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Generally Applicable Law and the Free Exercise of Religion

Douglas Laycock
University of Virginia School of Law, dlaycock@virginia.edu

Steven T. Collis
Holland & Hart LLP, Greenwood Village, Colorado, steve@steventcollis.com

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The 2016 Roscoe Pound Lecture†

Douglas Laycock* & Steven T. Collis**

Generally Applicable Law and the Free Exercise of Religion

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† Roscoe Pound is widely considered to be one of the early giants of American legal thought. A native Nebraskan born in Lincoln, Pound received a botany degree from the University of Nebraska. Pound became interested in law after traveling to Harvard to study with a botany professor only to find that the professor had just died. Pound stayed at Harvard and studied law instead. He then returned to Lincoln to practice law, joining the faculty of the University of Nebraska College of Law in 1899. In 1903, he became its dean. Pound later moved to Harvard Law School, where he was a professor and then dean. In 1949, at the instigation of a group of friends and graduates of the law college, the Nebraska State Bar Association funded a lectureship in Dean Pound's honor. "New Paths of Law," the first Pound Lecture, was delivered in 1950 by Roscoe Pound himself.

* Robert E. Scott Distinguished Professor of Law, Class of 1963 Professor in Honor of Graham C. Lilly and Peter W. Low, and Professor of Religious Studies, University of Virginia, and Alice McKean Young Regents Chair in Law Emeritus, University of Texas at Austin. This Article is based on the Roscoe Pound Lecture at the University of Nebraska Law School, delivered by Professor Laycock on March 3, 2016. The lecture was derived in part from a co-authored amicus brief on behalf of Religious Liberty Scholars in *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433 (2016).

** Chair, religious institutions and First Amendment practice group, Holland & Hart LLP, Greenwood Village, Colorado.

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I. INTRODUCTION

Roscoe Pound was one of the true giants of twentieth-century American law, and it was an honor of the first magnitude for one of us to give the Roscoe Pound lecture. Pound's contributions to the law are well documented and well known.[1] It is less well known that he covered the first Nebraska football team for the student newspaper, that he was the very first in the long line of fanatical Nebraska fans, and that he wrote cheers and victory songs.[2] He wrote some of them in Latin, which would be a challenge for twenty-first century fans at Nebraska or elsewhere.

II. FREE EXERCISE IN THE AGE OF *SMITH*

Our topic, in the lecture and in this Article, is the free exercise of religion. Free exercise is as fundamental as any other First Amendment right, yet it has become controversial. Few Americans would admit to opposing religious liberty, but many Americans seek to minimize it. Academics question whether religious liberty has any

1. *See, e.g.*, Roscoe Pound, Jurisprudence (1959); Roscoe Pound, Social Control Through Law (1942); Roscoe Pound, The Formative Era in American Law (1938); Roscoe Pound, The Spirit of the Common Law (1921); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 Harv. L. Rev. 591 (1911); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep., pt. I, at 395 (1906), https://law.unl.edu/RoscoePound.pdf [https://perma.unl.edu/T5CB-KBQP]; *see generally* Franklyn C. Setaro, Bibliography of the Writings of Roscoe Pound (1942) (collecting the writings of Roscoe Pound). For a recent full-scale review and evaluation, see David M. Rabban, *Pound's Sociological Jurisprudence: European Roots and American Applications*, *in* Le "Moment 1900": Critique Sociale et Critique Sociologique du Droit en Europe et aux États-Unis 113 (Olivier Jouanjan & Élisabeth Zoller, eds. 2015), http://ssrn.com/abstract=2688094 [https://perma.unl.edu/YU36-P2KJ].
2. Husker Century, *Roscoe Pound, Nebraska's First Fanatic*, Net Nebraska https://web.archive.org/web/20101125142522/http://netnebraska.org/extras/husker_century/hc_mvp/hc_fans/hc_fans2.html [https://perma.unl.edu/4LB4-6SDN].

modern rationale,[3] and many Americans affirmatively oppose religious liberty whenever it conflicts with some other interest they care about more. One of us has addressed this resistance to religious liberty elsewhere;[4] here, it merely sets the frame for our topic.

Opponents of religious liberty take much comfort from the Supreme Court's 1990 decision in *Employment Division v. Smith*.[5] This decision came down before much of the recent opposition to free exercise emerged; it was mostly the work of conservatives concerned about what they viewed as judicial activism. The state in *Smith* penalized the use of peyote in the central ritual of a Native American worship service. Under existing law at the time, the state had to show that this burden on a religious practice was necessary to serve a compelling government interest.[6] But *Smith* held that government has no duty to justify burdens on religion if the burden is inflicted by a law that is "neutral" and "generally applicable."[7] *Smith* held that banning a worship service raises no issue under the Free Exercise Clause if the ban is imposed through a neutral and generally applicable law.

Four dissenters, the religious liberty community, the larger civil liberties community, and Congress all reacted with alarm. Congress and thirty-three states have rejected the *Smith* standard, either by enacting Religious Freedom Restoration Acts (RFRAs) or by interpreting state constitutions to subject neutral and generally applicable laws that burden religious exercise to heightened judicial scrutiny—usually, but not universally, under the compelling interest test.[8] Much of this new state law remains little used and untested. RFRAs have recently become politically toxic, largely as a result of both sides in the culture wars misrepresenting what these laws do,[9] but most of them were passed with overwhelming bipartisan support.

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3. *See, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? (2013); Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). For a response, see Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. (forthcoming 2017).
4. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839; Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407 (2011).
5. 494 U.S. 872 (1990).
6. *See, e.g.*, Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).
7. *Smith*, 494 U.S. at 876–90.
8. *See* Laycock, *Culture Wars*, *supra* note 4, at 844 & n.22, 845 & n.26 (collecting citations). Arkansas and Indiana enacted Religious Freedom Restoration Acts more recently. ARK. CODE §§ 16-123-401 to 16-123-407 (2015); IND. CODE §§ 34-13-9-0.7 to 34-13-9-11 (2015). The thirty-third state only recently came to our attention. See State v. Everly, 146 S.E.2d 705 (W. Va. 1966) (applying a standard of review that is unclear, but clearly inconsistent with *Smith*).
9. *See* Douglas Laycock, *The Campaign Against Religious Liberty*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 231, 248–50 (Micah Schwartzman et al., eds. 2015).

Most recent religious liberty litigation in the Supreme Court has been under the federal RFRA,[10] which protects "any" exercise of religion[11] but only against federal law,[12] or under a similar statute, the Religious Land Use and Institutionalized Persons Act,[13] which protects prisoners and religious land use against state and local law.[14] There are additional pockets of federal protection. The Court has held that the Free Exercise and Establishment Clauses protect, and that *Smith* does not apply to, a religious organization's hiring and firing of its religious leadership.[15] This constitutional protection for the selection of religious leaders probably applies to all or most questions of internal church governance.[16]

Congress and the states have enacted specific exemptions, protecting particular religious practices from particular statutes, and a few of these provide federal protection from state law. So federal statutes now protect Native American religious use of peyote,[17] protect medical providers from assisting with abortions,[18] and protect churches from state and federal claims to recover contributions made by members who subsequently go bankrupt.[19]

But for all the remaining cases, *Smith* is the relevant federal law. And *Smith* says that the Free Exercise Clause protects only against laws that are not neutral, or not generally applicable. So what do these concepts mean? What makes a law neutral, generally applicable, or not?

