conviction[.]" *Id.* at 216. Further, the *Yoder* Court held that the compulsory education would "gravely endanger if not destroy" the Amish's free exercise of religion. *Id.* at 219. Additionally, the *Yoder* Court found that "[t]his case . . . is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be inferred." *Id.* at 230.

Yoder appears to be unique in the federal system. Only in one other case, *People v. Woody*, 394 P.2d 813 (1964), did a court carve an exemption from a neutral and generally applicable statute. The analysis of the *Woody* court is very similar to that of the *Yoder* Court. In *Woody*, the California Supreme Court held that the use of peyote

> [T]o determine whether there exists an unconstitutional infringement of the freedom of religion, it would be necessary to examine [1] whether or not the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief, [2] whether or not the parties' free exercise of religion had been burdened by the regulation, the extent or impact of the regulation on the parties' religious practices, and [3] whether or not the state had a compelling interest in the regulation which justified such a burden.[25]

Applying this standard, the court found that there was no evidence that operating a private school was motivated by a sincere religious belief, nor was there evidence that requiring "a private school to apply for a license . . . burden[ed] the appellees' free exercise of their religion."[26] Further, it found that the "State has a compelling interest in seeing that private schools are licensed."[27]

Though the court applied its interpretation of the *Yoder* strict scrutiny standard, it held that *Yoder* was not applicable to the case,[28] because the appellees had not "been denied a license by virtue of some provision of the statute, which they contend conflicted with their religious

---

by "Peyotists" was protected by the Free Exercise Clause, because the bona fide religious use of peyote was similar to taking the sacrament. *See id*. at 817. Further, the *Woody* court determined that prohibiting use would virtually destroy the religion, allowing use would not render drug enforcement impossible, and peyote did not permanently injure the faithful. *See id*. at 818-19. Also, just as the Amish in *Yoder*, the peyote takers in *Woody* were an insular group (Native Americans practicing their religion in hogans once a week). *See id*. at 817; *Yoder*, 406 U.S. at 217 (The Amish "way of life in a church-oriented community, separated from the outside world and 'worldly' influences ..."). *See also* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1387 (1967) ("the notion of freedom of religious belief carries with it the correlative idea of freedom of expression in ceremonial forms. Although the Court [in *Reynolds v. United States*, 98 U.S. 145] did not advert to this point, it seems unlikely that it would have permitted interference with symbolic religious rituals unless they infringed significantly upon the public health, welfare, or morals"). The Peyotists' practice did not affect society as a whole, nor did it injure the practitioners. *See Woody* at 818-19.

Yoder, however, implicated two fundamental rights: freedom of religion and the fundamental right of a parent to direct his child's education and religious upbringing. *See Yoder*, 206 U.S. at 213-14. Though not express in *Woody*, perhaps *Woody* too involved more than the freedom of religion alone, such as stewardship--the country's obligation to protect an ancient tradition. *See Woody*, 394 P.2d at 822. *See also Morton v. Mancari*, 417 U.S. 535, 552-54 (1974).

[25] *Andrews*, 65 Haw. at 291, 651 P.2d at 474.

[26] *Id*., 651 P.2d at 474-75.

[27] *Id*., 651 P.2d at 475. "The public policy of this State, as expressed by the legislature in the section of the statutes cited, requires that private schools be licensed." *Id*. at 290, 651 P.2d at 474.

[28] *See id*. at 291, 651 P.2d at 475.

beliefs[.]"[29] Further, the court found that the school and church did not collectively constitute a religious institution, because the school taught reading, writing, and arithmetic, as well as the Bible.[30] Consequently, the court determined that the school had to be licensed.[31]

In *State v. Blake*,[32] the Intermediate Court of Appeals addressed a challenge to a criminal statute prohibiting the use of marijuana. Blake, a Hindu Tantrism practitioner, contended that such a prohibition violated his free exercise of religion, because the tenets of his religion required him to smoke marijuana.[33] In applying strict scrutiny from *Andrews*, the appellate court first found that the appellant's religion was legitimate and his beliefs sincere.[34] Second, the court held that the criminal statute did not burden appellant's religion,[35] because the court found that marijuana played only a "peripheral role in Hindu Tantrism."[36] Therefore, appellant failed "to establish 'that such practice [wa]s an integral part of a religious faith and that the prohibition of [marijuana] result[ed] in a virtual inhibition of the religion or the practice of the faith.'"[37] As the

---

[29] *Id.* The factual situation to which the court refers is more similar to *Sherbert* than to *Yoder*. *See supra* notes 24-25.

[30] *See Andrews*, 65 Haw. at 292, 651 P.2d at 475.

[31] *See id.*

[32] 5 Haw. App. 411, 695 P.2d 336 (1985).

[33] *Blake*, 5 Haw. App. at 412, 695 P.2d at 337.

[34] *See id.* at 415, 695 P.2d at 338. Though there was no record from the court below establishing the validity of Hindu Tantrism, the court "assumed" the legitimacy of the Hindu Tantrism and the sincerity of appellant's beliefs therein. *Id.* The court noted that assuming such facts was "not uncommon" in freedom of religion cases. *Id.* at 415 n.5, 695 P.2d at 338 n.5. (citing *U.S. v. Middleton*, 690 F.2d 820 (11th Cir. 1982) (regarding the Ethiopian Zion Coptic Church); *Whyte v. U.S.*, 471 A.2d 1018 (D.C. 1984) (regarding the Twelve Tribes of Israel); *State v. Rocheleau*, 451 A.2d 1144 (1982) (regarding Tantric Buddhism)).

[35] *See id.* at 418, 695 P.2d at 340.

[36] *Id.* at 415, 695 P.2d at 339. "[T]he only reference to the use of marijuana in conjunction with Tantric practices appears in . . . The Complete Yoga Book[.] . . . 'drugs (mainly . . . types of cannabis) *may* be taken.'" *Id.* at 416-17, 695 P.2d at 339 (quoting J. HEWITT, THE COMPLETE YOGA BOOK 508 (1978)) (emphasis added).

The court held that appellant's reliance on *Woody* (where "peyote constituted in itself an object of worship") was misplaced, because in this case, "the finding was that the use of the proscribed drug, marijuana, was not an intrinsic or essential part of Hindu Tantrism[.]" *Id.* at 418, 695 P.2d at 340.

[37] *Id.* at 417, 695 P.2d at 340 (quoting *People v. Mullins*, 123 Cal. Rptr. 201, 207 (1975)).

statute did not burden his religion, "an analysis and discussion of the compelling interest issue [wa]s unnecessary."[38]

Blake is important to the evolution of Hawai`i's strict scrutiny standard for two reasons. First, the *Blake* court formally adopted the *Yoder* strict scrutiny standard as formulated in *Andrews.* Second, the *Blake* court established that to warrant relief, infringed practices must be essential to the religion.

In the following year, the Hawai`i Supreme Court visited a controversy similar to *Andrews* in *Koolau Baptist Church v. Department of Labor and Industrial Relations* (*Koolau Baptist*).[39] In *Koolau Baptist*, the church challenged the constitutionality of Hawai`i's Employment Security Law, because requiring the church as other employers to contribute to the unemployment fund for all of church's employees "deprived the church of funds to further its religious mission,"[40] burdened the free exercise of religion by the church. The church claimed exclusion from compliance on the ground that its teachers rendered church services.[41] The court here, as in *Andrews*, rejected the church's Free Exercise claim, because "[t]he case . . . d[id] not implicate religious beliefs as such[.]"[42] The court explained that

> "[n]ot all burdens on religion are unconstitutional," *U.S. v. Lee*, 455 U.S. 252, 257, . . . for "[i]t is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers."[43]

The court found that the "levy in question 'focuse[d] solely on the economic and social aspect of the employment relation and the cost that unemployment impose[d] on the [affected] employee

---

[38] *Id.* at 418, 695 P.2d at 340.

[39] 68 Haw. 410, 718 P.2d 267 (1986).

[40] *Koolau Baptist*, 68 Haw. at 413, 718 P.2d at 269.

[41] *See id.* "Hawaii Revised Statutes § 383-2(a) reads: . . . 'Employment' does not include the following service: (9)(A) . . . (ii) service . . . performed by a . . . member of a religious order in the exercise of duties required by such order[.]" *Id.* at 412 n.1, 718 P.2d at 269 n.1.

[42] *Id.* at 417, 718 P.2d at 271.

