2001

Free Exercise Is Dead, Long Live Free Exercise: *Smith*, *Lukumi* and and the General Applicability Requirement

Richard F. Duncan
University of Nebraska College of Law, rduncan2@unl.edu

FREE EXERCISE IS DEAD, LONG LIVE FREE EXERCISE: *SMITH, LUKUMI* AND THE GENERAL APPLICABILITY REQUIREMENT

Richard F. Duncan[*]

"Free exercise—let us as Americans assert it—is an American invention."[1]

I. INTRODUCTION

The Free Exercise Clause is the Mark Twain of Constitutional Law, because the recent report of its death "was an exaggeration."[2] According to the conventional wisdom in the community of First Amendment scholars, in *Employment Division v. Smith*[3] the Supreme Court "abandoned"[4] its longstanding commitment to protecting the free exercise of religion and "created a legal framework for persecution"[5] of religious dissenters. It is certainly true that under *Smith* the general rule seems to be that government may prohibit what religion requires or require what religion prohibits.[6] In other words, when the Court translates the constitutional command that government

---

[*] Sherman S. Welpton, Jr. Professor of Law, University of Nebraska College of Law. Many thanks to Fred Gedicks, Robert George, Doug Laycock, Mike McConnell, Mike Paulsen, Jo Potuto and Eugene Volokh for their help. I wish to acknowledge generous financial support for this article provided by grants from the Earhart Foundation and the University of Nebraska College of Law. I have presented many of the ideas developed in this article at several constitutional litigation academies sponsored by the Alliance Defense Fund. I wish to express my deep appreciation to Alan Sears, Bruce Green, Scott Phillips, Jane Hadro, Duane Schmidt and everyone else at ADF for their selfless dedication to religious liberty. As always, my work is dedicated to my wife, Kelly Duncan, and our children, Casey, Joshua, Rebecca Joy, Hannah Grace, and Kathleen Noel.

[1] JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 2 (1998).

[2] On June 1, 1897, Mark Twain wrote to the London correspondent of the *New York Journal*, "The report of my death was an exaggeration." BARTLETT'S FAMILIAR QUOTATIONS 528 (16th ed. 1992).

[3] 494 U.S. 872 (1990).

[4] Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 78 (2000); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990).

[5] Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 4. Professor Laycock does not subscribe to the conventional reading of *Smith*; rather, he was merely noting that if the conventional wisdom about the *Smith* decision is correct, religious persecutions will be the result. *Id.* Laycock further observed that his use of the strong word, "persecution," was carefully chosen and meant "quite literally." *Id.*

[6] *Smith*, 494 U.S. at 878-82.

"shall make no law . . . prohibiting the free exercise" of religion,[7] the First Freedom[8] becomes a license for government to "proscribe[] (or prescribe[]) conduct that . . . religion prescribes (or proscribes)."[9]

Although the general rule of *Smith* thus permits government to prohibit the free exercise of religion, the Court has recognized a number of exceptions that continue to protect religious dissenters under a compelling interest test. Most significantly, *Smith* applies only when government incidentally burdens religiously motivated behavior by means of "a 'valid and neutral law of general applicability.'"[10] As the Court subsequently emphasized in *Church of the Lukumi Babalu Aye v. Hialeah*,[11] "a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[12] Thus, the key to understanding the Constitution's protection of religious liberty in the post-*Smith* world is to locate the boundary line between neutral laws of general applicability and those that fall short of this standard.

The purpose of this article is to analyze and theorize about the general applicability standard and its impact on the free exercise of religion. At the end of the day, I will argue that free exercise is alive and well in the wake of *Smith* and (particularly) *Lukumi*.

II. FREE EXERCISE AT THE MILLENNIUM: *SMITH* AND *LUKUMI*

A. The Doctrine And Reasoning of Smith

In 1990, the Supreme Court cast aside almost three decades of free exercise jurisprudence when it handed down its decision in *Smith*. The free exercise doctrine abolished in *Smith* was, at least in theory, "highly protective of religious liberty."[13] Under this well-settled body of law, a governmental restriction that substantially burdened religiously motivated behavior was valid only if the government justified it by demonstrating that it was the least restrictive means of

---

[7] U.S. CONST. amend I.

[8] Religious liberty is the "first freedom" protected by the Bill of Rights. *See id.* Religious liberty is foundational, because it is "based on the view that the relations between God and Man are outside the authority of the state." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 173 (1992). As Madison observed, free exercise of religion is also "first" because the duty to please and obey God "is precedent both in order of time and degree of obligation to the claims of Civil Society." JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* Everson v. Board of Education, 330 U.S. 1, 64 (1947).

[9] *Smith*, 494 U.S. at 879.

[10] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 262 n.3 (1982) (Stephens, J., concurring).

[11] 508 U.S. 520 (1993).

[12] *Id.* at 546.

[13] McConnell, *supra* note 4, at 1110.

achieving a compelling state interest.[14] This so-called "conduct exemption"[15] dates back to 1963 and the Court's landmark decision in *Sherbert v. Verner*,[16] in which the Court held that South Carolina could not withhold unemployment compensation benefits from a woman who had refused work for religious reasons.[17] However, as Professor McConnell has bluntly stated, the Court's pre-*Smith* free exercise doctrine "was more talk than substance."[18] In practice, the Court "only rarely sided with the free exercise claimant,"[19] and explained these results sometimes by denying that the governmental scheme constituted a "burden" on religious liberty,[20] sometimes by concluding that the governmental interest was "compelling" and thus justified a taking of religious liberty,[21] and sometimes because the free exercise claim was "made within the confines of strictly controlled government institutions"[22] such as prisons[23] or the armed forces.[24]

---

[14] *Id. See also* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 247 (1991) (defending *Smith*'s abandonment of the conduct exemption).

[15] *Id.*

[16] 374 U.S. 398 (1963).

[17] *Id.*

[18] McConnell, *supra* note 4, at 1109. Professor Underkuffler-Freund examined the Court's pre-*Smith* free exercise cases and concluded free exercise claims were invariably denied whenever they directly challenged "a prevailing secular norm" or "public, 'secular' action" even in cases "when the governmental interest involved did not appear to be of a vastly more compelling nature." Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 854 (1995). Moreover, she concludes that free exercise claims were upheld only when they were "insular, discrete, and posed no fundamental challenge to the Court's conception of the separation of the religious from the secular sphere of public life." *Id.* at 853.

[19] McConnell, *supra* note 4, at 1110. McConnell describes the pre-*Smith* free exercise scorecard as follows: "In fact, after the last major free exercise victory in 1972, the Court rejected every claim requesting exemption from burdensome laws or policies to come before it except for those claims involving unemployment compensation, which were governed by clear precedent." *Id.* The 1972 case referred to by McConnell is *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the Court upheld the right of Amish parents to remove their children from formal schooling after the eighth grade.

[20] *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439 (1988) (finding that the Free Exercise Clause does not prohibit the United States Forrest Service from constructing a paved road on federal land that would irreparably damage a sacred site used by Native Americans for religious rituals); Bowen v. Roy, 476 U.S. 693 (1986) (rejecting the claim that the Free Exercise Clause prohibits the federal government from requiring states to use social security numbers in administering welfare programs). *See generally* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989). In this class of cases, the Court avoided applying strict scrutiny "by holding that the harms inflicted by the challenged government policies were not of the sort that would trigger the protections of the free exercise clause." *Id.* at 935.

[21] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that there was a compelling governmental interest in eradicating racial discrimination in education).

[22] Lupu, *supra* note 20, at 934 n.6.

[23] *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding that prison officials are not required to accommodate the requests of Muslim inmates for scheduling changes in order to attend religious services on Friday afternoons).