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10. 42 U.S.C. §§ 2000bb–2000bb-4 (2012); *see* Zubik v. Burwell, 136 S. Ct. 1557 (2016) (vacating and remanding decisions holding that religious non-profit organizations were not entitled to have their secular insurers exempted from any obligation to provide contraception); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that closely held for-profit corporations and their owners are protected from obligation to provide emergency contraception to their employees); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (protecting religious use of hoasca, a tea containing small quantities of an hallucinogenic drug).
11. 42 U.S.C. § 2000bb-2(4) (2012).
12. *See* 42 U.S.C. § 2000bb-2 (2012) (defining the governments subject to RFRA as only the United States and its territories and possessions, the District of Columbia, and Puerto Rico); *see also* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding an earlier version of RFRA unconstitutional as applied to the states).
13. 42 U.S.C. §§ 2000cc–2000cc-5 (2012).
14. *See* Holt v. Hobbs, 135 S. Ct. 853 (2015); Cutter v. Wilkinson, 544 U.S. 709 (2005).
15. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).
16. *See* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 Nw. U. L. Rev. 1183 (2014).
17. 42 U.S.C. § 1996a (2012).
18. *See, e.g.*, 42 U.S.C. § 300a-7 (2012); 42 U.S.C. § 238n(a)(1) (2012).
19. Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (1998) (amending 11 U.S.C. §§ 544, 546, 548, 707, 1325 (2012)).

Smith involved a state prohibition on possession of peyote, an hallucinogenic drug listed on Schedule I, which means it has no legal use. The Court treated the ban on peyote as obviously neutral and generally applicable and said little about what it meant by those words. But as we shall see, the little it did say is revealing.

The Court returned to the question three years later in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[20] Santeria is an Afro-Caribbean religion that sacrifices small animals to its gods. Hialeah sought to ban the practice, without disrupting any of the myriad secular activities in which humans kill animals. There were four ordinances; one will give the flavor of them all. It was illegal to kill an animal unnecessarily, in a ritual or ceremony, not for the primary purpose of food consumption.[21] One indication of how the legal community initially understood *Smith* is that the Eleventh Circuit unanimously upheld these ordinances in a four-sentence, unpublished order.[22] The Supreme Court unanimously reversed, holding that the ordinances were neither neutral nor generally applicable.[23]

It is now a quarter century since *Smith* and *Lukumi*. The Court has said nothing further about the meaning of neutral and generally applicable law. *Smith* upheld the epitome of a generally applicable law—what the Court called an "across-the-board criminal prohibition" on possession of peyote.[24] *Lukumi* struck down city ordinances gerrymandered to such an extreme degree that they applied to "Santeria adherents but almost no others."[25]

There is an impression in some circles that *Smith* states the broad general rule, and *Lukumi* states a narrow exception. But *Smith* and *Lukumi* are both exceptional, with facts at opposite ends of the continuum. The law in *Smith* regulated religious use and every conceivable secular use; there were no exceptions. The ordinances in *Lukumi* regulated religion and nothing but religion. The Court said explicitly that laws do not have to be as bad as in *Lukumi* to be unconstitutional: the "ordinances fall well below the minimum standard necessary to protect First Amendment rights."[26]

Many cases fall between the extremes of *Smith* and *Lukumi*. Religious claimants challenge the application of laws that regulate religious conduct and some analogous secular conduct, but exempt other

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20. 508 U.S. 520 (1993).
21. *Id.* at 527.
22. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 936 F.2d 586 (11th Cir. 1991) (unpublished table decision).
23. Professor Laycock briefed and argued *Lukumi* in the Eleventh Circuit and in the Supreme Court.
24. Emp't Div. v. Smith, 494 U.S. 872, 884 (1990).
25. *Lukumi*, 508 U.S. at 536.
26. *Id.* at 543.

analogous secular conduct. The lower courts have disagreed about those cases, and the Supreme Court has remained silent.

Nebraska's Richard Duncan has written about this issue repeatedly,[27] and one of us has written about it repeatedly.[28] We keep returning to the issue because it is fundamental to constitutional protection for religious liberty, and because what Justice Stevens called the "crucible of litigation"[29] continues to force new thinking and reveal further implications of *Smith* and *Lukumi*. We can state new insights and state old insights more clearly. The picture is not nearly as bleak for religious liberty as it was in the three years between *Smith* and *Lukumi*, when it was widely feared that the Court would never enforce its new requirements of neutrality and general applicability.

III. TWO REQUIREMENTS WITH DISTINCT CONTENT

A. Neutrality

In *Smith*, neutrality and general applicability mostly ran together. But *Lukumi* addressed them as distinct requirements in separate sections of the opinion. The ordinances were not neutral, because they "target[ed]" Santeria, their "object" was to suppress Santeria sacrifice, and they were "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings."[30] These key words—target, targeting, object, and gerrymander—are pervasive in the neutrality section of the opinion.[31] But none of them appears even once in the section on general applicability.[32]

The neutrality section of the opinion also used the language of equal protection and nondiscrimination law. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue *discriminates against* some or all religious beliefs or regulates or prohibits conduct *because* it is undertaken for religious reasons."[33] These words—discriminate, discrimination, because—are also en-

27. Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith, Sherbert*, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178 (2005); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001).

28. Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 200–18 (2004); Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 25–38 (2000); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 41–54.

29. *E.g.*, Wallace v. Jaffree, 472 U.S. 38, 52 (1985).

30. *Lukumi*, 508 U.S. at 542.

31. *Id.* at 532–42.

32. *Id.* at 542–46.

33. *Id.* at 532 (emphases added).

tirely absent from the general-applicability section of the opinion. General applicability is a distinct requirement; it does not depend on targeting, gerrymandering, discrimination, legislative motives, or the object of laws.

"There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion."[34] That is, there are many ways of showing that a law is not neutral. These ways largely track discrimination law. In that body of law, a plaintiff may prove either a facial classification or that a facially neutral law is "a purposeful device to discriminate."[35] A law that facially discriminates against a protected class is usually accompanied by discriminatory motive, but the law is discriminatory even without such a motive. This is most clearly illustrated by the cases on sex discrimination in retirement benefits. Employers are prohibited from providing different levels of retirement benefits to men and women even if their motivation is based purely on life tables showing that women live longer on average[36] or even on the difficulty of finding an insurance company that would sell a plan not based on such tables.[37]

Even when a challenged rule is facially neutral, those claiming discrimination may show that the rule was adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[38] In *Hunter v. Underwood*, the Court unanimously held that a facially neutral provision of the Alabama Constitution was invalid because it had been "enacted with the intent of disenfranchising blacks."[39] Courts are reluctant to find unconstitutional motive, but this path is open to claimants where the proof is sufficiently clear.