[43] *Id.* at 417-18, 718 P.2d at 272 (quoting *Yoder*, 406 U.S. at 220).

and on society'"[44] and that "Koolau Baptist Academy ha[d] not been singled out for different treatment because of its religious orientation."[45]

Though the regulation was neutral and generally applicable, the *Koolau Baptist* court still "realize[d] '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.'"[46] To burden the free exercise of religion unduly, the burden either must be substantial ("one which would inhibit the practice of the religion and in effect be a coercion to forego the practice"[47]) or must create "significant conflict between permissible goals of the state and religious practices [which in turn would call for] a balancing test . . . to measure whether the state has exceeded its constitutional power."[48] Because the *Koolau Baptist* court did not find a significant conflict, the court did not need to apply strict scrutiny.[49]

The *Koolau Baptist* opinion further defined and shaped Hawai`i's strict scrutiny standard by first adding that a neutral and generally applicable law may nonetheless constitute an undue[50] or actual[51] burden on the free exercise of religion. Second, an undue burden is now defined as

---

[44] *Id.* at 417, 718 P.2d at 272 (citing *Salem College & Academy, Inc. v. Employment Division*, 695 P.2d 25, 35 (1985)). This finding addresses the same issue as the *Grosz* "secular" threshold. *See infra* Part III.B.1.

[45] *Koolau Baptist*, 68 Haw. at 418, 718 P.2d at 272. This finding also addresses the same issue as the *Grosz* "secular" threshold. *See infra* Part III.B.1. Notably, rather than address the discrimination issue separately as in *Korean Temple*, the *Koolau Baptist* court logically addresses the issue under the "secular" threshold. *See infra* Part III.B.2.

[46] *Koolau Baptist*, 68 Haw. at 418, 718 P.2d at 272. *Cf. Yoder, infra* note 129. The court formulated the inquiry in terms of "actual burden" as: "[T]he Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Koolau Baptist*, 68 Haw. at 418, 718 P.2d at 272 (citing *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S.290, 303, (1985)) (internal citations omitted).

[47] *See id.* at 418, 718 P.2d 272 (citing J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW ch. 19 § 111, at 1054 (2d ed. 1983)).

[48] *Id.*, 718 P.2d at 273 (citing *Young Life v. Division of Employment & Training*, 650 P.2d 515, 524, (1982)).

[49] *See id.* at 419, 718 P.2d at 273.

[50] *See id.*, 718 P.2d at 272.

[51] *See id.* (citing *Tony and Susan Alamo Foundation*, 471 U.S. at 303).

one that either is substantial[52] (causing the believer to forego a practice) or creates a significant conflict between the regulation and religious practice.[53]

In its last application of strict scrutiny prior to its holding in *Korean Temple*, the Hawai`i Supreme Court, in *Dedman v. Board of Land and Natural Resources*,[54] affirmed the decision by the Board of Land and Natural Resources to grant the Campbell Estate a permit to explore and develop geothermal energy in an area where Pele[55] worshippers believed that the goddess dwelled.[56] The worshippers asserted that "construction of geothermal energy plants w[ould] desecrate the body of Pele by digging into the ground and w[ould] destroy the goddess by robbing her of vital heat."[57]

The *Dedman* court applied strict scrutiny as enunciated in *Andrews*, but emphasized the "distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute."[58] The court accepted the legitimacy and sincerity of

---

[52] *See id*. at 418, 718 P.2d 272 (citing NOWAK & YOUNG, *supra* note 47, § 111).

[53] *See id*. at 419, 718 P.2d at 273 (citing *Young Life*, 650 P.2d at 524). Again, this comment draws attention to the court's concentration on "practice." This comment contends that courts do so (1) to be able to analyze religious claims, because belief is absolutely protected and conduct is not (*see Sherbert*, 394 U.S. at 402-03; *Bowen*, 476 U.S. at 699 (1986)) and (2) to address Free Exercise claims in the concrete rather than abstract.

[54] 69 Haw. 255, 740 P.2d 28 (1987).

[55] Pele is a deity specific to the Hawaiian Islands.

> Volcano Goddess Pele was born as a flame in the mouth of her Earth Mother, Haumea. Her Grandmother is the great Sky Goddess Papa. Having searched a long time for a home, Pele finally settled at Halema`uma`u on the Island of Hawai`i. The Big Island (Hawai`i) represents the Root Chakra of the Hawaiian Island Chain."
>
> Pele has been honored as the Spirit of Fire as she keeps her energy open and flowing from the center of the earth. She is as much an Earth Goddess creating new land with every outpouring of lava. Unlike other Goddesses who are known throughout Polynesia, Pele seems to be a deity specific to Hawai`i. She can be seen playing amongst the people of Hawaii in human form or as a little white dog. As a human, she could appear at any age forming herself into a young priestess of unsurpassed beauty or an old wise-woman hitch-hiking on a deserted road.

Goddess Galaxy, *Hawaiian Goddesses* (visited Apr. 17, 2000) <http://www.powersthatbe.com/pastpele.htm>.

[56] *See Dedman*, 69 Haw. at 256, 740 P.2d at 30. The Board of Land and Natural Resources of the State of Hawai`i issued the exploration and development permit to the Campbell Estate and Tree Mid-Pacific Geothermal Venture. *See id*. at 257, 740 P.2d at 30. "[T]he Board has jurisdiction to approve the project." *Id*. (citing HAW. REV. STAT. § 205-5.1(d) (1985)).

[57] *Id*. at 261, 740 P.2d at 32.

[58] *Id*. at 260, 740 P.2d at 32 (citing *Bowen*, 476 U.S. at 699). *See supra* note 53. *See also Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) ("the freedom to act, even when the action is in accord with one's religious

the appellants' religious claims, because "[n]either the Board nor Campbell question[ed] the legitimacy and sincerity" thereof.[59] Though the court accepted that appellants' religion was legitimate and their *belief* sincere,[60] the court required appellants "'to show the coercive effect of the [law] as it operate[d] against [them] in the *practice* of [their] religion.'"[61]

Focusing on the Pele worshippers' actual conduct at the site, the court saw no impact on their practice.[62] The appellants argued that geothermal exploitation destroying Pele would

> interfere with their ritual practices, and [would] disable them from training young Hawaiians in traditional beliefs and practices (e.g., chant and hula). As such, approval of the geothermal plant does not regulate or directly burden Appellants' religious beliefs, nor inhibit religious speech. Further, the Board's action does not compel them, by threat of sanctions, to refrain from religiously motivated conduct or engage in conduct [that] they find objectionable on religious grounds.[63]

The *Dedman* court stated that, "to demonstrate the coercive effect of the geothermal project, Appellants [had to] show a 'substantial burden' on religious interests."[64] The court concluded that there was no "objective danger to the free exercise of religion that the First Amendment was designed to prevent[,]"[65] because "'[n]either . . . the [Appellants] nor any of the witnesses

---

convictions, is not totally free from legislative restrictions"); *Reynolds v. United States*, 98 U.S. 145, 166 (1879) ("the statute . . . under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action . . .").

[59] *Dedman*, 69 Haw. at 260, 740 P.2d at 32.

[60] *See id.* at 259-60, 740 P.2d at 31-32.

[61] *Id.* (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963)). In doing so, the court avoided the true issue: whether killing the worshippers' god would kill the religion, which in turn would kill belief and then the practice.

[62] *See id.* at 261-62, 740 P.2d at 33.

[63] *Id.* at 261, 740 P.2d at 32-33. The court's reasoning missed the point. Though the worshippers were not coerced to believe something else, destroying their goddess would arguably reduce their religion to myth.

[64] *Id.* at 261, 740 P.2d at 33 (quoting *Koolau Baptist*, 68 Haw. at 418, 718 P.2d 272; *Yoder*, 406 U.S. at 218). The court held that the religion was not endangered, because "'[t]here is no indication that tapping this heat source from the earth has diminished or negatively affected the eruptive nature of Kilauea Volcano.'" *Id.* (quoting the Board of Land and Natural Resources). Further, "'the proposed development site will be an additional 5 to 10 miles away from Moku`a`weoweo and Halema`uma`u where tradition suggests Pele to reside.'" *Id.* at 262, 740 P.2d at 33 (quoting the Board of Land and Natural Resources).

[65] *Id.* at 261-62, 740 P.2d at 33 (citing *Yoder*, 406 U.S. at 218).

testified that they ever conducted or participated in religious ceremonies on th[e] land.'"[66] Consequently, the court upheld the state's approval of the grant geothermal exploration permit.[67]

In sum, until *Korean Temple,* Free Exercise strict scrutiny in Hawai`i required the court to examine: (1) whether or not the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief; (2) whether or not the party's free exercise of religion had been unduly[68] burdened by the regulation, that is, the claimant had to show the extent or impact of the regulation on the party's religious practices, which had to be substantial or cause significant conflict as shown by claimant;[69] and (3) "whether or not the state had a compelling interest in the regulation which justified such a burden."[70]

III. *KOREAN BUDDHIST DAE WON SA TEMPLE OF HAWAII V. SULLIVAN*

Much of the *Korean Temple* opinion presents and deals with procedural background and claims. As there are no procedural violations or abnormalities in the appeal process of the denied variance,[71] this comment concentrates on the more outstanding issues: the applicability of

---

[66] *Id.* at 261, 740 P.2d at 33 (citation omitted by court). Again, the issue is faith, not conduct. Even the Board accepted that "Pele is central and indispensable to Native Hawaiian religious beliefs and practices." *Id.* at 265 n.11, 740 P.2d at 35 n.11 (quoting Board Finding ¶ 12). Further, it accepted that "Pele influences and informs the daily physical and spiritual life of Pele practitioners." *Id.* (quoting Board Finding ¶ 18). Therefore, regardless of whether the worshippers carry out religious practices on the site, if the exploration could have killed the goddess, the practitioners would be left without a goddess. As a result, the court's approach to its burden analysis is misplaced.