[24] *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that the Air Force is not re-

In *Smith*, the Supreme Court held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'"[25] even if the law prohibits conduct that his religion requires or requires conduct that his religion forbids. Thus, the State of Oregon had the power to enforce "an across-the-board criminal prohibition"[26] of the drug peyote against members of the Native American Church who ingested the drug as a sacrament at a worship service.[27] Remarkably, the *Smith* Court decreed this dramatic transformation of "existing law without an opportunity for briefing or argument, and it issued an opinion claiming that its new rules had been the law for a hundred years."[28]

The Bible says that fear of the Lord is the beginning of knowledge,[29] but fear of religious pluralism is the root of Justice Scalia's much-maligned[30] majority opinion in *Smith*. Indeed, the opinion's free exercise revisionism appears to have been determined by a formula that can be stated as follows: Religious Pluralism plus Religious Liberty equals Anarchy. As Scalia explicitly put it, any society that protects religiously motivated conduct under a compelling interest test is "courting anarchy, [and] that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."[31] For Scalia, religious freedom in a "cosmopolitan nation" is a "luxury"[32] that is unaffordable because it renders "each conscience . . . a law unto itself"[33] and encourages demands for religious exemptions "from civic obligations of almost every conceivable kind."[34] This free-exercise-phobia that

---

quired to accommodate Jewish officer's request to wear yarmulke indoors).

[25] Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)). As a student commentator has observed, *Smith* "identified a formal category of laws and regulations–the neutral and generally applicable–that are not subject to any scrutiny under the Free Exercise Clause . . . ." Kenneth D. Sansom, Note, *Sharing the Burden: Exploring the Space Between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 TEX. L. REV. 753, 760 (1999).

[26] *Smith*, 494 U.S. at 884.

[27] *Id.* at 874. Since a general criminal prohibition of peyote was consistent with the Free Exercise Clause, the state of Oregon was also free to impose a lesser burden on Respondents by withholding unemployment compensation after they had been discharged from work because of their use of peyote. *Id.* at 890.

[28] Laycock, *supra* note 5, at 1.

[29] *Prov.* 1:7.

[30] For scholarly criticism of *Smith*, see, e.g., Laycock, *supra* note 5; McConnell, *supra* note 4. In her opinion concurring in the judgment in *Smith*, Justice O'Connor criticized the majority for giving only "a strained reading of the First Amendment" and also for "disregard[ing]" the Court's established free exercise jurisprudence. *Smith*, 494 U.S. at 892 (O'Connor, J., concurring). Even one of *Smith's* most ardent defenders acknowledges that the Court's opinion "is neither persuasive nor well-crafted. It exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction." William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308-09 (1991).

[31] *Smith*, 494 U.S. at 888.

[32] *Id.*

[33] *Id.* at 890.

[34] *Id.* at 888.

animates Scalia's opinion in *Smith* has been described eloquently by Ira Lupu: Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe.[35]

In *Smith*, the voice whispering in Justice Scalia's ear warned him that a strongly protective free exercise doctrine would place at risk not only drug laws but also laws dealing with compulsory military service, payment of taxes, manslaughter, child neglect, compulsory vaccination, traffic regulation, minimum wages, child labor, animal cruelty, environmental protection, and racial equality.[36] In short, the social contract[37] itself might not survive a constitutional rule protecting religiously motivated conduct from governmental restrictions.

William Marshall argues that the results in *Smith* should be applauded because free exercise exemptions for religiously-motivated conduct promote "inequality" by creating "a constitutional preference for religious over non-religious belief systems."[38] According to Marshall, when a court grants a free exercise claim, the effect is to unfairly "insulate religious beliefs from social forces" while "competing secular beliefs . . . must stand or fall on their own accord."[39]

Both Scalia and Marshall raise legitimate concerns. A strong Free Exercise Clause clearly operates to insulate religious "deviants" and dissenters from the assimilative force of restrictive laws and policies enacted by the majority.[40] Moreover, since the Free Exercise Clause protects only the exercise of religion, those who seek exemptions for non-religious conduct are not protected. Thus, a student who wishes to be excused from school to observe a religious holy day is indeed treated differently under the Free Exercise Clause from one who

---

[35] Lupu, *supra* note 20, at 947. Lupu's article was published before *Smith* was decided, but it eloquently captures the panic that religious liberty seems to trigger in the imagination of Justice Scalia.

[36] *Smith*, 494 U.S. at 889.

[37] *See* Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 567 (1998) (noting the fear of free exercise "[l]urking beneath the surface of many appellate opinions.").

[38] Marshall, *supra* note 30, at 319.

[39] *Id.* at 322. Philip Kurland made the same point more bluntly almost forty years ago: "To permit individuals to be excused from compliance with the law solely on the basis of religious beliefs is to subject others to punishment for failure to subscribe to those same beliefs." Philip B. Kurland, *Of Church And State And The Supreme Court*, 29 U. CHI. L. REV. 1, 7 (1961). Of course, as Michael McConnell responds, the First Amendment doesn't prefer religious belief; rather, it "treats religious belief *differently*—sometimes better, sometimes worse, depending on whether the context is one of interference or advancement." Michael W. McConnell, *A Response To Professor Marshall*, 58 U. CHI. L. REV. 329, 331 (1991).

[40] "The unifying principle" of the Establishment and Free Exercise Clauses "is that the religious life of the people should be insulated, to the maximum possible degree, from the effect of governmental action, whether favorable or unfavorable." McConnell, *supra* note 39, at 331-32.

wishes the day off to attend a gothic rock concert, the World Series, or even a political campaign rally.[41]

However, if a highly protective free exercise doctrine sometimes limits the ability of political majorities to rule, a rigid application of the doctrine of *Smith* exposes religious minorities to a substantial risk of persecution[42] and unleashes "the forces of homogenization."[43] In 1791, when the First Amendment was ratified, the size of government was minimal and religious diversity "consisted mostly of Protestant pluralism."[44] Today, however, "the scope of pluralism and the scope of government are both vastly greater."[45] If the Free Exercise Clause is viewed as enacting a zero-sum game between democracy and religious pluralism, we will all lose something of inestimable value. However, there is no reason to think that the lion of democracy cannot lie down in peace with the lamb of religious liberty. The best reading of the free exercise doctrine of *Smith* and its progeny recognizes that a democratic society can indeed coexist with a strong commitment to religious pluralism and tolerance.

Although the general rule of *Smith* allowing government to restrict religious exercise has received much more attention, the most important parts of the decision's doctrine are those creating a number of potentially broad exceptions that explicitly provide the highest degree of protection for religious liberty.[46] These exceptions are now the principal source of constitutional protection for religious liberty, and understanding their existence and development in the post-*Smith* caselaw is therefore of critical importance to the religious freedom community.

---

[41] *See* Thomas v. Review Board, 450 U.S. 707, 713 (1981) (holding that the denial of unemployment compensation benefits violated petitioner's free exercise rights); Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (holding that the free exercise rights of Amish families were violated by enforcement of Wisconsin's mandatory school-attendance law). In both *Yoder* and *Thomas*, the Court held that the Free Exercise Clause does not protect conduct motivated only by secular considerations. In *Thomas*, the Court expressly declared: "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." 450 U.S. at 713.

[42] Laycock, *supra* note 5, at 4, 29-30.

[43] McConnell, *supra* note 8, at 138.

[44] Laycock, *supra* note 5, at 68.

[45] *Id.*

[46] Indeed, religious liberty claims protected under the exceptions recognized in *Smith* are entitled to more protection than they would have received under pre-*Smith* free exercise jurisprudence. *See Lukumi*, 508 U.S. at 546 ("The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not 'water[ed] . . . down' but 'really means what it says.'"). This conclusion will be discussed in depth throughout the remainder of this article.

B. *The* Smith *Exceptions: Herein of Belief, Hybrids and Non-General Applicability*

1. *Religious Belief*

The *Smith* opinion was based in part on the discredited distinction between religious belief and conduct. Thus, "the peyote worshipers of Oregon,"[47] were free to "believe their religion but not [to] practice it."[48] Nevertheless, it is clear that a great deal of protection remains under the First Amendment against laws restricting religious beliefs or the institutional autonomy of churches. According to the Court, at least this much is true:

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such . . . ." The government may not compel affirmation of religious belief, . . . punish the expression of religious doctrines it believes to be false, . . . impose special disabilities on the basis of religious views or religious status, . . . or lend its power to one or the other side in controversies over religious authority or dogma.[49]

On the other hand, as Justice Scalia was quick to observe, "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts . . . ."[50] Thus, the right of religious belief and profession does not include the right to engage in religiously motivated conduct.[51] To use one of Scalia's examples, the right to *believe* in the "sacramental use of bread and wine" does not protect the *act* of receiving Holy Communion.[52] If the Free Exercise Clause continues to protect the *exercise* of religion at the dawn of the new millennium, it must be under one of the other exceptions recognized by the Court in *Smith.*

---

[47] Laycock, *supra* note 5, at 22.