The Court did not invoke the law of free speech, but the rule requiring compelling justification for content-based regulation of speech has the same doctrinal structure. A law is content-based and requires compelling justification if it is content-based on its face *or* if it is facially neutral but motivated by the speaker's content.[40] If the restriction on speech is content-based, the speaker "need adduce 'no evidence of improper censorial motive.'"[41]

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34. *Id.* at 533.
35. Washington v. Davis, 426 U.S. 229, 246 (1976).
36. *See* Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Compen. Plans v. Norris, 463 U.S. 1073, 1079–85 (1983); City of Los Angeles v. Manhart, 435 U.S. 702, 707–11 (1978).
37. *See Norris*, 463 U.S. at 1085–91.
38. Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979).
39. Hunter v. Underwood, 471 U.S. 222, 228–29 (1985).
40. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).
41. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) (quoting Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987)).

The Court in *Lukumi* said that its invocation of nondiscrimination law is the "minimum" requirement of neutrality.[42] Laws that burden religion must at least not discriminate on their face and be free of anti-religious motive. Plaintiffs *may* prove as a path to strict scrutiny that a law was enacted with anti-religious motive and thus is not neutral. But they need not prove bad motive if the law discriminates on its face or if the law is not generally applicable. Anti-religious motive is *sufficient* to trigger strict scrutiny, but it is not *necessary*.[43]

We know that anti-religious motive is not necessary, because nine Justices held the *Lukumi* ordinances unconstitutional while only two found bad motive. Justices Kennedy and Stevens reviewed the legislative history of the ordinances and found anti-religious motive.[44] Four justices dropped off the opinion at that point,[45] and three said that strict scrutiny should apply even to neutral and generally applicable laws.[46] Motive added little in *Lukumi*, where there were so many other grounds for holding the ordinances not neutral and not generally applicable.

Justice Kennedy's discussion of legislative motive had only two votes, but his discussion of the "object" of the ordinances had five.[47] The "object" of an ordinance is a metaphorical construct; only the humans who enacted an ordinance can have goals, purposes, or objectives. Andrew Koppelman plausibly views this talk of a law's "object" as an objective proxy for subjective motive—purpose inferred only from the text of the law and the context in which it was enacted, not including what lawmakers or advocates said about it.[48] Alternatively, the object or purpose of a law is simply what the law does, or what it is intended to do, regardless of why legislators wanted to do those things. These two formulations differ in emphasis but not so much in substance; either is read largely off the statutory text.

Something like one of these appears to be what the Court meant by the "object" of the law in *Lukumi*, although neither the Court nor individual justices have ever been clear about just what they mean. Justice Scalia's shifting formulations were especially maddening. He

42. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).
43. Shrum v. City of Coweta, 449 F.3d 1132, 1144–45 (10th Cir. 2006) (collecting cases).
44. *Lukumi*, 508 U.S. at 540–42 (plurality opinion).
45. *Id*. at 558–59 (Scalia, J., concurring) (arguing for himself and Chief Justice Rehnquist that motive is irrelevant); *id.* at 522 (noting that Justices Thomas and White did not join the motive section of the opinion).
46. *Id.* at 565–77 (Souter, J., concurring); *id.* at 577–80 (Blackmun, J., concurring for himself and Justice O'Connor).
47. *See id.*
48. Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 107 (1997).

said that constitutionality depends "on the object of the *laws* at issue" and not on "the subjective motivation of the *lawmakers*."[49] He also said that "the First Amendment does not refer to the purposes for which legislators enact laws," apparently using "purposes" as a synonym for subjective motivations, "but to the *effects* of the laws enacted."[50] But of course in *Smith*, he expressly rejected an effects test: "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."[51]

This fuzzy talk of statutory "objects" identified largely from statutory text fits the analogy to discrimination law that the Court invoked and the analogy to the similar structure in free speech law. It is not enough that the law burdens a religious practice, but it is enough that the laws treats that practice unequally as compared to analogous secular conduct. If the law treats analogous religious and secular conduct in objectively unequal ways, the law is not neutral, and at least one of its purposes or objects is to discriminate.

Concluding that a law is not neutral does not require a finding of improper motive, but it may require an improper object. Or it may not: this inquiry into the ordinances' "object" addresses only "the minimum" requirement of neutrality."[52] It does not exhaust the neutrality requirement, and it is no part of the general-applicability requirement.

B. General Applicability

So what does general applicability add to neutrality? "Generally applicable law" would be an extremely odd way of describing a requirement that government not act with bad motive or not act with an improper purpose or object. It would be an equally odd way of describing a rule that government cannot single out religion for uniquely adverse treatment. A law that applies to religion and one secular analog is not generally applicable. In ordinary English, a generally applicable law is one that applies to everybody, in all similar situations—or at least to nearly everybody and nearly all similar situations. "Generally" allows for some exceptions in ordinary usage, but it does not allow for many. The question is what exceptions it allows for in free exercise cases under *Smith* and *Lukumi*.

The Court perceived the "across-the-board criminal prohibition" in *Smith* as clearly generally applicable,[53] so it had little occasion to explain what it meant by that requirement. But *Smith*'s understanding

49. *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring).
50. *Id.*
51. Emp't Div. v. Smith, 494 U.S. 872, 886 n.3 (1990).
52. *Lukumi*, 508 U.S. at 533.
53. *Smith*, 494 U.S. at 884.

appears from the Court's analysis of its earlier cases on unemployment compensation: *Sherbert v. Verner*[54] and *Thomas v. Review Board*.[55] *Sherbert* and *Thomas* applied compelling-interest review to unemployment-compensation statutes that denied benefits to claimants who refused work that conflicted with their religious obligations.

Smith reaffirmed these precedents. It said that strict scrutiny applied because the unemployment-compensation law allowed individuals to receive benefits if they refused work for "good cause," thus creating "individualized exemptions" from the requirement of accepting available work.[56] Where the state allows individual exemptions, "it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[57]

Individualized exemptions are one way in which a law can fail to be generally applicable. The statute at issue in *Sherbert* was not generally applicable, the Court said in *Smith*, because it allowed "at least some" exceptions.[58] There cannot be many acceptable reasons for refusing work and claiming a government check instead, but there were "at least some," and therefore, the state also had to recognize religious exceptions.

This explanation for reaffirming *Sherbert* plainly implies a stringent understanding of general applicability. Even limited exceptions can make a law less than generally applicable, triggering strict scrutiny. There was discrimination between religious and secular reasons for refusing employment, but that discrimination was quite narrow. Religious reasons were unacceptable, but the vast majority of secular reasons were also unacceptable. What mattered was that some secular reasons were accepted, and religious reasons were not. "The Free Exercise Clause 'protect[s] religious observers against unequal treatment,'"[59] regardless of targeting, motive, or an improper object.

IV. ELABORATING GENERAL APPLICABILITY

The Court elaborated the new standard in *Lukumi*, striking down Hialeah's ban on animal sacrifice. The lack of general applicability in *Lukumi* was shown in multiple ways: narrow prohibitions of selected conduct as well as categorical and individualized exemptions for anal-

54. 374 U.S. 398 (1963).
55. 450 U.S. 707 (1981).
56. *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality opinion)).
57. *Id.*
58. *Id.*
59. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 148 (1987) (Stevens, J., concurring) (alteration by the Court)).

ogous secular conduct,[60] resulting in failure "to prohibit nonreligious conduct" that endangered the city's interests "in a similar or greater degree than Santeria sacrifice."[61] The ordinances in *Lukumi* were far from generally applicable. But the Court's analysis lays out an approach that also applies in closer cases.