[67] *See id.* at 262, 740 P.2d at 33. Further, the court stated that invalidating the Board's decision to grant the exploration permit "on the mere assertion of harm to religious practices would contravene the fundamental purpose of preventing the state from fostering support of one religion over another." *Id.* The court did not explain over which other religion the state would have been supporting the Pele worshippers.

A driving factor in the court's holding may have been: "The First amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities . . .. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life[.]" *Id.* (quoting *Otten v. Baltimore & Ohio R. Co*., 205 F.2d 58, 61 (2d Cir. 1953)). *Accord Estate of Thornton v. Caldor, Inc*., 472 U.S. 703, 710 (1985)). As such, the issue then becomes whether majority communal mores and beliefs are justified in forcing minority religions to comply with their standards. *See infra* Part IV.B.

[68] *See Blake,* 5 Haw. App. at 417, 695 P.2d at 340. A claimant may show undue burden by demonstrating that a prohibition is a "virtual inhibition of [his] religion or the practice of [his] faith." *Id.* (citing *Mullins,* 123 Cal. Rptr. at 207). *Cf. supra* notes 34 and 36 and accompanying text.

[69] *See supra* notes 48 and 52 and accompanying text. *See also Dedman*, 69 Haw. at 260, 740 P.2d at 32.

[70] *Andrews*, 65 Haw. at 291, 651 P.2d at 474.

[71] *See Korean Temple*, 87 Haw. at 230-246, 953 P.2d at 1328-44.

Grosz to *Korean Temple* and unconscious preferential treatment of Christian denominations that Hawai`i's strict scrutiny standard leaves unchecked.

A. *Procedural Background*

The *Korean Temple* litigation ended in early 1998 after nearly a decade.[72] The Honolulu Building Department originally issued the Temple a permit to construct a "Hall, which the Temple expected to use for '[secular purposes] intended to further the understanding of the Korean Buddhist religion.'"[73] Under the zoning code in effect at that time, the Comprehensive Zoning Code, the Temple could have built the Hall to a maximum height of approximately sixty-eight feet; however, the Temple overbuilt the structure.[74] When the Temple received a violation notice,[75] the near decade-long legal battle began.[76]

The Director of the Department of Land Utilization denied the Temple's initial variance application, because the Hall was far higher than the new zoning code would allow[77] and the Temple had not met its burden in showing hardship to warrant a variance.[78] An appeal followed, but the Zoning Board of Appeals affirmed the Director's denial of the variance.[79] The Temple appealed to the circuit court and then appealed the circuit court's decision to the Intermediate

---

[72] *See id*. at 222, 953 P.2d at 1320. "The Temple filed its first application for a variance on June 15, 1988." *Id*.

[73] *Id*. The fact that Hall was originally intended for secular purposes is of no consequence. *Cf. Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 138-140 (1987) (the fact that claimant became a Seventh Day Adventist after having started work and was later fired for her inability to work Saturdays did not raise an issue as to the sincerity of her beliefs).

[74] *See Korean Temple*, 87 Haw. at 222, 953 P.2d at 1320. The Hall's "height was seventy-four to seventy-five feet . . . 6.88 feet higher than maximum height allowed by CZC § 21-5.4." *Id*.

[75] *See id*.

[76] *See id*. The temple received a notice of a height violation on February 23, 1988. *See id*.

[77] *See Whatever Happened To? . . .*, HONOLULU STAR-BULLETIN, Feb. 2, 1994, at A3 (paraphrasing Dan Clegg, agency director of the Department of Land Utilization, as saying that the present height of seventy-four to seventy-five feet is forty-four feet over the contemporary allowable limit). The Land Use Ordinance superceded the CZC in 1986. *See Korean Temple*, 87 Haw. at 222, 953 P.2d at 1320.

[78] *See id*. at 222-23, 953 P.2d at 1320-21.

[79] *See id*. at 223, 953 P.2d at 1321.

Court of Appeals ("ICA").[80] The ICA found that the appeal to circuit court was untimely and dismissed the appeal.[81]

A year after the Temple had exhausted its remedies, it refiled for a height variance.[82] At public hearings, the Temple stated and supported with expert testimony and other evidence that the Hall and other structures were important to the ritual uses required by the Chogye Order of Korean Buddhism; that the height should not be disturbed, because the buildings were now in balance and harmony, which led to Enlightenment; and that reducing the height would constitute a desecration and would create great expense.[83] Nonetheless, the Director denied the variance application, because (1) the Temple was not denied reasonable use of its land,[84] (2) there were no unique circumstances that caused hardship,[85] and (3) based on the opposition testimony of the neighbors,[86] "the height overage [had] altered the essential residential character of the neighborhood."[87]

After going through the Zoning Board of Appeals ("ZBA") again, both the Temple and two community groups, Concerned Citizens of Palolo and Life of the Land (collectively

---

[80] *See id.* While this transpired before boards and in the courts, "[o]ne after another, Palolo residents railed against the Korean Buddhist Dae Won Sa Temple complex . . . for violating the city building code, prompting temple attorney Wendell Marumoto to call them a 'hangman's posse.'" Lucy Young, *Neighbors Rail against Temple Code Violations*, HONOLULU STAR-BULLETIN, March 3, 1989, at D4 [hereinafter *Neighbors Rail*]. Not only were the neighborhood residents upset with the violations, but also they felt the size of structures had "damaged [their] residential community[.]" *Id.* However, the "law permitted" the size and bulk of the Temple's structures. *Id.* Moreover, the conflict spread beyond the courts and the neighborhood. Politicians felt they would reward wrongdoing, if the variance were granted. *See id.*

[81] *See Korean Temple*, 87 Haw. at 223, 953 P.2d at 1321.

[82] *See id.*

[83] *See id.* at 224, 953 P.2d at 1322.

[84] *See id.* at 225, 953 P.2d at 1323.

[85] *See id.* at 226, 953 P.2d 1324. In fact, the Director found that the Temple's hardship was "self-created." *Id.*

[86] *See id.* at 225, 953 P.2d at 1323. The neighbors complained of "damage, noise, pollution and other interference with their property . . . to parking congestion and the effects of the imposing size of the Hall, including loss of views, declining property values, and a sense of being overshadowed in their homes and yards." *Id. See also* Harold Morse, *Temple Keeps Striving to Stand Tall*, HONOLULU STAR-BULLETIN, Sept. 6, 1993, at A4 [hereinafter *Temple Keeps Striving*]. Most of the neighbors' complaints relate to patronage, not the height violation. *See id.*

[87] *Korean Temple*, 87 Haw. at 226, 953 P.2d at 1324.

"Concerned Citizens"), filed suit in the circuit court.[88] The court rejected the Temple and Concerned Citizens' respective appeals.[89] Again, the Temple appealed,[90] and, rather than allowing the Intermediate Court of Appeals to address these long argued issues, the Hawai`i Supreme Court took the case.[91]

---

[88] *See id.* at 227-28, 953 P.2d 1325-26. The "Concerned Citizens of Palolo" and "Life of the Land" (collectively Concerned Citizens) urged the court to overturn the "Director's decision in which he ruled that the Hall would be permitted to remain sixty-six feet in height as a nonconforming use." *Id.* at 227, 953 P.2d 1325 (citing Case No. 93/ZBA-9). The Concerned Citizens wanted the Temple's buildings to conform to Land Use Ordinance specifications (*see id.* at 223 n.9, 953 P.2d at 1321 n.9), which would have reduced the maximum height of any structure in the neighborhood to approximately thirty feet. *See supra* note 77.

Around this time, the Temple also filed a suit against the city in U.S. District Court claiming $300 million in damages for "stopping of its construction." Darren Pai, *Korean Temple Sues City for $300 Million*, HONOLULU ADVERTISER, May 27, 1995, at A4.

[89] *See Korean Temple*, 87 Haw. at 228, 953 P.2d at 1326.

[90] *See id.* at 229, 953 P.2d at 1327.