[48] *Id.*

[49] *Smith*, 494 U.S. at 877 (citations omitted). However, "in the history of the Court's adjudication of free exercise claims, only once has the Court recognized clear governmental coercion of religious belief: the required declaration of belief in God for the holding of public office." Underkuffler-Freund, *supra* note 18, at 852.

[50] *Smith*, 494 U.S. at 877.

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

[52] *Id.* at 877. Douglas Laycock has observed that the belief-conduct distinction echoes Oliver Cromwell's understanding of religious liberty. Although Cromwell claimed to "meddle not with any man's conscience," he made clear that "if by liberty of conscience you mean a liberty to exercise the mass, I judge it best to use plain dealing, and to let you know, where the Parliament of England have power, that will not be allowed of." Laycock, *supra* note 5, at 22 (quoting CHRISTOPHER HILL, GOD'S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION 121 (1970)). Laycock concludes that "[t]he only difference between Scalia's definition of religious liberty and Cromwell's is that Scalia requires formal neutrality." *Id.*

2. *Free Exercise "Hybrid" Claims and the Demise and Reincarnation of* Yoder

For almost two decades prior to *Smith*, constitutional law students were taught that *Wisconsin* v. *Yoder*[53] was a major landmark of the Supreme Court's free exercise jurisprudence. *Yoder* is the 1972 decision which held that Wisconsin's formally neutral compulsory attendance laws could not be enforced against Old Order Amish parents who declined to send their children to public or private school beyond the eighth grade.[54] In order to avoid overruling *Yoder* as inconsistent with the general thrust of *Smith's* new free exercise doctrine, Scalia asserted that *Yoder* was not a free exercise decision at all, but rather a "hybrid" case.[55] A "hybrid" case is one in which the Free Exercise Clause can be linked to another constitutional claim, such as free speech, freedom of association, or substantive due process.[56] Thus, *Yoder* is like a moth that experienced pupation for nearly two decades in a free exercise cocoon only to emerge in *Smith* as a hybrid case involving both free exercise and parental rights.

The mechanics of the hybrid theory work something like this: neither free exercise nor parental rights standing alone can reach the results in *Yoder*,[57] but somehow when the two claims are "hybridized" or linked together they can do the work. Thus, two insufficient constitutional interests–when combined–equal one sufficient hybrid claim.[58] In his concurring opinion in *Lukumi*, Justice Souter described hybrid claims as "untenable"[59] and proceeded to deconstruct the hybrid concept:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the

---

[53] 406 U.S. 205 (1972).

[54] *Id.* at 213-15, 234-35.

[55] *Smith*, 494 U.S. at 881-82.

[56] *Id.*

[57] In *Yoder*, the Court made clear that a parental claim "based on purely secular considerations," such as those based upon the writings and philosophy of Thoreau, "may not be interposed as a barrier to reasonable state regulation of education." 406 U.S. at 215-16.

[58] The mathematics of *Yoder* as a hybrid case are Pickwickian: Free Exercise Clause satisfied plus Due Process Clause satisfied equals Constitution unsatisfied. The hybrid concept may not be an entirely new idea in constitutional law. It might, for example, explain how the Court, in *Stanley v. Georgia*, 394 U.S. 557 (1969), constructed a right to possess obscene publications in the home. Although *Stanley* involved a lawful search under the Fourth Amendment and obscene materials which generally are not protected by the First Amendment, the Court held that possession of obscene material in the privacy of one's home could not constitutionally be made a crime. *Id.* at 559, 568. The Court expressly indicated that the case had an "added dimension" because a privacy interest was linked to a free speech interest. *Id.* at 564. The arithmetic of *Stanley*–"First amendment satisfied plus fourth amendment satisfied equals Constitution unsatisfied"–is no less paradoxical than that of the Court in *Smith*. Gerard V. Bradley, *Remaking the Constitution: A Critical Reexamination of the* Bowers v. Hardwick *Dissent*, 25 WAKE FOREST L. REV. 501, 512 (1990).

[59] 508 U.S. at 567 (Souter, J., concurring).

> situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[60]

Souter's argument is powerful. If *Yoder* survives *Smith*, as either a free exercise case or a hybrid case, the judgment in *Smith* is difficult to support. If *Yoder* is a free exercise case, then the claimants in *Smith* were entitled to strict scrutiny when Oregon restricted their use of sacramental peyote. On the other hand, if *Yoder* is understood as a hybrid case, the claims in *Smith* should have received heightened protection as religion-speech-association hybrids. The Court did not reach this issue in *Smith* only because the case was decided without briefing or argument on this (as yet) undiscovered First Amendment concept.[61]

Of course, the concept of hybrid claims is not completely irrational. Although it is certainly true that zero plus zero does not equal one, it is equally true that the sum of a number of fractions–one-half plus one-half, for example–may equal one. *Yoder*, indeed, is a case in which Wisconsin's mandatory attendance laws implicated not only religious liberty interests, but also free speech, association, and parental rights. Even if no single strand of the constitutional interests at stake in a case like *Yoder* is sufficient to trigger heightened constitutional protection, it is possible to argue that the cumulative effect of all these interests is sufficient.[62]

Regardless of the intellectual merits of the hybrid theory, it is still law until the Court holds otherwise, and it is malpractice not to plead hybrid claims in free exercise litigation.[63] Hybrid claims may be particularly helpful in litigating disputes between religious families and public schools, because these cases always involve multiple components. A good example is *Alabama and Coushatta Tribes* v. *Big Sandy Independent School District*.[64] *Big Sandy* involved a free exercise chal-

---

[60] *Id.*

[61] In *Smith*, both Petitioners and Respondents assumed the Free Exercise Clause required strict scrutiny, and their briefs and arguments focused on whether the State of Oregon had satisfied the compelling interest test on the facts of the case. *Id.* at 571-72. "[N]either party squarely addressed the proposition the Court was to embrace, that the Free Exercise Clause was irrelevant to the dispute." *Id.* at 572.

[62] I would like to acknowledge the Religion Law e-mail discussion group, available at religionlaw@listserve.ucla.edu, and, in particular, Dean Robert Destro for stimulating my thinking on this point.

[63] "Whatever the theoretical explanation for . . . [hybrid claims], a great many free exercise claims might be recast to take advantage of this construct." Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 266 (1993). For an extensive discussion of hybrid cases in the lower courts, see William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998).

[64] 817 F. Supp. 1319 (E.D. Tex. 1993), *remanded for further consideration*, 20 F.3d 469 (5th Cir.

lenge by Native American students to a school hair code that required boys to grow their hair "no longer than the top of a standard dress collar."[65] The court held that the claim was a hybrid and applied strict scrutiny under *Smith*, because the students' free exercise claim was reinforced both by a free speech claim and a parental rights claim.[66]

3. *Laws that are not Neutral or Generally Applicable*

Under the general rule of *Smith*, the Free Exercise Clause is stifled only by neutral laws of general application. If religious practice is restricted by a law that is not neutral or not generally applicable, free exercise claims are protected by the compelling interest test.[67] Thus, the key issue in religious liberty litigation has become locating the borders of neutrality and general applicability.

In *Smith*, the Court assumed–without analysis–that the Oregon peyote law was "an across-the-board criminal prohibition o[f] a particular form of conduct."[68] Thus, there was no need to distinguish and precisely define the concepts of neutrality and general applicability. Scalia did concede that the Free Exercise Clause would be violated if a state "sought to ban [certain] acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."[69] Thus, a law "specifically directed" at religion,[70] such as one banning "the casting of 'statues that are to be used for worship purposes,'"[71] would "doubtless[ly] be unconstitutional."[72]

There is an infinity of hard cases that lies between an "across-the-board criminal prohibition"[73] and a law that "specifically directs"[74] a restriction only at religiously motivated behavior. Imagine, for example, three states with different approaches to the prohibition of alcoholic beverages. State A enacts a total prohibition of possession and distribution of alcoholic beverages. State B prohibits *only* the sacramental use of alcoholic beverages. Finally, the prohibition law enacted in State C is widely applicable, but contains an exception that permits alcoholic beverages to be served with meals at restaurants. How does the opinion in *Smith* inform our analysis when these laws are enforced against churches that use alcoholic wine for the Lord's

---

1994).

[65] *Id.* at 1323.

[66] *Id.* at 1332.