If we require that analogous religious and secular conduct be treated equally, then we have to decide what secular conduct is analogous. The Court was quite clear on what makes religious and secular conduct analogous: that the "nonreligious conduct . . . endangers these [state] interests in a similar or greater degree" as the burdened religious conduct.[62] We must look to the reasons the state offers for regulating religious conduct and then ask whether it permits secular conduct that causes the same or similar harms. Governments have to offer these reasons in order to argue that the challenged law serves a compelling government interest. They may occasionally argue only that the law is neutral and generally applicable, or that religious exercise is not burdened, and not say what interests the law serves, but such cases will be rare. Quite apart from the doctrinal relevance of the government's interests, and whether or not those interests are plausibly compelling, government litigants try to motivate courts by elaborating the important interests that the challenged law allegedly serves.

The secular conduct may be quite similar to the prohibited religious conduct, as in killing animals for religious and secular reasons. Or the conduct itself may be substantially different; it is still analogous if it harms or undermines the same or similar government interests. So in *Lukumi*, one thinly substantiated reason the city offered for prohibiting sacrifice was that the carcasses of sacrificed animals threatened public health. But a county health official testified that garbage from restaurants was a greater health hazard than sacrificed animals, and the Court treated restaurants, or at least disposal of restaurant garbage, as analogous secular conduct.[63]

So how much analogous secular conduct can be left unregulated before a law ceases to be generally applicable? Are some exceptions more acceptable, or more troublesome, than others? There is a circuit split on such questions. We will use the most extreme decision on the unprotective side of the split to illustrate some of the arguments.

60. *Id.* at 543–44.

61. *Id*. at 543.

62. *Id.*

63. *Id.* at 544–45. The testimony is quoted in Petitioners' Brief at 41–42, *Lukumi*, 508 U.S. 520 (No. 91-948), 1992 WL 541280.

A. Arguments for Minimizing the Requirement of General Applicability: *Stormans v. Wiesman*

The most extreme decision attempting to minimize or effectively eliminate any requirement that laws burdening religion be generally applicable is *Stormans, Inc. v. Wiesman* in the Ninth Circuit.[64] *Stormans* was a free-exercise challenge to a rule that requires conscientiously objecting pharmacists to stock and deliver emergency contraception. These pharmacists believe that emergency contraception sometimes causes very early abortions.[65] The state stipulated, and the evidence confirmed, that there is no problem of access to emergency contraception in Washington when pharmacists do not dispense it and refer patients elsewhere.[66] No other state even has such a rule.[67] So there was clearly no compelling government interest at stake. But that mattered only if strict scrutiny applied. Lack of any compelling interest is irrelevant if the rule is generally applicable. It is not.

More than 6,000 prescription drugs are approved for human use, and no pharmacy can stock them all.[68] The district court found that regulators had long deferred to pharmacies' discretion in deciding what drugs to stock and that no pharmacy in Washington had ever been cited for failure to stock a drug.[69] Detailed findings of fact identified a wide range of accepted reasons for not stocking drugs.[70] Pharmacies that failed to stock emergency contraception overwhelmingly made that decision for business reasons, not for reasons of conscience.[71] On the district court's view of the regulations, none of these business decisions were illegal. *Only* the failure to stock a drug for reasons of conscience was forbidden.[72] On the district court's view, the facts of *Stormans* are as extreme as the facts of *Lukumi*.[73]

The Ninth Circuit rejected the district court's finding of a vast expanse of unwritten exceptions.[74] It agreed that pharmacies refused to

64. Stormans, Inc. v. Weisman, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).
65. Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 932 (W.D. Wash. 2012), *rev'd on other grounds sub nom*. Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).
66. *Id*. at 944, 946–51.
67. *Id.* at 935.
68. *Id.* at 933.
69. *Id.* at 934.
70. *Id.* at 933–34, 943–44, 952–56, 970–75.
71. *Id.* at 947.
72. *Id.* at 939, 943, 945, 956.
73. Stormans, Inc. v. Selecky, 844 F. Supp. 2d 1172, 1188, 1191 (W.D. Wash. 2012), *rev'd sub nom*. Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).
74. Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).

stock or deliver drugs for a vast array of secular reasons, and it agreed that the Pharmacy Commission had never interfered with these practices.[75] But it credited testimony that such practices might violate the rules and that the Commission might investigate such practices and decide what to do about them if anyone ever filed a complaint.[76] It did not acknowledge that the trial court had found the limited testimony to that effect not credible in light of much contrary testimony, the text of the rules, and the unbroken history of non-enforcement against business reasons for failing to stock or deliver drugs both before and after adoption of the new rules.[77] The court of appeals focused only on explicit, written exceptions and held them reasonable.

The written rules contain an exception for prescriptions that are erroneous, medically contraindicated, or incompatible with other drugs the patient is taking.[78] They have an exception for fraudulent prescriptions.[79] Neither of these exceptions undermines the state's interest in prompt delivery of appropriate medications, and the plaintiffs did not claim that they made the rule less than generally applicable. There is an exception for state or national emergencies in which a prescribed drug is unavailable.[80] The *emergency* undermines the state's interest, but the exception simply bows to reality; it does not authorize any behavior *by the pharmacy* that undermines the state's interest, and plaintiffs did not rely on this exception either.

Then there is an exception for "lack of specialized equipment or expertise,"[81] which is broadly interpreted and is often a matter of the pharmacy deciding for business reasons not to buy certain equipment or provide certain services.[82] There is an exception for customers who do not pay,[83] which sounds reasonable enough, but which often results from the pharmacy's discretionary decision not to accept Medicare, Medicaid, or the customer's private insurance plan.[84]

Most significant, pharmacies do not have to deliver a drug if it is not in stock "despite good faith compliance with [the 'Stocking Rule']."[85] The Stocking Rule requires pharmacies to "maintain at all times a representative assortment of drugs in order to meet the phar-

75. *Id.* at 1080–81.
76. *Id.* at 1081.
77. *Stormans*, 854 F. Supp. 2d at 957–59.
78. WASH. ADMIN. CODE § 246-869-010(1)(a) (2016).
79. WASH. ADMIN. CODE § 246-869-010(1)(d) (2016).
80. WASH. ADMIN. CODE § 246-869-010(1)(b) (2016).
81. WASH. ADMIN. CODE § 246-869-010(1)(c) (2016).
82. Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 957–58, 970, 972 (W.D. Wash. 2012), *rev'd on other grounds sub nom.* Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).
83. WASH. ADMIN. CODE § 246-869-010(2) (2016).
84. *Stormans*, 854 F. Supp. 2d at 959, 972–73.
85. WASH. ADMIN. CODE § 246-869-010(1)(e) (2016).

maceutical needs of its patients."[86] "[R]epresentative assortment" is not defined or explained, but "representative" clearly implies a reasonable sample of drugs, not every drug. The Stocking Rule has been in effect for forty years, and as already mentioned, no pharmacy has ever been charged with violating it.[87] The state makes no effort to enforce it.[88] Given the looseness of the Stocking Rule, it is not actually written down that failure to stock or deliver for reasons of conscience is prohibited. This prohibition was also left to unwritten understandings. But everyone understood that prohibiting conscience-based refusals to stock or deliver drugs was the whole point of an elaborate rule-making process, and not even the Ninth Circuit disputed it.