[91] Under Rule 31(a) of the Hawai`i Rules of Appellate Procedure:

> The chief justice, or his designee . . . shall receive each case or matter. The clerk of the Supreme Court shall forward the complete file of the case or matter to the assignment judge or justice . . . .
>
> The assignment judge or justice shall an order with the clerk of the Supreme Court assigning the case or matter either to the Intermediate Court of Appeals or to the Supreme Court . . . .

HAW. R. APP. P. 31(a).

Besides addressing the Free Exercise of Religion claim, the court dealt largely with procedural issues and applying the right-wrong standard found against the Temple on every one. *See Korean Temple*, 87 Haw. at 230-246, 953 P.2d at 1328-44. First, the court found that the Director of the Land Utilization properly refused to issue a declaratory ruling on whether the Hall complied with the CZC, because under the Rules Relating to Administrative Practice and Procedure (1993) ("RRAPP") Rule 3-5, the director may "refuse to issue a declaratory ruling" where such a ruling may adversely affect the interests of the city in any pending or possible litigation or for good cause. *Id.* at 230, 953 P.2d at 1328. Here, the court found that refusing to issue the ruling was not clearly erroneous, because the issues in the Temple's petition were substantially similar to those in the variance and an appeal to the Zoning Board of Appeals ("ZBA") was reasonably predictable. *See id.* at 230-31, 953 P.2d at 1328-29.

Second, the court held that the Director's denial of the Temple's height variance was justified, because the saddle-shaped roof did not qualify as a spire. *See id.* at 232-33, 953 P.2d at 1330-31. For a full analysis of the relevant code sections, see *infra* note 98.

Third, the court held that the Director did not abuse his discretion when he denied the Temple its variance. *See Korean Temple*, 87 Haw. at 234, 953 P.2d at 1332. Under the Revised Charter of the City and County of Honolulu (1973) ("RCCCH") § 6-910, a variance may only be granted upon a showing of unnecessary hardship that requires (1) that the applicant to be denied reasonable use of his land and (2) that the application arises under unique circumstances and granting the application does not alter the neighborhood's essential character. *See id.* First, the court found that the Temple was not denied reasonable use of its premises, because the Temple had failed to establish that reasonable use could not be achieved without the height variance. *See id.* at 235, 953 P.2d at 1333.

B. *Standard, Analysis, and Holdings in the Temple's Free Exercise of Religion Claim*

The Hawai`i Supreme Court addressed three issues in its analysis of the Temple's Free Exercise claim: (1) the Temple's reliance on the Religious Freedom Restoration Act of 1993[92] (RFRA); (2) the burden on the Temple's religious practices; and (3) the alleged discriminatory intent of the City toward the Temple.[93] The court quickly dismissed the Temple's claim resting on the RFRA, because the United States Supreme Court, in *City of Boerne v. Flores*,[94] held that Congress had exceeded its power in enacting the RFRA and therefore, declared the act as unconstitutional.[95] Consequently, this section of the comment focuses on the new strict scrutiny standard formulated by the Hawai`i Supreme Court, the application of the new standard to the Temple's Free Exercise claim, and the alleged discriminatory actions of the City toward the Temple and the beliefs practiced therein.

1. *New threshold requirements for Hawai`i's strict scrutiny standard*

In *Korean Temple*, the Supreme Court of Hawai`i deviated from Hawai`i precedent by adding a two-tiered threshold test to its Free Exercise of Religion strict scrutiny standard. These two threshold requirements, borrowed from *Grosz*, determine whether the regulation at issue is constitutionally valid.[96] Now, before applying its strict scrutiny analysis, a court must find that "a government regulation, which is challenged on first amendment 'free exercise' grounds" (1)

Then, it found that "an owner's unusual plans for a parcel do not . . . generate 'unique circumstances.'" *Id.* (quoting McPherson v. Zoning Bd. of Appeals, 67 Haw. 603, 606, 699 P.2d 26, 28 (1985)). It further found that the Hall's size alone altered the neighborhood's character. *See id.*. at 235-36, 953 P.2d at 1333-34.

Finally, the court did not find the Temple was deprived of its procedural due process under HAPA nor under the Hawai`i or Federal constitutions. *See id.* at 236-245, 953 P.2d at 1334-43.

[92] 42 U.S.C. §§ 2000bb *et seq.* When the Temple filed its appeal, the Supreme Court had not decided City of Boerne v. Flores, 521 U.S. 507 (1997), in which a church challenged a denial by the zoning authority to enlarge its structure under the Religious Freedom Restoration Act of 1993 (RFRA).

[93] *See Korean Temple*, 87 Haw. at 246-49, 953 P.2d at 1344-47.

[94] 521 U.S. 507 (1997).

[95] *See Korean Temple*, 87 Haw. at 246, 953 P.2d at 1344.

[96] *Cf. Koolau Baptist, supra* notes 44-45 and accompanying text.

does not "regulate religious beliefs" and (2) has "both a secular purpose and a secular effect to pass constitutional muster."[97]

The court neither demonstrated how the relevant CZC sections, which created a mechanism for individualized exemptions, did not regulate the Temple's beliefs, nor explained, in light of past interpretations, how the law had a secular purpose.[98] The court simply stated that, "[t]he *Grosz*[99] threshold tests are also satisfied in the present appeal, because (1) the City's height restrictions regulate the Temple's conduct and not its beliefs, and (2) the regulations have

---

[97] *Korean Temple*, 87 Haw. at 246, 953 P.2d at 1344 (citing Grosz v. City of Miami Beach, Florida, 721 F.2d 729, 733 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984)).

[98] The CZC sections, upon which the Temple relied for its exemption, had not been amended since the CZC was originally proposed in 1967. The drafters of CZC used rather simple language and did not define many terms including "spire." *See id*. at 232-33, 953 P.2d at 1330. Moreover, it did not define the term "church." *See* CZC § 21-5.2 (1978). Over the years, however, courts drew the perimeters around the terms relevant to the Temple's case.

First, the Temple was constructed in an "R-5" residential district, "the purpose of [which was] to provide for concentrated urban residential development [which would be facilitated] by permitting duplex type facilities." CZC § 21-5.40. The CZC allowed the construction of "churches" in an R-5 residential district. *See id*. § 21-5.2(a)(2). The court defined the term "church," as used in the CZC, as "'a place of worship of any religion.'" *Marsland v. International Society for Krshna Consciousness*, 66 Haw. 119, 121, 657 P.2d 1035, 1037 (1983) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 404 (1967)). Consequently, the Department of Land Utilization could grant the Temple a permit to build a religious facility in an area zoned for residential development.

Second, the Temple filed for an exemption to its height restrictions claiming its roof was equivalent to a "spire" or was "spire-like[,]" see *Korean Temple*, 87 Haw. at 233, 953 P.2d 1331, because "[w]henever height limits for building and other structure are established, no portion of any building or other structure shall extend beyond such height limits, except . . . spires[.]" CZC § 21-2.4. Relying on Webster's New Twentieth Century Dictionary, the court held that a "spire" was "'anything that tapers to a point as a pointed tower or steeple[.]'" *Korean Temple*, 87 Haw. at 233, 953 P.2d at 1331. In context of CZC § 21-2.4, "'spires'" are understood to be tall, narrow extensions of a primary structure." *Id.* The court found the "'reason and spirit' behind [the] exemptions was to allow for minor intrusions[.]" *Id.*

Consequently, to be exempt the Temple would have to demonstrate its saddle-shaped roof extended from a primary structure, was narrow, tapered to a point and created a minor intrusion. The court held that though "the Hall's roof does taper, it does not do so in the manner of a tower or steeple." *Id*. Further, the court rejected the Temple's argument that the roof was sufficiently spire-like to warrant an exemption, holding that, "the Temple's assertion that the LUO's and CZC's lists of specific exemption are merely suggestive of some generic, uncircumscribed, limitless, and undefined universe of 'like' structures is patently implausible." *Id*.

[99] 721 F.2d 729, 733 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984).

a clear secular purpose and effect."[100] Having found, without substantive analysis, that the CZC sections at issue passed constitutional muster, the court applied strict scrutiny.[101]

The *Andrews* strict scrutiny standard required the court to determine: (1) whether the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief; (2) whether a party's free exercise of religion had been unduly burdened by the regulation, that is, the party must show the extent or impact of the regulation on the party's religious practices, which must be substantial or must cause significant conflict; and (3) whether the state had a compelling interest in the regulation which justified such a burden.[102] Moreover, the court stated that, "the burden of showing unconstitutionality [must be met] beyond a reasonable doubt. The infraction should be plain, clear, manifest, and unmistakable."[103]

Without analyzing the sincerity or legitimacy of the Temple's beliefs or mentioning that it had assumed the legitimacy of such beliefs,[104] the court simply stated that, "[t]he temple has failed to make out a prima facie case that its exercise of religion has been burdened."[105] After declaring that the Temple failed to demonstrate a burden, though, the court admitted that there might be a burden:

> Granted, the record includes testimony that the "balance and harmony" of the buildings forming the Temple compound are ingredients essential to the generation of meditative state that is fundamental to Chogye Buddhist practice. The record further contains . . . sentiments . . . that lowering the roof would be tantamount to an act of religious desecration.[106]

Nonetheless, the court found that the Temple's religious practices did not warrant protection as the "Temple's troubles were self-inflicted."[107] Additionally, the court focused on testimony

---

[100] *Korean Temple*, 87 Haw. at 246, 953 P.2d at 1344.