[67] *See supra* notes 10-12 and accompanying text.

[68] Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

[69] *Id.* at 877.

[70] *Id.* at 878.

[71] *Id.* at 877-78.

[72] *Id.* at 877.

[73] *Id.* at 884.

[74] *Id.* at 878.

Supper?

The prohibition laws in State A and State B are easy cases. State A has enacted a neutral and generally applicable law–an "across-the-board" prohibition of alcoholic beverages.[75] Under *Smith*, there is no free exercise claim; Christians are free to believe in the sacrament of Holy Communion, but they may not perform the act of drinking sacramental wine from the cup. State B's prohibition law, however, is unconstitutional because it prohibits alcoholic beverages only when they are used in religious rituals.[76]

Although the first two prohibition laws are thus clearly controlled by *Smith*, the opinion has little to say about laws like State C's prohibition statute, and what little guidance Scalia provides is internally conflicting. On the one hand, Scalia's example of a neutral and generally applicable law is that of an "across-the-board criminal prohibition."[77] On the other hand, his example of a non-neutral, non-generally-applicable law is one that singles out religious conduct for direct persecution.[78] State C's prohibition statute is neither of these. The law is not specifically directed at sacramental wine, but it is discriminatory in the sense that it permits alcoholic beverages to be served in restaurants but not in churches or anywhere else. Ironically, whenever the law is enforced against a church for providing Communion wine to worshipers, elsewhere in State C gourmands will be permitted to enjoy a carafe of wine with brunch at their favorite local bistro. If State C's prohibition law is constitutional, *Smith's* critics are correct when they lament about the end of religious liberty in America.[79]

4. Sherbert *Transformed: Laws with "A System of Individual Exemptions"*

Although *Smith* is widely understood as having rejected the free exercise doctrine established in *Sherbert*,[80] it is important to remember that *Smith* did not overrule *Sherbert*.[81] According to the Court in *Smith*, the "*Sherbert* test . . . was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant

---

[75] *See id.* at 884 (noting the general applicability of across-the-board criminal prohibition).

[76] *See id.* at 877 (stating that a state could not "ban such acts or abstentions only when they are engaged in for religious reasons.").

[77] *Id.* at 884.

[78] *Id.* at 877-78.

[79] *See supra* notes 3-5 and accompanying text. For an analysis suggesting that the general applicability requirement is not satisfied by laws such as State C's selective prohibition statute, see *infra* Parts II.C and III.

[80] *See supra* notes 13-28 and accompanying text.

[81] As Justice Souter has observed, *Smith* has created "a free-exercise jurisprudence in tension with itself" because it rejected the doctrine of earlier free exercise cases, such as *Yoder* and *Sherbert*, but simultaneously "left those prior cases standing." Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 564 (1993) (Souter, J., concurring).

conduct"[82] and therefore is best understood as standing "for the proposition that 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."[83]

In other words, *Smith* reclassified *Sherbert* as a case in which strict scrutiny was properly applied because free exercise was unequally burdened by South Carolina's individualized–and thus non-generally-applicable–unemployment compensation process. The South Carolina law was not generally applicable, because an applicant was ineligible for unemployment benefits if the Employment Security Commission made a finding that the applicant had failed without "good cause" to accept "suitable work."[84] Since the Commission was empowered to grant "good cause" or "suitability" exemptions to those who had refused work for certain secular reasons, such as an applicant's physical fitness, prior earnings, and prospects for securing local work in his or her customary occupation, but refused to grant a similar exemption to Mrs. Sherbert when she declined employment for religious reasons, the law was tainted by a selective process and, therefore, was not generally applicable.[85] Such an individualized exemption process "provides ample opportunity for discrimination against religion in general or unpopular faiths in particular."[86] Therefore, any refusal to extend discretionary exemptions to claims of religious hardship must be strictly scrutinized.[87] Although some commentators view the individualized exemption process rule as "deriving from suspicion" of laws that grant "government agents substantial discretion in determining the scope of the law's coverage and enforcement with respect to a fundamental right,"[88] the rule is best understood as nothing more than a subset of the general applicability requirement.[89]

Notice that the employment compensation scheme in *Sherbert* did not recognize *all* secular reasons for refusing work as qualifying for the "good cause" or "suitability" exemptions. Some secular reasons, such as the applicant's prior earnings or customary occupation, were considered good reasons for refusing work, while other secular rea-

---

[82] *Smith*, 494 U.S. at 884.

[83] *Id.*

[84] Sherbert v. Verner, 374 U.S. 398, 400-01 (1963).

[85] *See id.* (describing process for granting "good cause" and "suitability" exemptions).

[86] Laycock, *supra* note 5, at 48.

[87] *See id.* at 49-50.

[88] Gedicks, *supra* note 4, at 115.

[89] "If the potential for an individualized secular exemption" requires strict scrutiny when religious exemptions are denied, "then a fortiori a whole class of secular exemptions" enacted by the legislature should entitle religious claimants to strict scrutiny when they are restricted by such unequal laws. Laycock, *supra* note 5, at 50. In other words, "[w]holesale secular exceptions make [a] law even less generally applicable than individualized secular exceptions." Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 32 (2000).

sons were not considered acceptable.[90] *Smith's* reconceptualization of *Sherbert* states that when the government has in place a system of individual exemptions, it must treat religious exemption claims as well as the *most favored* secular exemption claims, even if this means that religious claims are treated better than the *disfavored* subset of secular exemption claims. In other words, the government may not refuse to treat religious reasons for exemptions as well as the preferred secular reasons without compelling justification.[91]

This is potentially a very significant free exercise rule, because whenever you are dealing with burdensome regulations administered by governmental departments, public schools, state universities, or similar bureaucracies, there will often be some process for requesting an exemption, waiver, or variance. Even if the regulation or restrictive policy is generally applicable on its face, if a state agency grants ad hoc exemptions, waivers, or variances in even a few cases involving secular claims, it may not refuse to grant similar exemptions, waivers, or variances in cases of "religious hardship" without satisfying strict scrutiny.

For example, suppose a state law school requires all students to enroll as full-time students during their first year of study. However, assume also that over the years the law faculty has granted a small number of exemptions from the requirement for students who request part-time status to accommodate various personal or family hardships. Perhaps the faculty has granted part-time status to first year students who are single parents, or who are caring for aged parents, or whose petition for a waiver is accompanied by a supporting letter from a member of the state legislature. Must the law college grant a religious exemption to a student who wishes to enroll on a part-time basis to accommodate his volunteer work at a shelter and evangelical outreach for the homeless operated as a ministry by the student's church? Under *Smith* and *Sherbert*, the answer is yes; since the law school has in place "a system of individual exemptions," it must either grant the religious exemption or be prepared to pass strict scrutiny.[92]

Smith's reinterpretation of *Sherbert* may be of particular importance when a church or other religious institution is burdened by zoning or other land use restrictions. Land use regulations often contain individualized procedures for determining which parcels of land are re-

---

[90] *See* Sherbert v. Verner, 374 U.S. 398, 400 n.3 (1963) (quoting the South Carolina Unemployment Compensation Act which details what factors to consider when determining if work is suitable for an individual).

[91] I am indebted to various posts to the Religion Law list, and in particular to Michael McConnell's insights, for enriching my understanding of *Smith's* reconceptualization of *Sherbert*.