Finally, there is a catch-all exception for "substantially similar circumstances."[89]

So the vast array of accepted business reasons for not delivering a drug were not entirely unwritten. They could be found in the looseness and nonenforcement of the Stocking Rule, in the written rule that a pharmacy that doesn't stock a drug doesn't have to deliver it, and in the provision for "substantially similar circumstances." But the Ninth Circuit focused only on the explicitly written exceptions, narrowly construed.

It concluded that "the enumerated exemptions are 'necessary reasons for failing to fill a prescription' in that they allow pharmacies to operate in the normal course of business."[90] And therefore, these exceptions for business reasons do not detract from the general applicability of the rules.[91] Because these business reasons were acceptable, the state was free to decide that religious reasons were not acceptable. Business reasons good; religious reasons bad.

The Supreme Court denied certiorari.[92] As Justices of all ideological perspectives remind us from time to time, a denial of certiorari implies no view of the merits.[93] The vagueness of the written rules and reliance on unwritten understandings were part of the substantive problem in *Stormans*, but they may also have created doubts about what questions were really presented in this pre-enforcement

86. WASH. ADMIN. CODE § 246-869-150 (2016).
87. *Stormans*, 854 F. Supp. 2d at 934, 954.
88. *Id.* at 934, 959–60.
89. WASH. ADMIN. CODE § 246-869-010(1) (2016).
90. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1080 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).
91. *Id.*
92. Stormans v. Wiesman, 136 S. Ct. 2433 (2016).
93. *See, e.g.*, Redd v. Chapell, 135 S. Ct. 712, 713 (2014) (statement of Sotomayor & Breyer, JJ., respecting denial of certiorari); Martin v. Blessing, 134 S. Ct. 402, 405 (2013) (statement of Alito, J., respecting denial of certiorari); Boumediene v. Bush, 549 U.S. 1328, 1329 (2007) (statement of Stevens & Kennedy, JJ., respecting denial of certiorari).

challenge. In addition to these and other common non-merits reasons for which the Court may deny certiorari, a less common possibility seems apparent in *Stormans*: perhaps the Court did not want to decide a fundamental question about the meaning of the Free Exercise Clause without nine Justices sitting. Whatever the reasons, the denial of certiorari in *Stormans* leaves a deep and wide circuit split that the Court will eventually have to resolve. This article addresses the merits of the issue on which the circuits are split.

B. Reasonable Exceptions

The Ninth Circuit held that reasonable or justified exceptions do not undermine a law's general applicability. This reasoning is precisely the preference for secular reasons over religious reasons that *Smith* and *Lukumi* prohibit. *Smith* said that systems of individual exemptions must include religious exemptions.[94] That requirement does not turn on whether secular reasons are "better" than religious ones; that is a judgment that government is generally not permitted to make.

In *Sherbert v. Verner*, the narrow exemption for "good cause"[95] was a perfectly sensible exemption to the general requirement of accepting available work. But this narrow and justified secular exemption still required a corresponding religious exemption—or a compelling reason why not. It was not the bad policy of the secular exemption that mandated a religious exemption; it was the secular exemption's mere existence. Similarly in *Lukumi*, the city argued that its permitted secular reasons for killing animals were "important," "obviously justified," and "ma[de] sense."[96] But that did not make the ordinances generally applicable. Secular exceptions defeat general applicability no matter how important, justified, or sensible.

The Ninth Circuit also said that the state's exemptions for business reasons were "necessary."[97] This reasoning of course assumes that religious reasons are unnecessary—even if the religious practice is absolutely necessary to the believer. For the court to conclude that a religious practice is unnecessary requires a conclusion that the underlying religious teaching is false. That would be akin to a heresy trial, and it is clearly off limits to the court.

The Ninth Circuit's argument from necessity flouts a specific holding in *Lukumi*. Three of the ordinances prohibited only unnecessary killings.[98] The city argued that nearly all secular killings were neces-

94. Emp't Div. v. Smith, 494 U.S. 872, 884 (1990).
95. Sherbert v. Verner, 374 U.S. 398, 400–01 (1963).
96. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 544 (1993).
97. *Stormans*, 794 F.3d at 1080.
98. *Lukumi*, 508 U.S. at 525–28.

sary but that religious killings were unnecessary. But the Court rejected this necessity standard: "[T]he ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons."[99] Neither courts nor states can decide that business reasons are necessary but that religious reasons are not.

There may be cases where an unusual secular reason for acting is so important that the government has a compelling interest in treating that secular act more favorably than analogous religious acts. At the oral argument in *Lukumi*, one of us told Justice Scalia that "saving human life by killing an animal in self defense is a compelling interest."[100] And such a compelling interest could justify discriminating between self-defense killings and religious killings. But that limited consideration of the reasons for secular exceptions goes at the end of the case, subject to strict scrutiny under the compelling-interest test. That is very different from comparing reasons at the beginning of the case under a much more deferential standard of review—which appeared in *Stormans* to be only rational basis—and holding that a rule riddled with exceptions is really generally applicable if there appear to be plausible reasons for the secular exceptions.

C. Circular Categories and Circular Government Interests

Every law applies to everything it applies to. And opponents of religious liberty often argue that a law is generally applicable for just this circular reason—it is a generally applicable prohibition of whatever it prohibits. In *Lukumi*, the city argued that it had enacted a generally applicable ban on sacrifice, and that other animal killings were "different."[101] The Ninth Circuit indulged similar reasoning in *Stormans*, concluding at one point that "the rules' delivery requirement applies to *all* objections to delivery that do not fall within an exemption."[102] The court's italicized "all" is entirely circular.

The circularity can also be introduced in the specification of the relevant government interests. At one point, the Ninth Circuit specified the state's interest as preventing "the potential deleterious effect on public health that would result from allowing pharmacists to refuse to dispense lawfully prescribed medications based on personal, moral objections (of which religious objections are a subset)."[103] This formulation of the state's interest tries to put the rabbit in the hat. The

99. *Id.* at 537–38.
100. Transcript of Oral Argument, *Lukumi*, 508 U.S. 520 (No. 91-948), 1992 WL 687913, at *22.
101. *See Lukumi*, 508 U.S. at 544.
102. *Stormans*, 794 F.3d at 1077.
103. *Id.* at 1079 (quoting Stormans, Inc. v. Selecky, 586 F.3d 1109, 1133 (9th Cir. 2009)).

state cannot define its interests in terms of religion any more than it can write its laws in terms of religion. If your pharmacy will not deliver a drug because of some business reason, you are just as inconvenienced as when it will not deliver a drug because of conscientious objection. The state has to identify a real difference in the harm, not just a difference in the source of the harm.

Nor does it make a law generally applicable to classify religious conscience with secular conscience. A law that applies only to religion plus one tiny secular application, little different from religion and arguably just a variant of religion, is not generally applicable. This particular secular application was an empty set in *Stormans*; despite considerable attention to the issue at trial, the state could not identify any pharmacy in Washington that refuses to provide emergency contraception on grounds of secular conscience. The argument is reminiscent of the city's argument in *Lukumi* that its ordinances would also apply to voodoo and that voodoo did not qualify as a religion[104]—an argument the Court found unworthy of response.