[101] *See id*. at 246-47, 953 P.2d at 1344-45.

[102] *See Andrews*, *supra* Part II.A.

[103] *Korean Temple*, 87 Haw. at 248, 953 P.2d at 1346 (paraphrasing State v. Gaylord, 78 Haw. 127, 137, 890 P.2d 1167, 1177 (1995)).

[104] *Cf. Blake*, *supra* note 34 and accompanying text.

[105] *Korean Temple*, 87 Haw. at 248, 953 P.2d at 1346.

[106] *Id*.

[107] *Id*. The court found the Temple's burden self-inflicted as the "Temple need not have chosen to purchase land and [to] build within [such a height restricted] zone." *Id*. Further, the court noted that the "Temple

relating to cost as opposed to the Temple's aesthetic arguments.[108] Consequently, the court concluded that, "the burdens placed on the Temple by the height restrictions are of expense and inconvenience[and therefore,] are generally insufficient to constitute a substantial burden of the free exercise of religion."[109]

2. *Discriminatory intent*

The court last addressed whether "the City had acted in a discriminatory manner toward the Temple based upon the religious tradition practiced in it."[110] To show that the variance denial invidiously deprived the Temple use of its property, the Temple relied on *Islamic Center of Mississippi v. City of Starkville*.[111] In *Islamic Center*, the court determined that the aldermen, empowered with the discretion to permit use of buildings as churches within the city limits, had abused their discretion by inconsistently allowing exemptions.[112] The aldermen granted exemptions for Christian denominations in the same area where they had repeatedly denied the Islamic Center an exemption.[113] The Fifth Circuit found the denial invalid.[114]

In the Temple's case, the Hawai`i Supreme Court held that, "no absolute ban on the use of the Temple's property for religious purposes ha[d] been imposed, but only a regulation regarding the height to which its buildings may be constructed."[115] Further, the court found "no

---

initially proposed construction plans for the Hall that prescribed a height limit of sixty-six feet, but then deliberately chose not to abide by its own plans, as approved." *Id*.

[108] *See id.* The court stated that the "Temple cannot force the city to zone according to its religious conclusion that a particular plot of land is 'holy ground.'" *Id.* (citing *Dedman*, 69 Haw. at 259-63, 740 P.2d at 31-34).

[109] *Id.* at 248, 953 P.2d at 1346.

[110] *Id.* at 249, 953 P.2d at 1347.

[111] 840 F.2d 293 (5th Cir. 1988).

[112] *See Islamic Center of Mississippi v. City of Starkville*, 840 F.2d at 294.

[113] *See id.*

[114] *See id.*

[115] *Korean Temple*, 87 Haw. at 249, 953 P.2d at 1347.

indication" of discriminatory behavior on the City's part.[116] In the end, though the court acknowledged hardship, it did not find the Temple's hardship either substantial enough or of a type to support a variance or Free Exercise claim.[117]

IV. ANALYSIS OF THE COURT'S FREE EXERCISE HOLDINGS

In *Korean Temple*, the Supreme Court of Hawai`i adopted two-pronged threshold test for a regulation challenged on Free Exercise of Religion grounds.[118] The adopted threshold test gives the claimant the opportunity to have a court invalidate a regulation before having to show how the regulation burdens the claimant's religion. In this case, however, the Temple apparently did not demonstrate how the past interpretations of the relevant CZC sections by the Hawai`i courts prevented traditional, non-Christian structures from receiving the benefits that a Christian structure could have under the same code sections. Rather, the Temple tried to argue that its saddle-shaped roof constituted a spire.[119]

A. *Validating the Challenged Law before Testing the Burden*

The Hawai`i Supreme Court departed from precedent by adapting the two-pronged threshold test from *Grosz* to its Free Exercise strict scrutiny analysis.[120] Before Hawai`i courts apply strict scrutiny in Free Exercise claims, the new rule requires Hawai`i courts to determine first whether the government is regulating conduct or belief and second whether the law has a secular purpose and a secular effect.[121] To understand these new prongs thoroughly, however, more context from *Grosz* is necessary. Under the first prong, the *Grosz* court accepted the

---

[116] *See id.* Notably, the court had earlier explained that, "[i]f a state creates . . . a mechanism [for individualized exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent." *Id.* at 244 n.31, 953 P.2d at 1344 n.31. The court, however, took no steps to explain how the City's actions did not suggest discriminatory intent. C*f. supra* note 98 (analyzing the cumulative effect of the vague CZC language and the various interpretations by the courts of Hawai`i).

[117] *See id.* at 248, 953 P.2d at 1346.

[118] *See id.* at 246, 953 P.2d at 1344. *See also infra* Part IV.A.

[119] *See supra* note 98.

[120] *See supra* notes 97, 100 and accompanying text.

[121] *See Korean Temple*, 87 Haw. at 246, 953 P.2d at 1344. *See also Grosz*, 721 F.2d at 733.

distinction between belief and conduct despite criticism of the distinction.[122] Therefore, where a "regulation[] focus[es] on conduct, government action passes the first threshold,"[123] but "the government may never regulate religious beliefs[.]"[124]

Under the second prong, which requires a law to "have both a secular purpose and a secular effect to pass constitutional muster[,] a law may not have a sectarian purpose[, i.e., be] based upon disagreement with religious tenets or practices, or [be] aimed at impeding religion."[125] Also, "a law violates the free exercise clause if the 'essential effect' of the government action is to influence negatively the pursuit of religious activity or the expression of religious belief."[126] The *Grosz* court explained that, "[t]his is not to say that any government actions significantly affecting religion fail this threshold test. Rather, any nonsecular effect, regardless of its significance, must be only an incident of the secular effect."[127]

These threshold requirements are inconsistent with the purpose of the Free Exercise analysis in *Yoder*, the case from which the *Andrews* court drew Hawai`i's strict scrutiny standard,[128] because *Yoder* required a strict scrutiny analysis even if a party challenged a valid, neutral, and generally applicable law. The *Yoder* court held that, "this case [cannot] be disposed of on the grounds [that the regulation] applies uniformly to all citizens . . . [or that], on its face,

---

[122] *See Grosz*, 721 F.2d at 733 n.5. The court cited Laurence Tribe and Donald Giannella as commentators who were critical of the belief conduct distinction. *See id.* (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-9, at 837-38 (1978); Giannella, *supra* note 24, at 1387 ("The rule adopted by [*Reynolds*] was that the free exercise clause in effect only protected religious belief")).

[123] *Id.* at 733 (citing *Braunfeld*, 366 U.S. at 603; *Cantwell*, 310 U.S. at 303-304).

[124] *Id.*

[125] *Id*. (citing *Braunfeld*, 366 U.S. at 607). *See, e.g., Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 524 (1993) [hereinafter *Lukumi Babalu*] ("The challenged laws had an impermissible object; and in all events the principle of general applicability was violated, because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs"). In *Lukumi Babalu*, Santeria practitioners sacrificed animals for religious purposes, which the City attempted to prevent. *See id.*

[126] *Grosz*, 721 F.2d at 733 (citing *Braunfeld*, 366 U.S. at 607). *See, e.g., Lukumi Babalu*, *supra* note 125.

[127] *Grosz*, 721 F.2d at 734 (citing TRIBE, *supra* note 122, § 14-9, at 838-40).

[128] *See supra* notes 24-25.

[it does not] discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns."[129]

If the challenged law passes constitutional muster in that it only regulates conduct and only has a secular purpose,[130] the claimant, under Hawai`i's strict scrutiny analysis, must show "beyond a reasonable doubt"[131] that "the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief [and that] the parties' free exercise of religion has been [unduly] burdened by the regulation."[132] That is, the extent or impact of the regulation on the party's religious practices must be substantial or must cause significant conflict.[133] The *Korean Temple* court clarified this inquiry by requiring that the "'infraction . . . be plain, clear, manifest, and unmistakable.'"[134] If the claimant makes out its prima facie case, the court then determines whether the state had a compelling interest sufficient to justify such a burden.[135]

Yet, by requiring that the Temple show a burden to the practice of its religion, which the government coincidentally may regulate, the court overlooks the bigger picture for most non-Protestant religions: belief necessitates certain conduct.[136] Therefore, as belief and conduct often

---

[129] *Yoder*, 406 U.S. at 220. *Cf. supra* note 46. The *Yoder* Court also held that, "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." *Yoder*, 406 U.S. at 215. The Court supported its holding with the following case examples: *Sherbert*, 374 U.S. 398; *McGowan v. Maryland*, 366 U.S. 420 (1961) (separate opinion of Frankfurter, J.); *Prince v. Massachusetts*, 321 U.S. 158 (1944). *See id.*

Thus, if the Hawai`i Supreme Court adopts *Smith* at some point, it will in part overturn nearly twenty years of Free Exercise jurisprudence in the State.