[92] *See* Employment Div. v. Smith, 494 U.S. 872, 884 (1990) ("[O]ur decisions in the unemployment cases stand for the proposition that 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.").

stricted and which are unrestricted,[93] and the existence of these ad hoc procedures should trigger strict scrutiny when claims to exempt religious land uses from burdensome restrictions are denied.[94]

C. Lukumi, *Religious Gerrymanders and Underinclusiveness*

As previously discussed, laws such as the hypothetical prohibition statute of State C, which exempts alcoholic beverages served with meals at restaurants from an otherwise across-the-board prohibition, raise interesting questions concerning the meaning of the general applicability requirement mandated by *Smith*. When *Smith* and *Lukumi* are read together, a persuasive argument can be made that laws such as State C's are not generally applicable and may not be enforced against religiously motivated dissenters absent a compelling justification. Indeed, under *Lukumi* religious liberty will often receive greater protection than under pre-*Smith* law, because the Court has made clear that it will no longer apply a "watered down" version of the compelling interest test for free exercise claims that meet *Smith's* requirements.[95]

Lukumi concerned a regulatory scheme that had been gerrymandered to prohibit the killing of animals *only* when done as part of a religious ritual.[96] The Court held that this enactment was neither neutral[97] nor generally applicable.[98] Therefore, when the Church of the Lukumi Babalu Aye challenged the law as a violation of its right to practice a religious ritual of animal sacrifice, the Court applied

---

[93] "Land use regulation is among the most individualized and least generally applicable bodies of law in our legal system." Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 767 (1999). Moreover, as Laycock correctly observes, zoning laws that restrict the right to assemble on private property for worship or religious ministry strike "at the very core of religious liberty." *Id.* at 755-56

[94] *See, e.g.*, Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996) (historic preservation ordinance creates a system of individualized exemptions; compelling interest test applied); First Covenant Church v. City of Seattle, 840 P. 2d 174, 181 (Wash. 1992) (landmark ordinance contained "mechanisms for individualized exceptions.") However, some courts take the position that "any law not motivated by hostility to religion in general, or to a particular faith, is a generally applicable law" even if it is substantially underinclusive and even if it "is applied through individualized assessments that [burden] churches with gross disproportion." Laycock, *supra* note 93, at 768-69. *See, e.g.*, Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990) (finding that absent evidence of "discriminatory motive," New York City's landmarks law "is a valid, neutral regulation of general applicability."). The recently enacted Religious Land Use and Institutionalized Persons Act of 2000 will also protect religious liberty whenever any governmental land use regulation substantially burdens religious exercise. Pub. L. No. 106-274, 114 Stat. 803 (2000).

[95] *Lukumi*, 508 U.S. at 546.

[96] *Id.* at 534-40.

[97] *Id.* at 542.

[98] *Id.* at 545-46.

authentic strict scrutiny[99] and held that the law violated the "fundamental nonpersecution principle of the First Amendment."[100]

1. *Strict Scrutiny That "Really Means What It Says"*

In *Lukumi*, the Court held that *Smith* acts as a gatekeeper to the Promised Land of strict scrutiny for religious liberty.[101] In other words, if the general rule of *Smith* is applicable, the religious liberty claim will receive no protection under the Free Exercise Clause; however, "once a law fails to meet the *Smith* requirements," the Court held that the free exercise claim will be protected by a compelling interest test that "is not 'water[ed] . . . down' but 'really means what it says,'" one that the state will be able to satisfy "only in rare cases."[102]

Thus, when a free exercise claim is brought against a law that is both neutral and generally applicable, the gatekeeper function of *Smith* applies and the law normally will be upheld against the free exercise challenge. However, if a law is either not neutral or not generally applicable,[103] it must pass through the gauntlet of superlatives that is strict scrutiny and will be upheld only if it advances a governmental interest "of the highest order" and is narrowly tailored in pursuit of that truly compelling interest.[104]

This is a good news/bad news scenario for religious liberty. The bad news is that some worthwhile religious liberty claims will be summarily rejected under *Smith's* general rule when brought against truly neutral and generally applicable governmental restrictions. The good news is that some religious liberty claims will receive surpassingly strict protection under *Lukumi's* rigorous compelling interest test, when brought against laws that fail to satisfy *Smith's* requirements of neutrality and general applicability. Whether the good news outweighs the bad news depends upon the lines drawn by the Court marking the boundaries of neutral laws and generally applicable laws. Although the Court has not yet settled on a final map, the preliminary lines sketched in *Lukumi* bode well for the state of religious freedom.

---

[99] *Id.* at 546-47.

[100] *Id.* at 523.

[101] *See id.* at 546 (noting that "once a law fails to meet the *Smith* requirements" the Court will apply a very strict compelling interest test).

[102] *Id.*

[103] Since hybrid claims are not covered by *Smith's* restrictive general rule, these claims presumably are also entitled to the rigorous strict scrutiny established in *Lukumi*. *See supra* notes 52-66 and accompanying text.

[104] *Lukumi*, 508 U.S. at 546.

2. *The Neutrality Requirement*

Although neutrality and general applicability are "interrelated" concepts and the failure to satisfy one of these requirements is "a likely indication that the other has not been satisfied,"[105] *Lukumi* recognized that these requirements are not identical. The neutrality requirement mandates formal as opposed to substantive neutrality[106] and generally will be satisfied if the law in question neither targets religious practices for special burdens nor adopts classifications that discriminate on the basis of religion.[107] The requirement of general applicability, however, is concerned with laws that are underinclusive in the sense of failing "to prohibit nonreligious conduct that endangers [state] . . . interests in a similar or greater degree" than the restricted religious conduct that is the subject of the free exercise claim.[108]

Only in rare instances will strict scrutiny be triggered by the neutrality requirement, because it forbids only the most direct forms of religious persecution. The requirement will be satisfied unless the object or purpose of the law is to suppress religiously motivated conduct "because of [the] . . . religious motivation."[109] Laws that facially target a particular religious practice, such as laws prohibiting peyote or alcoholic wine *only* when used for sacramental purposes, lack facial neutrality and will be subject to strict scrutiny under *Lukumi*.[110] Similarly, laws that discriminate "against some or all religious beliefs" do not satisfy the neutrality requirement.[111]

---

[105] *Id.* at 531.

[106] The term "formal neutrality" basically adopts a "standard of no religious classifications." Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999 (1990). Substantive neutrality on the other hand goes beyond the face of a law and examines its effects. It asks whether government action "encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance." *Id.* at 1001. Substantive neutrality is satisfied "when government encouragement and discouragement [of religious belief or practice] is minimized." *Id.* at 1002. An across-the-board prohibition of the use of peyote thus satisfies the requirements of formal neutrality, but probably fails the test of substantive neutrality as applied to the sacramental use of peyote by members of the Native American Church. *Id.* at 1003.

[107] *Lukumi*, 508 U.S. at 532-40.

[108] *Id.* at 543. The general applicability requirement will be analyzed extensively infra Part II.C.3.

[109] *Lukumi*, 508 U.S. at 533.

[110] *Id.* In *Smith*, the Court stated that a law prohibiting the "casting of 'statues that are to be used for worship purposes'" or one forbidding "bowing down before a golden calf" would violate the Free Exercise Clause. Employment Div. v. Smith, 494 U.S. 872, 877-78 (1990). These laws fail to satisfy the neutrality requirement because they restrict particular kinds of conduct "only when they are engaged in for religious reasons." *Id.* at 877.

[111] *Lukumi*, 508 U.S. at 532. For example, an across-the-board prohibition of alcohol with an exception for the Catholic Church (but not other denominations) to use sacramental wine creates a discriminatory religious classification and thus fails the neutrality requirement. Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 423 (1994). *See also* McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating a state law that disqualified members of the clergy from serving in certain public

In *Lukumi*, the Court invalidated a scheme of legal restrictions involving both a pattern of exemptions and a pattern of narrow prohibitions, because the scheme amounted to a gerrymander designed to prohibit the killing of animals only when done for religious purposes.[112] The gerrymander singled out a religious practice–Santeria animal sacrifice–for discriminatory treatment and thereby violated the neutrality requirement.

Although the neutrality requirement is an important component of free exercise doctrine under *Smith* and *Lukumi*, it is dwarfed by the potential significance of the general applicability requirement. Justice Kennedy's majority opinion in *Lukumi* has much to say about the meaning of general applicability and the scope of this exception from *Smith's* general rule.

3. *The General Applicability Requirement*

Since a law that is not neutral will never be generally applicable, a law that fails the neutrality test must also fail the test of general applicability. However, it does not follow that a law that satisfies the former requirement will always satisfy the latter. For example, imagine a law that does not target a particular religious practice or classify on the basis of religion, but which does contain one or a few exceptions for favored secular interests. Suppose a state enacts a (nearly) across-the-board prohibition law that contains a single exception permitting alcoholic beverages to be served with meals at restaurants. This law is certainly widely applicable, but is it generally applicable? If this law is enforced against sacramental uses of alcoholic wine, is the Free Exercise Clause irrelevant under *Smith*, or should rigorous strict scrutiny be applied under *Lukumi*?

In *Lukumi*, the Court did not need to "define with precision the standard used to evaluate whether a prohibition is of general application," because the ordinances prohibiting animal sacrifice had been gerrymandered to target a particular religious ritual and thus fell *"well below* the minimum standard necessary to protect First Amendment rights."[113] However, the Court did provide at least a rough sketch of the boundaries of general applicability.