D. Secular Exceptions Not Stated in the Law's Text

Unequal treatment of religious and secular conduct requires strict scrutiny, whether or not that inequality is reflected in the text of the challenged law. *Lukumi* expressly rejected the city's contention that judicial "inquiry must end with the text of the law at issue."[105] In addition to evaluating the text of the city's ordinances, the Court reviewed an array of other sources to find analogous secular conduct left unregulated. These included numerous and wide-ranging sections of Florida statutes,[106] a tourist guide that described fishing in Hialeah,[107] and the testimony already mentioned about garbage from restaurants.[108]

If only the text of the challenged law counts, then legislators or regulators can use language that seems generally applicable, while assuring favored interests that they are not the target and that the rule will never be enforced against them. The drafting history of the pharmacy regulations in Washington clearly and repeatedly stated that the Pharmacy Commission had no intention of interfering with the many business reasons for not stocking drugs.[109] The industry trade

104. Brief of Respondent at 15, *Lukumi*, 508 U.S. 520 (No. 91-948), 1992 WL 541282.
105. *Lukumi*, 508 U.S. at 534.
106. *Id.* at 526, 537, 539, 544–45.
107. *Id.* at 543.
108. *Id.* at 544–45.
109. Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 936–46 (W.D. Wash. 2012), *rev'd on other grounds sub nom.* Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).

group withdrew its objections based on that assurance.[110] But the Ninth Circuit refused to consider the drafting history because "the collective will of the [Commission] cannot be known, except as it is expressed in the text and associated notes and comments of the final rules."[111]

Only two Justices in *Lukumi* looked at legislative history for evidence of bad motive. We have no square holding on whether a majority would look at legislative history for the quite different purpose of determining the meaning and reach of the challenged law. But the Court in *Lukumi* did look at other things beyond the text of the challenged ordinances. And if it will not look to the legislative history for help to determine the reach of a challenged law, then the door is wide open to laws that use uncodified understandings to regulate religion and to exempt analogous secular conduct. This is especially true for administrative agencies, where the body that drafts the regulation is also the body that enforces it.

Moreover, identifying these secular exemptions is rarely an all-or-nothing choice between written and unwritten. Washington's exemption of all business reasons for not stocking and delivering drugs partly depends on unwritten understandings, but not entirely so. There was enough flexibility in the regulations' text to reassure the industry trade group. Courts could consider these written escape hatches together with the drafting history.

The district court also relied on the enforcement history. The Stocking Rule had never been enforced, and the new rules had not been enforced against anyone except the lead plaintiff in the four years between their promulgation and the trial.[112] This was not legislative history; enforcement history was a matter of official action and it reflected the "collective will" of the Pharmacy Commission.

But the Ninth Circuit said it was irrelevant that the rules had never been enforced against anyone but the lead plaintiff, because the Pharmacy Commission followed a policy of "complaint-driven enforcement."[113] There had been "many complaints" against the lead plaintiff, and hardly any complaints against anyone else.[114] There were hardly any complaints because being referred to another nearby pharmacy is rarely a problem worth complaining about. There had been many complaints against the lead plaintiff because there had been an organized campaign against that plaintiff by ideologically motivated

110. *Id.* at 941.

111. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1078 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016) (alteration by the court) (quoting Stormans, Inc. v. Selecky, 586 F.3d 1109, 1133 (9th Cir. 2009)).

112. *Stormans*, 854 F. Supp. 2d at 956–57.

113. *Stormans*, 794 F.3d at 1083–84.

114. *Id.* at 1083.

activists.[115] A complaint-driven enforcement policy validates such a campaign; it gives governmental effect to private hostility to the free exercise of religion.

If governments can write vague rules that leave accepted understandings unstated, or that leave much to the discretion of enforcement authorities or activists among the public, and courts then ignore both the extratextual understandings and the actual and intended exercise of discretion, government is completely free to treat religious and secular practices unequally. The Free Exercise Clause would protect only against unsophisticated governments that explicitly state what they are doing and make no effort to conceal it.

E. Rules That Apply to Most but Not All Analogous Secular Conduct

Once we have identified the analogous secular conduct, both regulated and unregulated, how much of it can be left unregulated before the law is no longer generally applicable? Many laws apply to some but not all analogous secular conduct. If the exempted secular conduct undermines the state's interest to the same degree as the burdened religious conduct, such a law is not generally applicable. That is what the Court said in *Lukumi*,[116] and there are several illuminating examples in the lower courts.

One of our favorite examples is *Rader v. Johnston*,[117] which arose at the University of Nebraska-Kearney. All the lawyers in the case were graduates of the University of Nebraska's law school, and the plaintiff's lawyer was very young when he won this case. Rader challenged the University's requirement that freshmen live in the dorm.[118] He wanted permission to live in a Christian group house instead to avoid the alcohol, drugs, and premarital sex he said were prevalent in the dorms.[119] The university denied permission.[120]

The rule contained categorical exemptions for students older than nineteen, married students, and students living with their parents.[121] These categorical exemptions were entirely reasonable, but they treated students' secular needs more favorably than Rader's religious needs. An explicit exception for individual hardship created entirely reasonable individualized exceptions that were generously interpreted

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115. *See Stormans*, 854 F. Supp. 2d at 948, 950–51, 960–61.

116. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993).

117. 924 F. Supp. 1540 (D. Neb. 1996).

118. *Id*. at 1543.

119. *Id*. at 1544–46.

120. *Id*. at 1548.

121. *Id.* at 1546.

in secular cases,[122] but not in Rader's case. There were additional individualized exceptions in unwritten administrative practice.[123]

When all the exceptions were accounted for, 64% of freshmen were actually required to live in the dorm.[124] That's a large majority, but the court held the rule not generally applicable. It said that "exceptions are granted for a variety of non-religious reasons, [but] they are not granted for religious reasons."[125]

There are other decisions to similar effect. The Third Circuit held that a permit fee for keeping wild animals, with exceptions for zoos, circuses, hardship, and extraordinary circumstances, was not generally applicable.[126] The Sixth Circuit considered a rule that penalized a counseling student for referring to another counselor a client seeking help with his same-sex relationship difficulties. The court held the rule not neutral and not generally applicable, because referrals were permitted for other values conflicts and for failure to pay.[127] In a case about an acting student who refused to say certain religiously prohibited words and phrases in a script, the Tenth Circuit held that a single exception given to a student of another faith to observe a religious holiday, and earlier religious exceptions given to the plaintiff, suggested that defendant maintained a system of individualized exceptions. And that precluded summary judgment.[128]

An Iowa county ordinance prohibited vehicles with metal tires and any kind of protuberance, which banned the tractors used by a community of Old Order Mennonites.[129] But there was a year-round exception for school buses and fire trucks, a five-months-per-year exception for studded snow tires, and an exception for tire chains when there was actually snow or ice.[130] All these permitted metal protuberances went on rubber tires, not metal tires. So the exempted conduct was not identical to the prohibited religious conduct, but it did the same kind of damage to the roads. The Supreme Court of Iowa unanimously held that the ordinance was not generally applicable.[131]

A Virginia court held that a ban on possession of certain bird feathers was not neutral where it contained exceptions for taxidermists, academics, researchers, museums, and educational institutions.[132] And a federal district court held that a landmarking ordinance was