[130] *See supra* notes 121, 123, and 125 and accompanying text.

[131] *Korean Temple*, 87 Haw. at 248, 953 P.2d at 1346 (quoting *Gaylord*, 78 Haw. at 137, 890 P.2d at 1177).

[132] *Id.* at 247, 953 P.2d at 1345 (citing *Andrews*, 65 Haw. at 291, 651 P.2d at 474).

[133] *See supra* notes 68-70 and accompanying text.

[134] *Korean Temple*, 87 Haw. at 248, 953 P.2d at 1346 (quoting *Gaylord*, 78 Haw. at 137, 890 P.2d at 1177).

[135] *See supra* notes 68-70 and accompanying text.

[136] For example, Catholicism requires that adherents take the sacrament, part of which entails drinking wine. "Even when wine was illegal during Prohibition, [however,] Congress exempted the sacramental use of wine from the proscription." Michael W. McConnel, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L.

overlap with non-Protestant religions, permitting a law to regulate non-Protestant religious conduct may also permit the law to regulate the beliefs of that religion.

B. *Separating Belief from Conduct is an Improper Requirement of Hawai`i Strict Scrutiny Standard*

The application of Free Exercise strict scrutiny by the Hawai`i courts is short sighted. Though claimants invoke the First Amendment to protect their religious beliefs, as well as their conduct, strict scrutiny in Hawai`i examines only how a law impedes a claimant's practice of his religion rather than examining the detriment that the law has on the belief itself. [137] Separating conduct from belief, which Protestant-based cultures readily do,[138] presumes that belief can

---

REV. 1109, 1135 (1990). Therefore, the majoritarian rule has recognized that conduct cannot be separated from belief.

[137] As applied in Hawai`i, the court preliminarily requires the applicant "'to show the coercive effect of the [law] as it operates against him in the practice of his religion.'" *Korean Temple*, 87 Haw. at 247, 953 P.2d at 1345 (quoting *Schempp*, 374 U.S. at 223).

[138] The court's desire to separate conduct completely from belief likely finds its roots in Protestantism. Martin Luther protested against the pomp and circumstance of Catholicism. "[A]ll the churches and monastic houses are full of praying and singing, but how does it happen that so little improvement and benefit result from it . . . [?]" HUGH T. KERR, JR., A COMPEND OF LUTHER'S THEOLOGY 108 (1943). He urged believers to practice their faith in earnest rather than through empty ceremony. *See id.* 108-109. "We should pray, not as the custom is, counting many pages or beads, but fixing our mind upon some pressing need, desire it with all earnestness, and exercise faith and confidence toward God in the matter, in such wise that we do not doubt that we shall be heard." *Id*. at 107. Thus, Protestant-based cultures do not view conduct as necessary to communion with their God.

This socio-cultural mindset has repressed minority religionists in their free exercise of their respective religions, because in the past, "to be considered legitimate, religions had to be viewed as 'civilized' by Western standards." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1179 (2d ed. 1988). *See, e.g.*, Davis v. Beason, 133 U.S. 333, 341 (1890) ("Bigamy and polygamy are crimes by the laws of all civilized and Christian countries"); *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1, 48-49 (1890) ("polygamy,--a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. . . . The organization of a community for the spread and practice of polygamy is . . . a return to barbarism. It is contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the western world"); *Reynolds*, 98 U.S. 145, 164 (stating that, "[p]olygamy has always been odious among northern and western nations of Europe"). "[T]his view of religion combined easily with a belief-action distinction so as to limit religious liberty to immunity for beliefs and traditional forms of worship, leaving unprotected religiously motivated action of a less conventional sort." TRIBE, *supra* this note, § 14-6, at 1179. *See, e.g.*, Marc Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 256 (1966) ("Having identified the protected part of religion[, i.e. "mere religious belief and opinions" (*Reynolds*, 98 U.S. at 166)] . . ., the *Reynolds* Court had no need to define which actions were religious, for actions were to be measured by nonreligious qualities"). *See also supra* note 122. As post-war case law has evinced, however, the Court's 120-year-old approach in *Reynolds* still forces minority religions to conform to the majority's code of conduct at all cost. *See, e.g., Braunfeld*, 366 U.S. 599 (holding that a criminal statute requiring all stores to be closed on Sunday did not burden the free exercise of religion by Orthodox Jews whose Sabbath falls on Saturday, because the running of a store was a secular activity, though the law together with the religious precepts required Orthodox Jews to be close their shops for two days).

continue without conduct or that conduct is never mandated by a belief to maintain the belief. Since the adoption of Free Exercise strict scrutiny in Hawai`i, Hawai`i courts in all cases but *Blake* focused on visible detriment or restriction of conduct rather than on a more abstract detriment to the claimant's belief system.[139] Such an approach to the second inquiry of the State's Free Exercise strict scrutiny standard is contrary to *Yoder.*[140]

The Hawai`i Supreme Court's belief-conduct dichotomy in *Korean Temple* perpetuated its tradition of compartmentalizing any expression of religion, "so the distinction between [belief] and conduct [are] seen at best as announcing a conclusion of the [c]ourt, rather than as a summarizing in any way the analytic processes which led the [c]ourt to that conclusion."[141] By quantifying the burden on religion through the burden on religious practices, the *Korean Temple* court could more readily dismiss the Temple's Free Exercise of Religion challenge, because conduct is not absolutely protected under Article I, Section 4, of the Hawai`i Constitution[142] or under the First Amendment of the United States Constitution.[143]

In contrast, by delving into the conduct and its motivation, the court could "depart[] from any purportedly 'objective' judicial notion of what constitutes the core of a religion, and . . . mov[e] toward the view that the core of any religion must always be defined from the perspective of the religion itself."[144] Thus, "the ultimate inquiry must look to the claimant's

---

[139] *See supra* Part II.A.

[140] *See Yoder*, 406 U.S. at 220 ("[B]elief and action cannot be neatly confined in logic-tight compartments").

[141] TRIBE, *supra* note 138, § 12-7, at 827. *See also supra* Part III.B.1. The court's present "belief-action dichotomy . . . is at best an oversimplification." *Id*. § 14-6, at 1184.

[142] The section states in part that, "[n]o law shall be enacted respecting an establishment of religion, or prohibiting the exercise thereof[.]" HAW. CONST. art. I, § 4.

[143] The First Amendment provides in part that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. CONST. amend. I.

The author resolutely believes that the Protestant view toward separating belief from conduct greatly influences the nation's Free Exercise jurisprudence. *See supra* note 138. For the theory of cognitive psychology, which supports the proposition of this comment, *see infra* notes 158-162 and accompanying text. This comment also questions whether the courts should maintain such a distinction as the nation moves to foster multi-culturalism.

[144] TRIBE, *supra* note 138, § 14-12, at 1249.

sincerity in stating that the conflict is indeed burdensome *for that individual*."[145] This approach is superior to the compartmentalization of belief-conduct, because it fosters multi-culturalism by forcing courts to view the issue from the standpoint of the practitioner rather than through the Protestant-based cultural filter that permeates American society, mores, and law.[146] Even under a sincerity-based inquiry though, the Temple would not likely have prevailed either, because the Hawai`i Supreme Court was rather skeptical about the Temple's claims.[147]

Even if the court found the Temple's claims sincere,[148] the court could still have found that in balancing the Temple's burden against the compelling government interest, the scales were tipped in the City's favor, because protecting scenic views constitutes a highly compelling governmental interest in promoting public health, safety, and welfare in Hawai`i.[149] Yet,

---

[145] *Id.* (emphasis in original). As a result, where courts have thoroughly explored religiously motivated conduct and have found the conduct not to pose a danger to the general public, the courts have protected that conduct under the Free Exercise of Religion Clause. *See supra* note 24.

[146] Such an approach better addresses the needs of minorities, who were given special consideration by the drafters of the Bill of Rights.