It is very significant that the Court stated that a law that directly targets religion falls "well below" the minimum requirement of general applicability, because this indicates that facial neutrality is a necessary, but not a sufficient, condition of generality. The neutrality requirement is designed to forbid direct religious persecution, how-

---

offices).

[112] *Lukumi*, 508 U.S. at 536-40. "Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 536.

[113] *Id.* at 543 (emphasis added).

ever, the "precise evil" prohibited by the general applicability requirement is the inequality that results when underinclusive legal prohibitions are enforced against religious conduct.[114] When society is unwilling to impose the same legal restrictions on favored secular activities that it imposes on religious practices of the same kind, that "evil" is present and renders the constitutionality of the legal scheme doubtful.[115] As Justice Kennedy put it, "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."[116]

Certainly, when a restriction is advanced "only against conduct with a religious motivation,"[117] that law is well below the standard of general applicability. However, it seems equally clear that at least some laws that stop short of targeting religion–laws that do not directly restrict religious conduct as such, but contain at least some "categories of selection" that impose incidental burdens on religious exercise–are perhaps less than "well below," but nevertheless, still below the minimum standard of general applicability.

Although it was not necessary for the Court in *Lukumi* to provide the precise standard for evaluating a law's general applicability,[118] it did provide a very useful general formula. A law that is underinclusive in the sense of failing to restrict certain "nonreligious conduct that endangers" state interests, "in a similar or greater degree" than the restricted religious conduct is not generally applicable, at least when the "underinclusion is substantial, not inconsequential."[119] For example, the city ordinances struck down in *Lukumi* were designed to promote the city's interest in protecting the public health, which was said to be threatened by the improper disposal of animal carcasses and the consumption of uninspected meat.[120] However, the city did not prohibit hunting and certain other secular activities that equally endangered these public health concerns.[121] These ordinances were thus substantially underinclusive and therefore failed the test of general applicability.[122]

---

[114] *Id.* at 545-46.

[115] *Id.*

[116] *Id.* at 542.

[117] *Id.* at 543.

[118] *Id.* It was not necessary for the Court to determine the precise boundary of general applicability in *Lukumi*, because the law struck down in that case was a religious gerrymander that fell well below the minimum standard.

[119] *Id.* For a thoughtful student note discussing *Lukumi* and general applicability, see Sansom, *supra* note 25.

[120] *Lukumi*, 508 U.S. at 544-45.

[121] *Id.*

[122] *Id.* at 544-46. *See* Horen v. Virginia, 479 S.E.2d 553 (Va. Ct. App. 1997) (holding that a law prohibiting possession of owl feathers was not generally applicable under *Lukumi* because it contained secular exceptions for taxidermists, academics, researchers, museums, and educational institutions); Sansom, *supra* note 25, at 770-71 (describing the inconsistent treatment of religious and secular activity under the ordinances in *Lukumi* as a failure of general applicability).

In the next section of this article, I will argue that, properly understood, the concept of underinclusiveness is the key both to ensuring a minimum level of protection for religious liberty in the Constitution and to assuaging the legitimate concern that constitutional protection of religiously motivated conduct in a pluralistic society risks anarchy. I will conclude that a strong commitment to religious liberty, far from being a threat to civilization and the social compact, is a necessary part of the good in a religiously pluralistic society that aspires to be both tolerant and free.

III. BEYOND THE MILLENNIUM: UNDERINCLUSIVE LAWS AND EQUAL REGARD FOR RELIGIOUS EXERCISE

Although *Lukumi* stopped short of providing the precise standard for measuring a law's general applicability, it cast a considerable degree of light on the problem. We know that "categories of selection" and "underinclusion" are the earmarks of laws which, although facially neutral with respect to religion, fail to satisfy the requirement of general applicability. A law can be selective or underinclusive either because it contains express exceptions for certain favored classes of behavior or because the narrow scope of its restrictions leaves certain classes of behavior unregulated. For example, there is no material difference between a law that prohibits all alcoholic beverages with an express exception for alcoholic beverages served with meals at restaurants and a law that prohibits all alcoholic beverages not served with meals at restaurants. These two laws are equally selective in imposing their restrictions, and thus equally in compliance (or equally not in compliance) with the general applicability requirement.[123]

In order to determine if a law restricting religious exercise is underinclusive, one must ask two questions. First, what governmental purposes are being served by the restrictive law at issue? Second, does the law exempt or otherwise leave unrestricted secular conduct that endangers those governmental purposes in a similar or greater degree than the prohibited or restricted conduct of the party seeking the protection of the Free Exercise Clause? In other words, a law burdening religious conduct is underinclusive, with respect to any particular government interest, if the law fails to pursue that interest uniformly against other conduct that causes similar damage to that government interest.[124]

---

[123] "[W]hat is at some time or place a broad rule with an accompanying exception is at other times a narrow rule having no need for an exception to perform the same prescriptive task." Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 873 (1991). By focusing on underinclusiveness as the standard for the general applicability requirement, *Lukumi* does not allow trivial formal distinctions between broad rules with exceptions and equally selective narrow rules without exceptions to obscure the substantive analysis when determining whether a challenged law satisfies the requirement. *Id.*

[124] The unrestricted secular conduct does not have to be the same activity as the proscribed

In determining whether a particular law is underinclusive, the relevant governmental purposes are those that justify the scheme of restrictions, not those that justify the exemptions or selective coverage. For example, our hypothetical prohibition law was probably enacted for the purpose of eliminating the harmful physical and moral consequences associated with the consumption of alcohol. The exception for restaurants, however, was designed to advance a completely unrelated purpose–the accommodation of the economic and social interests of the restaurant industry and its patrons. Although this second purpose is certainly a legitimate state interest, it is unrelated to the purpose that justifies the legal ban on alcohol and therefore is not part of the formula for determining whether the law is underinclusive. This hypothetical prohibition law appears to be underinclusive (and thus not generally applicable), because it leaves unrestricted a substantial subclass of secular conduct (wine served with meals at restaurants) that threatens the state's interests in eliminating the harmful consequences of alcoholic beverages at least as much as the sacramental use of wine that is subject to the law's regulatory scheme. In other words, if the state chooses to accommodate a certain subclass of "harmful" nonreligious consumption of alcoholic beverages, it must pass strict scrutiny under *Lukima* if it fails to accommodate equally the consumption of sacramental wine. The decision to value secular conduct that is not protected by the Constitution (wine consumption in restaurants) more than religious conduct covered by the Free Exercise Clause (wine used for religious rituals) is the kind of unequal treatment that should be the minimum standard for constitutional protection of religious liberty.

Two recent federal cases–one in the District of Nebraska and one in the Third Circuit–serve as illuminating "test suites"[125] for the general applicability requirement.

A. Rader v. Johnston

In *Rader* v. *Johnston*,[126] Douglas Rader, an eighteen-year-old freshman student at the University of Nebraska-Kearney ("UNK"), chal-

---

religious conduct. Rather, "it can be a different activity with the same effect." Laycock, *supra* note 89, at 31. As Michael Paulsen has observed, a similar analysis is used by the Court to determine whether a government interest is "compelling." An interest cannot be regarded as compelling, says Paulsen, "where government fails to uniformly pursue that interest wherever it arises, but only pursues it occasionally, sporadically, or inconsistently. The lack of systematic pursuit belies the assertion of compelling importance." Michael Stokes Paulsen, A RFRA Runs Through it: Religious Freedom and the U.S. Code, 56 MONT. L. REV. 249, 264 (1995). To paraphrase Paulsen, the lack of systematic pursuit also belies the assertion that a selective law is generally applicable. *Id.*

[125] A "test suite" is a term used by computer programmers to refer to tests designed to determine whether a software program works properly. Eugene Volokh, *Intermediate Questions of Religious Exemptions–A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 599 (1999).

[126] 924 F. Supp. 1540 (D. Neb. 1996).

lenged a rule that purported to require all full-time freshmen to live on-campus their freshman year.[127] The rule, however, did not require "all" freshmen to reside on campus, because exceptions were allowed for local students commuting from their parents' homes, for students who were nineteen years of age or older, for married students, and "on an ad hoc basis at the discretion of [University] administrators."[128] Rader, a devout Christian, petitioned the University for permission to live off-campus in a Christian Student Fellowship facility located just across the street from the UNK campus.[129] Rader's petition to live off campus was denied, and he received a letter from a University administrator threatening to drop him from classes "unless he signed a housing contract to live in a residence hall."[130] He then brought suit in federal court seeking to enjoin the housing policy's enforcement against him on the ground that it violated the Free Exercise Clause.