122. *Id*. at 1546–47.
123. *Id*. at 1547.
124. *Id*. at 1555.
125. *Id*. at 1553.
126. Blackhawk v. Pennsylvania, 381 F.3d 202, 206–12 (3d Cir. 2004).
127. Ward v. Polite, 667 F.3d 727, 738–40 (6th Cir. 2012).
128. Axson-Flynn v. Johnson, 356 F.3d 1277, 1297–99 (10th Cir. 2004).
129. Mitchell County v. Zimmerman, 810 N.W.2d 1, 4–5 (Iowa 2012).
130. *Id.* at 15.
131. *Id.* at 15–16.
132. Horen v. Commonwealth, 479 S.E.2d 553, 556–57 (Va. Ct. App. 1997).

subject to strict scrutiny where it had exceptions for substantial benefit to the city, financial hardship to the owner, and the best interests of the community.[133]

These are all cases where the challenged law or rule applied to most people, or to a substantial range of secular conduct, but had exceptions that undermined the state's asserted interests. These are all cases where government preferred some set of secular interests over a similarly situated religious interest—where the government permitted an otherwise prohibited activity for what it considered to be good reasons, but did not believe that religion was a good reason. These are the cases that fall in between the facts of *Smith* and *Lukumi*. *Smith*'s treatment of a law with "at least some exceptions," and *Lukumi*'s test of whether the state's asserted interests are endangered clearly imply the solution to these cases. And all these courts held the challenged law or rule not neutral or not generally applicable—usually the latter. The Ninth Circuit opinion in the pharmacy case is the principal exception.

F. Laws with a Single Secular Exception That Undermines the State's Interests

Sometimes the challenged law has only one secular exception. But a single secular exception also triggers strict scrutiny if it undermines the state interest allegedly served by regulating religious conduct. This is the holding of a well-reasoned opinion by then-Judge Alito, writing for the Third Circuit in *Fraternal Order of Police v. City of Newark*.[134]

The plaintiffs in *Newark* were two Muslim police officers whose religious beliefs required them to grow beards. They challenged a city policy requiring officers to be clean-shaven. It was touted as a "zero tolerance" policy, but it had two exemptions—one for officers with medical conditions, and one for officers working undercover. The undercover exemption did not trigger strict scrutiny, because it did not undermine the department's interest in a uniform public appearance. That interest obviously did not apply to undercover officers;[135] uniform appearance would have wholly defeated the purpose of having undercover officers. But the medical exemption made the rule not generally applicable, because it undermined the city's interest in uniformity in the same way as would a religious exemption.[136]

The Eleventh Circuit reached a similar result in *Midrash Sephardi, Inc. v. Town of Surfside*,[137] which applied compelling-inter-

133. Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 885–86 (D. Md. 1996).
134. 170 F.3d 359 (3d Cir. 1999).
135. *Id.* at 366.
136. *Id.* at 364–66.
137. 366 F.3d 1214 (11th Cir. 2004).

est review to the exclusion of religious assemblies from the business district. The stated goal of the zoning ordinance was to create "retail synergy" in the business district.[138] A single exemption for lodges and private clubs "violates the principles of neutrality and general applicability because private clubs and lodges endanger Surfside's interest in retail synergy as much or more than churches and synagogues."[139]

The unemployment-compensation cases can also be viewed in this light: a single exception for "good cause" required strict scrutiny of the state's failure to provide a religious exception. *Newark* and *Midrash Sephardi* each involved a single categorical exception; the unemployment cases involved a single provision for individualized exceptions. Either kind of exception—even if there is only one, if that lone secular exception undermines the state's asserted interests—results in unequal treatment of persons who need a religious exception.

Employment Division v. Smith is consistent as well, even though Oregon allowed possession of a "controlled substance" pursuant to a doctor's prescription.[140] "Controlled substance" covers a wide range of drugs, and Oregon told the Court that the exception did not apply to Schedule I drugs, including peyote.[141] This is presumably why the Court described the prohibition as "across-the-board."[142] The case was about peyote, there were no secular exceptions, and the Court treated the point as obvious.

The Court had not yet formulated the standard of whether secular exceptions undermined the state's interest, and the parties had had no warning that the case would turn on neutrality and general applicability, so there was no evidence in the record that would have let the Court consider whether medical use under a physician's supervision would have undermined the state's interests to the same extent as religious use under the supervision of a religious leader, the peyotero. If the Court thought about that question at all in 1990, it probably assumed that physicians were more reliable and that a medical exception would not undermine the state's interest. But the essential point is that there was no medical exception for peyote.

Smith was a case with no secular exceptions; *Newark*, *Midrash Sephardi*, and *Sherbert v. Verner*, which all went the other way, were cases with only one. The question is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is *not* regulated. The constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular

138. *Id.* at 1234–35.
139. *Id.* at 1235.
140. Emp't Div. v. Smith, 494 U.S. 872, 874 (1990).
141. Brief for Petitioners at 14 & n.6, *Smith*, 494 U.S. 872 (No. 88-1213), 1989 WL 1126846.
142. *Smith*, 494 U.S. at 884.

conduct. It is not enough to treat a constitutional right like the least favored, most heavily regulated secular conduct.

V. UNDERLYING REASONS

These rules are not arbitrary. They are deeply rooted in the underlying rationales of the general-applicability requirement.

A. Value Judgments about Religion

The *Newark* opinion reasoned that the medical exception "indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not."[143] The Eleventh Circuit adopted this reasoning in *Midrash Sephardi*.[144] This point about value judgments also appears in *Lukumi*, which said that the ordinances' necessity test "devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons."[145]

The point deserves further elaboration. It does not require that the state make an explicit value judgment, or that state officials consciously compare religious and secular conduct and deem the secular conduct more worthy—although governments often do just that. In a typical case, the value judgment first emerges from a series of separate comparisons. In *Newark*, the exemption for medical needs showed that the city considered medical needs more important than its interest in uniformity. And the refusal to exempt religious obligations showed that the city considered its interest in uniformity more important than its officers' religious obligations. The transitive law applies; if medicine is more important than uniformity, and uniformity is more important than religion, then medicine is more important than religion. Whether explicit or implicit, that is the value judgment that the Free Exercise Clause prohibits.

James Oleske has argued that with respect to secular exceptions for *categories* of conduct, this reasoning requires that the request for a religious exception be considered simultaneously with the adoption of the secular exceptions.[146] Otherwise, he claims, there is no value judgment about religion. But that is plainly not right. There are separate value judgments against a common standard. The rule maker compares a proposed secular exception to the need for an exception-

143. Fraternal Order of Police v. City of Newark, 170 F.3d 359, 366 (1999).
144. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1235 (11th Cir. 2004).
145. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993).
146. James M. Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Law*, 19 ANIMAL L. 295, 327, 338 (2013).

free law. Either earlier or simultaneously or later, it compares the proposed religious exception to the need for an exception-free law. It concludes that the secular need is important enough or sympathetic enough to deserve an exception and that the religious need is not.