> James Madison, who proposed [the Bill of Rights, which included the free exercise of religion] . . ., explained that their purpose was to "limit and qualify the powers of government" by prohibiting government from exercising its power in "those cases in which the government ought not to act, or to act only in a particular mode." [Not only did Madison believe] that such limitations would guard against "the abuse of the executive," but he also hoped that it would guard against abuses that might be committed by "the community itself." . . . In other words, one of the objects of the Bill of Rights was to protect the minority from the tyranny of the majority.

Washegesic v. Bloomingdale Public Schools, 813 F. Supp. 559, 560 (quoting *James Madison: A Bill of Rights Proposed*, *in* 3 ANNALS OF AMERICA 360 (1968) (excerpted from I ANNALS OF CONGRESS 424-50 (1789)).

[147] *See Korean Temple*, 87 Haw. at 248, 953 P.2d at 1346. *See also supra* notes 107-109 and accompanying text.

[148] *See Korean Temple*, 87 Haw. at 248, 953 P.2d at 1346. *See also supra* notes 105-106 and accompanying text.

[149] The court found that the legislative intent of the pertinent CZC's sections raised in *Korean Temple* was to protect views. *See Korean Temple*, 87 Haw. at 233, 953 P.2d at 1331. *See also supra* note 98; *Life of the Land, Inc. v. Land Use Commission*, 61 Haw. 3, 594 P.2d 1079 (1976) (recognizing the importance of aesthetic and environmental interests); *Life of the Land, Inc. v. City Council of the City and County of Honolulu*, 61 Haw. 390, 400, 606 P.2d 866, 875 (1980) ("OCS . . . concluded that the application complied with the intent of the 1977 amendment to the General Plan, which was to: (a) protect O`ahu's scenic views . . .").

Such a holding is consistent with *Yoder*. "[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. [Religiously based activities] are often subject

scholars question the appropriateness of giving zoning ordinances, a body of law not developed in a truly democratic fashion, such deference when they impact fundamental freedoms and rights.[150]

To address Free Exercise challenges by minority religions more equitably, Hawai`i courts should return to the heart of *Yoder*, which balanced the burden on the integral religious conduct of an individual against the necessity of the State to regulate the individual's conduct.[151] The *Yoder* Court examined the burden on belief-conduct, not simply on conduct. As the claimant's belief was expressed through conduct, the Court had to determine whether exempting the conduct undermined the purpose of the challenged law to such a point that it would render the legal rationale ineffective.[152] This analysis would permit courts to protect practices integral to a

---

to regulation by the States in the exercise of their undoubted power to promote the [public] health, safety, and general welfare." *Yoder*, 406 U.S. at 219-20.

"Zoning ordinances may regulate religious conduct [if they] are reasonably related to a permissible state interest such as protecting public health, safety, or welfare, and [they] do not regulate religious belief." PETER W. SALSICH & TIMOTHY J. TRYNIECKI, LAND USE REGULATION 275-76 (1st ed. 1998) (paraphrasing Messiah Baptist Church v. County of Jefferson, State of Colorado, 859 F.2d 820, 824 (10th Cir. 1988)).

[150] "Zoning rules are created by a planning-political process that emphasizes majoritarian values rather than libertarian ones. . . . The dominant factors in zoning are public pressure and political influence[.]" BERNARD H. SIEGAN, PROPERTY & FREEDOM 179 (1st ed. 1997). Additionally, "[p]lanning is unquestionably highly subjective, lacking those standards and measurements that are the requisites of a scientific discipline." *Id.* at 185. Moreover, "the zoning process is often inconsistent with a fundamental democratic principle: that a legislature should represent the people whom its decisions affect." *Id.* at 180. However, "[l]aws restricting individuals do not necessarily impact all individuals equally." *Id.* at 187-88. Nonetheless, "[z]oning is one of the most criticized regulatory systems in the United States . . . . Law reviews have published [critical] articles[.]" *Id.* at 181. *See also* Norman Karlin, *Back to the Future, From Nollan to Lochner*, 17 SW. LU. L. REV. 627 (1988); David J. Mandel, *Zoning Laws: The Case for Repeal*, ARCHITECTURAL FORUM 58 (Dec. 1971); Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970); Note, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 CAL. L. REV. 335 (1972); Lawrence G. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Robert Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); Douglas Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. (1981); Sheldon J. Plager, *The XYZ's of Zoning*, PLANNING 271 (1967); Mark Pulliam, *Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform*, 13 SW. U.L. REV. 435 (1983); Norman Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317 (1955); Jan Krasnowieck, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980); Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973). "The term 'exclusionary zoning' has become a pejorative part of our language, referring to the exclusion of unwanted people—often minorities—from a locality." SIEGAN, *supra* this note, at 181.

[151] *See Yoder*, 406 U.S. at 214-15. *See also supra* note 144 and accompanying text.

[152] *See Yoder*, 406 U.S. at 219. *See also Braunfeld*, 366 U.S. at 608.

religion, as long as the conduct does not undermine the State's compelling interests to such an extent as to render them ineffective.

C. *Appearance of a Sectarian Effect*

When the Hawai`i Supreme Court pronounced that, "there is no indication in the present matter that the City has acted in a discriminatory manner toward the Temple based upon the religious tradition practiced in it[,]"[153] it might have been correct; however, the court did not realize or fully analyze the collective effect of the Hawai`i courts'[154] previous CZC interpretations,[155] which exempted only Christian denominations in the structural expression of their religions.[156] Thus, though the regulations may have been promulgated with a secular purpose, they no longer had a secular effect due to the collective force of the CZC interpretations by the Hawai`i courts. Therefore, the *Korean Temple* court should have reinterpreted the relevant CZC provisions or struck them under the second *Grosz* threshold requirement.

As a result, why the Hawai`i Supreme Court, in *Korean Temple*, did not strike or reinterpret the provisions on grounds that the legal force of the provisions created a Christian-based preference becomes a provocative issue. Most likely, however, the court simply did not see the preference.[157] Assuming that the court simply did not realize the collective impact of the

---

[153] *Korean Temple*, 87 Haw. at 249, 953 P.2d at 1347.

[154] The term "courts" refers to both the Hawai`i Intermediate Court of Appeal and Hawai`i Supreme Court, because both courts interpreted the CZC.

[155] *Korean Temple*, 87 Haw. at 249, 953 P.2d at 1347.

[156] *See supra* note 98. The court held that a spire tapers to a point from a primary structure. *See id.* For example, any denomination whose structures do not use spires to reach the heavens are excluded, such as those which use temples, e.g., Buddhists and Shintoists. Also, other denominations that construct spire-like structures, such as Muslims, will not qualify, because a minaret does not taper. For example, a minaret may have a "crown" (from which load speakers are hung) approximately two-thirds of the way up the minaret and an upper crown (the conal top). *See* Fundamental Concepts of Persian Architecture, *Monar - Minaret* (visited June 6, 2000) <http://www.carn. anglia.ac.uk/~trochford/glossary/monar/monar2.html>. For another example, a minaret may be flat on top instead of coming to point. *See id.*

[157] Further, there is no pattern of discriminatory conduct against minority religions. Prior to *Korean Temple*, Hawai`i courts only addressed Free Exercise claims involving minority religions twice. *See generally Dedman*, 69 Haw. 255, 740 P.2d 28; *Blake*, 5 Haw. App. 411 695 P.2d 336. In *Blake*, the court could determine that the practice was only peripheral. *See supra* Part II.A. In *Dedman*, however, this comment questions whether the court addressed the true issue: the impact of the government approved activity on the fundamental basis of the Pele worshipper's faith. *See id*.

CZC provisions raised in *Korean Temple*, why the court did not realize the disparate impact begs the question of why not.

Unconscious discrimination[158] helps explain the preferential treatment that the Hawai`i courts afforded Christian denominations under the CZC. Cognitive psychology, a theory underlying unconscious discrimination, holds that a culture conditions the members of its society with common beliefs and preferences[159] that are based on "a common historical and cultural heritage."[160] Though these common beliefs and preferences do not necessarily promote a cultural stereotype of a different belief or behavior, they do slowly construct a cultural filter common to a given society into the perception of each individual of that society. Therefore, an individual views conduct and belief through his cultural filter and screens out belief or conduct not compatible with his social system.[161] Individuals of a common culture, however, "do not

---

[158] Charles Lawrence posited that disparate treatment of minority groups is unconscious. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987). Lawrence presented two theories for unconscious discrimination:

> First, Freudian theory states that the human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right. . . .
>
> Second, the theory of cognitive psychology states that the culture—including, for example the media and an individual's parents, peers, and authority figures—transmits certain beliefs and preferences. . . .

Id. at 322-23.

The "discomfort of guilt" to which Lawrence referred in his racism analysis does not appear to exist presently in the context of religious discrimination. *See id.* at 322. Therefore, Lawrence's second proposition, the theory of cognitive psychology, offers strong support to an argument of unconscious discrimination by the State's law-making powers against minority religions.