Is the UNK housing policy generally applicable? Although it is widely applicable, it is also quite selective. Indeed, the court found that when all the exceptions to the housing policy are taken into account, "only 1,600 of the 2,500 freshmen attending UNK are required" to live in residence halls.[131] Moreover, these categories of selection rendered the policy substantially underinclusive, because the subclasses of students exempted from the on-campus requirement endangered the policy's purposes at least as much as Rader's request to live off campus in the Christian facility. The University adopted the policy because it believed that student life in the dormitories fosters diversity, promotes tolerance, improves academic achievement[132] and, last but almost certainly not least, ensures full occupancy of the residence halls.[133] These are certainly legitimate interests, but the University was willing to forego these academic and fiscal benefits in order to accommodate the subclasses of freshmen covered by the ex-

---

[127] *Id.* at 1543.

[128] *Id.* at 1544.

[129] *Id.* at 1544-45. The Christian Student Fellowship is a non-denominational Christian ministry that operates a "residential facility for UNK students who wish to share 'a lifestyle which glorifies Christ.'" *Id.* at 1545. Rader explained his decision to eschew life in a college dormitory for that in a Christian facility as follows: "I want to live a daily life which reflects high moral standards–those standards which my parents and my church have instilled in me. Living in the residence halls would make that impossible." *Id.* In short, he believed that the Christian fellowship, prayer, Bible studies, and counseling available in the Christian facility were more conducive to proper living than the sex, drugs, and rock and roll available in the UNK dormitories. *See id.* at 1545-46 (citing the availability of condoms and no regulation of visits of members of the opposite sex in the dormitories, a survey of students attesting to the widespread use of drugs and alcohol in the dormitories, and describing the general "sinful" atmosphere of the dormitories).

[130] *Id.* at 1548.

[131] *Id.* at 1547. In other words, more than one-third of UNK freshmen were excused from the housing policy that prohibited Mr. Rader from residing at the Christian facility. *Id.* at 1551.

[132] *Id.* at 1548.

[133] *See id.* at 1548 n.16 (noting that a 1992-93 manual on residential life published by UNK states that full occupancy was the goal of the housing policy).

emptions. Is there any reason to think that commuters living at home with their parents are less in need of the social and educational benefits of dormitory life than are students who wish to live in off-campus religious communities?[134] Are occupancy rates in residence halls affected when commuters and other exempted subclasses are allowed to reside off campus? The UNK housing policy is clearly underinclusive as that term was used in *Lukumi*, and the court in *Rader* correctly concluded that the "rule cannot be viewed as generally applicable to all freshman students."[135] The court applied strict scrutiny, concluded that enforcement of the housing rule against Mr. Rader was not a narrowly tailored means of serving a compellingly important governmental interest, and therefore enjoined the University from interfering with his free exercise right to reside in the religious facility.[136]

Suppose in *Rader* that the housing policy did not contain categorical exemptions for commuters and other classes of preferred students. In other words, suppose UNK adopted an across-the-board on-campus housing requirement for all freshmen and granted exceptions only on an *ad hoc* basis at the discretion of University administrators.[137] In *Rader*, the record showed that UNK administrators had granted *ad hoc* exceptions for medical need,[138] for single parents,[139] for a student who wished to provide care for her great-grandmother,[140] for a student who wished to drive his pregnant sister to classes at UNK,[141] and for a number of students whose petitions were supported by a member of the UNK Foundation or the state legislature.[142] However, when Mr. Rader filed a petition for a religious exception, his petition was denied.[143]

---

[134] As one student commentator has observed, "it might be argued that freshmen who . . . live at home . . . are in even greater need of the tolerance and diversity promoting effects of dorm life" than are students, like Mr. Rader, who live with many other students in an off-campus religious community. Sansom, *supra* note 25, at 786.

[135] *Rader*, 924 F. Supp at 1553.

[136] *Id.* at 1558.

[137] *Id.* at 1544, 1546-47. In fact, UNK did have an *ad hoc* exemption process in place, pursuant to which University officials granted exceptions from time to time "for various reasons under the rubric of 'significant and truly exceptional circumstances which would make living on-campus impossible.'" *Id.* at 1546.

[138] *Id.* at 1546-47. For example, a student "who was depressed and experienced headaches" was granted an *ad hoc* exemption. *Id.* at 1547.

[139] *Id.* at 1546-47. For example, a hardship exception was granted for a student "who was a non-custodial parent entitled to visitation with his son on alternating weekends." *Id.* at 1547.

[140] *Id.* at 1547.

[141] *Id.*

[142] *See id.* (referring to these VIP exemptions from the housing policy as "administrative" exceptions).

[143] *Id.* at 1548. Douglas Wermedal, the Assistant Director of Residence Life at UNK, explained that he denied Rader's petition based upon Wermedal's own "religious expertise," which led him to conclude that "there was nothing within the residence halls that would hinder Rader's practice of religion." *Id.* Wermedal's superior, UNK Chancellor Gladys Styles Johnston, supported the denial of Rader's petition and testified that exceptions should not be

This *ad hoc* procedure for individualized exemptions brings even an otherwise across-the-board campus housing policy squarely within the *Sherbert/Smith* rule requiring strict scrutiny when the state refuses to extend individualized exemptions to cases of religious hardship.[144] In *Rader*, the court concluded correctly that UNK has "created a system of 'individualized government assessment' of the students' requests for exemptions, but [has] refused to extend exceptions to freshmen who wish to live [off campus] for religious reasons."[145] Thus, the court continued, "the parietal rule cannot be viewed as generally applicable to all freshman students."[146]

B. The Newark Police Case

Perhaps the most thoughtful judicial analysis of the general applicability requirement can be found in Judge Alito's opinion in the Newark Police Case, *Fraternal Order of Police* v. *Newark*[147] (hereinafter "*Newark Police*"). The Newark, New Jersey Police Department had adopted a policy prohibiting police officers from wearing beards. Although this proscription was labeled a "Zero Tolerance" policy by the Chief of Police,[148] exemptions were made for medical reasons[149] and for "undercover officers whose 'assignments or duties permit a departure from the requirements.'"[150] However, the Department refused to grant an exemption to two Sunni Muslim officers who were compelled by their religious beliefs to grow beards.[151]

The Third Circuit held that the Department's decision to allow exemptions for medical beards but not for religious beards took the case out of *Smith* and triggered heightened scrutiny under *Lukumi*.[152]

---

granted in "cases of spiritual hardship" and "that students who do not wish to live in the residence halls for religious reasons should not attend UNK." *Id* at 1549.

[144] *See supra* Part II.B.4.

[145] *Rader*, 924 F. Supp. at 1553.

[146] *Id.*

[147] 170 F.3d 359 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 56 (1999).

[148] *Id.* at 361.

[149] *Id.* at 360. The medical exemption was designed primarily to accommodate a skin condition known as pseudo folliculitis barbae ("PFB"). *Id.* PFB is an inflammatory infection of the bearded region popularly known as "razor bumps" or "shaving bumps." This condition primarily afflicts black males and "[r]egular shaving with a sharp blade is usually the precipitating stimulus." RICHARD SLOANE, THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 684 (1987).

[150] 170 F.3d at 360.

[151] *Id.* at 360-61. The two officers, Faruq Abdul-Aziz and Shakoor Mustafa, believe that they are under a religious obligation to grow beards. According to an affidavit of a Sunni Muslim imam, the refusal of a Sunni Muslim male to grow a beard is a "major sin" as serious a sin "as eating pork." *Id.* at 360. Moreover, the sin remains and "the penalties will be meted out by Allah" even if the Sunni Muslim male shaves "because of an instruction of another, even an employer." *Id.* at 360-61.