The rule maker may make these two decisions separately even if they are more or less simultaneous; it may or may not consciously compare the proposed religious exception to the secular exception. And there may be such a conscious comparison even if the two decisions are separated in time; the rule maker may consider the rule and all its existing exceptions in deciding to refuse the religious exception. It may be impossible to know what the rule maker consciously thought about, but we know the rule maker found a religious exception undeserving, and secular exceptions deserving, when measured against the same alleged government interests.

Oleske would not require simultaneous decisions in cases of individualized exceptions.[147] But categorical exceptions are no different, except that they affect a lot more people. The decision maker administering a system of individualized exceptions may or may not consciously compare the religious request he refuses to secular exceptions he has granted or is granting. But all requests are judged in light of the same alleged government interests; some secular requests are found deserving, and the religious request is found undeserving.

Governments inevitably consider religious and secular exceptions simultaneously when they defend the litigation. The plaintiff demands a religious exception and focuses attention on existing secular exceptions. If the body that made the rule is also making the litigation decisions, as with administrative agencies and city councils, it could easily make the rules equal, either by granting the religious exception or repealing the secular exceptions. With its attention focused on the problem and considering all the exceptions simultaneously, it refuses to do so. Even where the executive-branch officials who control the litigation lack power to amend the challenged law, as with statutes enacted by the legislature, the executive could settle the case. The executive is subject to the Free Exercise Clause as well as to the law that creates secular exceptions but fails to create religious exceptions. If the executive chooses to litigate rather than settle, it rejects any religious exception despite its simultaneous attention to the secular exceptions. Simultaneity should not matter, but it is always present.

B. Vicarious Political Protection for Religious Minorities

The requirement of generally applicable law also provides vicarious political protection for religious minorities. It is an application of

147. *Id.* at 342.

Justice Jackson's much quoted observation that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[148] This idea also appears in *Lukumi*. Regulation that "'society is prepared to impose upon [religious groups] but not upon itself'" is the "precise evil the requirement of general applicability is designed to prevent."[149]

Small religious minorities will rarely have the political clout to defeat a burdensome law or regulation. But if that regulation also burdens other, more powerful interests, there will be stronger opposition and the regulation is less likely to be enacted.

Even narrow secular exceptions rapidly undermine this vicarious political protection. If secular interest groups burdened by the regulation get themselves exempted, they have no reason to oppose the regulation, and religious minorities are left standing alone. That is plainly what happened in Washington: the groups seeking to suppress conscientiously objecting pharmacies were careful at every stage not to threaten any other pharmacy's secular reasons for failing to stock and deliver drugs. With its secular interests protected, the industry trade association abandoned its defense of the few pharmacies with objections based on conscience.[150] This concern with vicarious political protection is the deepest rationale for the rule that even a single secular exception, if it undermines the asserted reasons for the law, makes a law not generally applicable. A single secular exception can remove the most—or only—politically effective opposition to a burdensome rule.

Professor Oleske also objects to this rationale, on the curious ground that it provides only partial and somewhat random protection for religious liberty.[151] Some religious practices will have secular analogs engaged in by interest groups that provide this vicarious political protection; some will not. That is true, and that is a problem with *Smith* and *Lukumi* however they are interpreted.[152] But it is not a reason to make the problem worse with an unprotective interpretation

148. Ry. Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).
149. *Lukumi*, 508 U.S. at 545–46 (quoting Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring)).
150. *Compare* Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 937 (W.D. Wash. 2012) (finding that industry initially supported right to refer customers elsewhere for reasons of conscience), *rev'd on other grounds sub nom*. Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016), *with id.* at 941 (finding that industry accepted "compromise" in which referrals for business reasons were permitted but referrals for reasons of conscience were not).
151. Oleske, *supra* note 146, at 329–30.
152. Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627 (2003).

of *Smith* and *Lukumi*. And the randomness does not flow from reading *Smith* and *Lukumi* more protectively.

Sometimes there are analogous secular interests that will be affected by a rule that burdens religion, and sometimes there are not. That is the source of any randomness, and that is not what Oleske objects to. To eliminate that source of randomness would require overruling *Smith* and returning to *Sherbert* and *Yoder*.

When analogous secular interests are affected, sometimes those interests will kill the proposed law, thereby protecting the religious practice—a random source of protection that Oleske cannot change and thus necessarily accepts. And sometimes those analogous secular interests will get themselves exempted and withdraw, leaving the religious practice to its fate. How we treat this last set of cases neither increases nor decreases the degree of randomness, but it is critical to whether we provide a reasonable level of protection for religious liberty.

C. The Level of Protection

We said that the requirements of traditional discrimination law goes to neutrality, and that general applicability is a separate requirement. Some readers may think that this general-applicability requirement provides a higher level of protection. In a sense it does, and that is entirely appropriate. First Amendment rights are fundamental and deserving of the highest level of protection. But there is another way to think about it. A stringently interpreted general-applicability rule can be understood as implementing a nondiscrimination requirement in the face of complexity.

These cases differ from routine discrimination cases in the complexity and number of possible secular comparisons. Complexity gives rise to arguments about whether the secular activity is really analogous. And multiple secular analogs to the burdened religious exercise create the potential for some secular analogs to be regulated and some to be exempted.

Racial comparisons are often simpler, although there can certainly be arguments about whether an employee of a different race was similarly situated with the plaintiff. And as with secular analogs to religious practices, there is more than one race in the workforce. If an African-American plaintiff shows that he was treated worse than similarly situated white employees, we would never let the employer defend on the ground that Asian or Hispanic employees were treated just as badly as the plaintiff. Minority employees are entitled to be treated as well as the best-treated race, not merely as well as some other badly treated race. It is no different to say that the exercise of religion is entitled to be treated like the best-treated secular analog.

When the law regulates the religious practice and exempts the analogous secular practice, we have a facial classification—even if we have to look at two different statutes to uncover it. An initial failure to exempt the religious practice may result from simple ignorance that any such religious practice exists. But persistence in that refusal after the issue is presented nearly always results from hostile indifference to the needs of religious Americans, and often from more active hostility. Improper motive or purpose often accompanies unequal treatment of religious and secular conduct, but that is not required. When government regulates the exercise of religion and exempts some or all analogous secular conduct, it is discriminating against religion. Because of the number and complexity of the necessary comparisons, this discrimination is best addressed by rigorously interpreting and enforcing the requirement of generally applicable laws. And a careful reading of *Smith* and *Lukumi* supports that understanding.

VI. CONCLUSION

Of course there will be hard cases, and cases close to the line. Some secular exceptions will serve compelling interests, and some will not undermine the same interest as the needed religious exception. But we should not casually assume that because secular exceptions are common, legislators are free to create them without also protecting the free exercise of religion. The free exercise of religion is a fundamental constitutional right; the many secular interests pushed by lobbyists seeking exceptions generally are not.

The Ninth Circuit's reading in *Stormans* would effectively repeal the Free Exercise Clause. If those regulations are generally applicable, anything can be drafted to be generally applicable. But *Smith* and *Lukumi* promise much more protection than that.

Protection for religious liberty under *Smith* and *Lukumi* is incomplete; some laws really are generally applicable. And it is complicated; the threshold issue of general applicability adds complexity to every case. But many laws have exceptions that undermine the interests the laws are meant to serve. And in that wide range of cases, there is still constitutional protection for the free exercise of religion. And protecting religious liberty, just like protecting other constitutional rights, is a good thing.