[159] Lawrence, *supra* note 158, at 323. *Cf.* McConnel, *supra* note 136, at 1134 ("The selection of Sunday as the day on which the courts would not operate was itself a religious choice, almost an establishment of the Christian religion").

[160] Lawrence, *supra* note 158, at 322.

[161] *See id. See generally* McConnel, *supra* note 136, at 1133. "Throughout the *Smith* opinion, generally applicable laws are treated as presumptively neutral, with religious accommodations a form of special preference, akin to affirmative action. . . . In a sense, then, both *Smith* and *Sherbert* are about neutrality toward religion. But which has the correct understanding of neutrality?" *Id.*

McConnel began his examination of the issue with *Stansbury v. Marks*, 2 U.S. 213 (1793), "the first recorded case raising free exercise issues after adoption of the First Amendment." McConnel, *supra* note 136, at 1133. The *Stansbury* opinion simply reported that a Jew had refused to testify on Saturday, his Sabbath, and had been fined; however the fine was discharged after he waived the benefit of his testimony. *See id.*

This is an example of a generally applicable, otherwise valid, law. Is it neutral toward religion?

recognize the ways in which [their] cultural experience has influenced [their] beliefs . . . or the occasions on which those beliefs affect [their] actions."[162]

The theory of cognitive psychology provides insight into the preferential treatment of the *Korean Temple* court in its Free Exercise jurisprudence in two instances. First, the *Korean Temple* court did not evaluate the impact of its CZC "spire" definition on non-Christian denominations, because the cultural perceptive filter prevented the court from being sensitive to the issue. The court did not realize that it created a preference for Christian religions when it defined "spire" to include "steeple" by the dictionary definition.[163] Compounding the court's blindness to the issue was the choice of common language comprehensible to a Protestant-based culture, such as "church" for a religious structure and "spire" for a protrusion from a primary religious structure, which the drafters of the CZC used. Facially, these structural concepts common in Christian societies to describe their houses of worship preferred Christian denominations, because only Christian houses of worship could match the criteria of the zoning

---

> No, it is not. The courts were closed on Sundays, the day on which the Christian majority of Pennsylvania observed the sabbath. The . . . six-day calendar . . . impose[d] a burden on Saturday sabbath observers (mostly Jews) that [wa]s not imposed on others (mostly Christians)."

Id. at 1134. Trying to accommodate every religious persuasion in America would require courts to be closed essentially every day. *See id*. Therefore, the "best, least costly, and most neutral solution is to exempt Saturday sabbath observers from the obligation of testifying on Saturday. Thus, an exemption is not 'affimative fostering' of religion; it is more like *Sherbert's* neutrality in the fact of differences." *Id.*

> All free exercise claims involve government decisions that are fraught with religious significance, at least from the point of view of the religious minority. In this respect, *Stansbury* . . . cannot be distinguished from *Smith*. In *Smith*, the generally applicable law was the prohibition on the use of hallucinogenic drugs[, which the] Native American Church uses . . . as its sacrament. . . . Christians and Jews use wine as part of their sacrament, and wine is not illegal. Even when wine was illegal during Prohibition, Congress exempted the sacramental use of wine from the proscription.

Id. at 1134-35. Just as with designating Sunday the day on which government facilities would be closed in *Stansbury*, not making alcohol illegal appears to be based in religious considerations. *Cf.* the Islamic faith (alcohol is prohibited but smoking hashish is not). The *Smith* Court would likely argue, however, that exemption of wine from the Eighteenth Amendment by Congress, the voice of the people, was valid though it created favored Testament-based faiths. *See* J. Scalia speaking on *Smith* at the University of Hawai`i, William S. Richardson School of Law (Feb. 2, 2000) (stating that such exemptions had to come from the legislature). Consequently, if individual state legislatures wished to exempt "controlled substances" that minority faiths use as "sacrament," such exemptions would be constitutionally valid. The legislative approach, however, requires majoritarianism, which eludes minority faiths in representation and leaves them to the benevolence of the majority.

[162] Lawrence, *supra* note 158, at 322.

[163] *See supra* note 98.

code to qualify for an exemption. Second, the court's requirement that applicants show how a regulation works against them in their free exercise of religion allows the courts to separate completely an applicant's belief from conduct, a concept that a Protestant-based culture can more readily grasp.[164] As a result, the *Korean Temple* court has required all belief structures to fit into preconceived Protestant-based molds for the purposes of Free Exercise analysis. In sum, by explaining how common culture creates a cultural filter over an individual's perception, cognitive psychology offers a ground for (1) the court not recognizing the effect that its common cultural understanding of structures had on the minority religious structures under the CZC and (2) for the court applying a bright-line belief-conduct dichotomy in its Free Exercise jurisprudence.

V. CONCLUSION

In adopting the *Grosz* two-part threshold test, the Hawai`i Supreme Court, in *Korean Temple*, expanded its Free Exercise strict scrutiny to determine the constitutional validity of a challenged regulation before beginning to analyze the competing interests under strict scrutiny. Thus, a claimant may now invalidate a regulation before having to show a substantial burden on his religious practices.

Next, in following precedent in its analysis of the "undue burden" inquiry of strict scrutiny, the *Korean Temple* court perpetuated the use of a bright-line belief-conduct dichotomy. This bright-line approach is contrary to the intent of *Yoder*, the case from which the *Andrews* court drew what was to become Hawai`i's strict scrutiny standard.[165] The standard, as now applied, permits a Protestant cultural base to evaluate the burden on a claimant by clearly separating conduct from belief. Consequently, the religious majority can more readily deny Free Exercise claims of minority faiths, because the state can argue under its broad police powers of public health, safety, and welfare that its interests command conformity.

The cornerstone of our democracy, however, is to protect the minority from the tyranny of the majority.[166] To acknowledge this concept, the Hawai`i courts must adjust their application

---

[164] *See supra* notes 138-141.

[165] *See Andrews*, 65 Haw. at 290, 651 P.2d at 474; *Yoder*, 406 U.S. 205. *See also supra* notes 21-24.

[166] James Madison wrote that

of their Free Exercise strict scrutiny standard. The Hawai`i Supreme Court should consider the in-depth analysis that the Intermediate Court of Appeals applied in *Blake* in which the appellate court examined to what extent a practice was an integral part of religious faith. This more open-minded approach permits minority religions with distinctly different belief structures to show that belief requires certain conduct, just as Catholicism requires the sacrament.

In short, the crux of determining an undue burden is whether the practice is integral to the religion.[167] If it is not, it is pure conduct, and the state may regulate it. If it is integral, it is belief-conduct, which, like belief, falls under the full protection of the First Amendment. Because belief-conduct does have an external or societal effect, however, before restricting such activity, the court should balance the state's necessity in regulating the conduct against the constitutional infringement demanded by the regulation. If exempting the conduct would not threaten the overall purpose of the law challenged, the belief-conduct should be exempted as it was in *Yoder* and *People v. Woody*.[168]

This proposed approach to the undue burden inquiry of the state's strict scrutiny standard attempts to provide minority faiths and native Hawaiians with the same protections that primarily New Testament sects have received either through the courts or Congress throughout this

---

> [i]f there were a majority of one sect, a bill of rights would be a poor protection for liberty . . .. [Such] freedom arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society . . .. The United States abound in such a variety of sects, that it is a strong security against religious persecution, and it is sufficient to authorise a conclusion, that no one sect will ever be able to outnumber or depress the rest.

James Madison in Virginia Convention (June 12, 1788), *in* THE COMPLETE MADISON 306, 306 (Saul K. Padover ed., 1953).

Madison also felt government should not interfere with religion. He wrote, the tendency of government to usurp religion would "be best guarded against by an entire abstinance of the Government from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespass on its legal rights by others." IX THE WRITINGS OF JAMES MADISON 487 (G. Hunt ed., 1910).

Further, he felt that "religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure competition among sects rather than dominance by any one." TRIBE, *supra* note 138, § 14-3, at 1159. *See also* Robert S. Alley, JAMES MADISON AND RELIGIOUS LIBERTY (1985); Robert C. Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419, 421 (1964).

[167] *See, e.g., Yoder*, 406 U.S. at 219 (The Amish "mode of preparing [its] youth for Amish life . . . is an essential part of [Amish] religious belief and practices"). *See also supra* note 144 and accompanying text.

[168] For a discussion of *Yoder*, 406 U.S. 205, and *Woody*, 394 P.2d 813, *see supra* note 24.

country's history.[169] If implemented, these protections would permit the minority faiths to establish themselves and influence the socio-cultural basis of the nation. Without such protections, minority denominations will remain subject to the tyranny of the majority.

James C. Hitchingham[170]

[169] *See supra* note 161.

[170] Class of 2000, University of Hawai`i, William S. Richardson School of Law.