[152] *Id.* at 366. Although the court noted that *Smith* and *Lukumi* require strict scrutiny when the general applicability requirement is not satisfied, it assumed, without deciding, that only "an intermediate level of scrutiny applies since this case arose in the public employment context

Judge Alito's excellent opinion closely tracked the reasoning of *Lukumi* regarding underinclusiveness as the key to locating the boundary between general applicability and non-general applicability. The no-beard policy was underinclusive because beards grown for medical reasons undermined the Department's interest in uniformity and in fostering "public confidence" in the police force no less than beards grown for religious reasons.[153] The court said that "the medical exemption raises concern because it 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."[154] This underinclusiveness was "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*."[155] The fact that the exception for medical beards was enacted to address a perfectly legitimate governmental interest–accommodating the medical needs of certain police officers–was irrelevant to the court's analysis of the general applicability requirement. Although it is perfectly proper for the state to accommodate secular hardships, religious hardships are entitled to equal consideration under *Smith* and *Lukumi*.

Circuit Judge Alito's opinion in *Newark Police* demonstrates a sophisticated understanding of the general applicability requirement and the related concept of underinclusiveness. He understands the subtle but important point that not every exception renders a law underinclusive (and thus non-generally applicable) under *Lukumi*. A law will be deemed underinclusive only when it exempts (or otherwise leaves unrestricted) secular conduct that endangers or undermines the state interests served by the restriction in a similar or greater degree than religious conduct that is subject to the law's restrictions.[156]

In *Newark Police*, Alito understood that the exemption for medical beards rendered the grooming policy underinclusive, but the exemp-

---

and since the Department's actions cannot survive even that level of scrutiny." *Id.* at 366 n.7.

[153] According to the Newark Police Department, the purpose of its no beard policy was to "convey the image of a 'monolithic, highly disciplined force.'" *Id.* at 366. Uniformity of appearance was designed to bolster "the force's morale and espirit de corps" and to offer the public "a sense of security in having readily identifiable and trusted public servants." *Id.* Although these are certainly legitimate state interests, the Department was unable to explain why the presence of officers who grow beards for religious reasons threatens these interests more than does the presence of officers who grow beards for medical reasons. As the court put it: "We are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not." *Id.* at 367.

[154] *Id.* at 366.

[155] *Id.* at 365.

[156] *See supra* notes 118-22 and accompanying text. A law burdening religious exercise is underinclusive "only if nonexempted religious conduct is in the same relationship to the purpose of a law as exempted secular conduct." Gedicks, *supra* note 4, at 119. Thus, if the government can establish that "exempted secular conduct is substantially different in terms of the purpose of the law than nonexempted religious conduct," the law is not underinclusive. *Id.*

tion for beards worn by undercover police officers did not.[157] He recognized that beards grown for medical purposes undermine the uniform appearance policy in exactly the same way as beards grown for religious purposes. The exception for beards worn by undercover officers does not undermine the Department's interest in uniformity, however, because undercover officers are not held out to the public as law enforcement personnel.[158] Thus, the exemption for medical beards rendered the policy non-generally applicable and triggered heightened scrutiny under the Free Exercise Clause. However, a "no beard" policy that exempted undercover officers and no one else would satisfy the requirement of general applicability and would be valid under *Smith*.[159]

C. *Some Additional "Test Suites" for Evaluating the General Applicability Requirement*

Some commentators take the position that "courts should not insist, as a constitutional matter, on religious exemptions from laws that don't discriminate against religion, whether or not the laws contain secular exceptions."[160] For example, Eugene Volokh has argued that "virtually all laws, including those widely seen as aiming at quite serious harms, contain many secular exceptions."[161] Volokh acknowledges that the presence of such secular exemptions, "coupled with the absence of corresponding religious exemptions," does indeed demonstrate that the government values the exempted secular conduct more highly "than the religious activities (among many other [unexempted] activities)."[162] However, he believes this unequal treatment merely reflects "legislative judgment[s]" about often complex issues of public policy and therefore "may be perfectly proper."[163] Basically, Volokh believes that courts are poorly equipped to balance the competing moral claims that often underlie laws creating general

---

[157] *Fraternal Order of Police*, 170 F.3d at 365-66.

[158] *Id.* at 366.

[159] *Id.*

[160] Volokh, *supra* note 125, at 631. Of course, underinclusive laws that exempt certain secular conduct but not similar religiously motivated conduct do discriminate between the favored secular activities and the disfavored religious activities. For example, in the *Newark Police* case, the Police Department was willing to accept non-uniformity from police officers who grew beards for medical reasons, but not from officers who grew beards for religious reasons. The Third Circuit correctly viewed this as a discriminatory value judgment by government officials. 170 F.3d at 365-66. Although the underinclusive scheme of restrictions and exemptions was not directly targeted at religion, the policy's compassion for medical hardship and indifference to religious hardship was "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Id.* at 365.

[161] Eugene Volokh, *A Common-Law Model For Religious Exemptions*, 46 UCLA L. REV. 1465, 1540 (1999).

[162] *Id.* at 1540-41.

[163] *Id.* at 1541.

rules and carving out secular exemptions.[164] This is particularly true, argues Volokh, with respect to laws securing private rights, such as trespass laws, copyright laws, and contract laws, "even when the laws contain secular exceptions."[165]

On the contrary, I submit that when the legislature enacts underinclusive laws and thereby chooses to accommodate certain "harmful" secular conduct but not "harmful" religious conduct,[166] it is the duty of courts to intervene and protect the free exercise of religion. The decision of the legislature to value secular conduct that is not expressly protected by the constitution more than analogous religiously motivated conduct is precisely the kind of unequal treatment that should be the minimum standard for constitutional protection of the free exercise of religion.

I now propose to borrow some of the "test suites" suggested by Professor Volokh as helpful windows for viewing the meaning of free exercise in the context of underinclusive laws. Although Volokh appears to believe that these test suites demonstrate that the underinclusion test for general applicability is unworkable, I believe that on closer examination just the opposite is true. Consider the following situations:

> A person claims an exemption from trespass law to view an apparition of the Virgin Mary (or other sacred subject) on private land.[167] Assume trespass law "has exceptions for adverse possession, necessity, [and] law enforcement."[168]
>
> A person claims an exemption to use marijuana as part of a religious ritual in a state that prohibits possession of marijuana but which exempts the medical use of the drug when prescribed by a physician.[169]
>
> A person claims a religious exemption from a housing discrimination law that prohibits discrimination on the basis of sexual orientation but which exempts owner-occupied dwellings containing four apartments or less.[170]

Although a complete analysis of these "test suites" is beyond the scope of this article, I will attempt to sketch the broad outlines of how these cases should be evaluated under *Lukumi* and the underinclu-

---

[164] Volokh, *supra* note 125, at 630-34.

[165] *Id.* at 632.

[166] The reference in the text to "harmful" secular and religious conduct is based upon the *Lukumi* Court's definition of an underinclusive law. *See* Church of the Lukumi Balalu Aye v. Hialeah, 508 U.S. 520, 543 (1993) (noting that a law is underinclusive, and thus not generally applicable, when it fails to restrict certain "nonreligious conduct that endangers" the law's purposes "in a similar or greater degree" than religious conduct subject to the law's restrictions).

[167] Volokh, *supra* note 125, at 634.

[168] *Id.* at 632.

[169] *Id.* at 634.

[170] *See id.* For example, Connecticut prohibits discrimination on the basis of sexual orientation in the sale or rental of housing, but exempts "a unit in a dwelling containing not more than four units if the owner actually maintains and occupies one of such other units as his residence." CONN. GEN. STAT. ANN. § 46a-81e (1995).

sion test. I will also suggest, where appropriate, some "counter test suites" that might help focus the free exercise issues.

1. *The Trespass Test Suite*

The first test suite, involving a free exercise claim to trespass on private property to view a sacred apparition, probably involves a law that satisfies the requirement of general applicability. The three exceptions cited by Volokh–adverse possession, necessity, and law enforcement–probably do not render the law of trespass non-generally applicable under *Smith* and *Lukumi*, because the degree of underinclusion does not appear to be substantial.[171] The doctrine of adverse possession is not an exception to the law of trespass, but rather a "strange and wonderful" means of acquiring title by operation of the statute of limitations.[172] The doctrine of adverse possession does not permit anyone to trespass on the property of another; it merely recognizes that once the statute of limitations to recover land from a wrongful possessor has run, the original owner's right to recover the land is barred and the adverse possessor thereby acquires "as perfect title [to the land] as if there had been a conveyance by deed."[173] The law enforcement exception, which allows a public official to commit a trespass when "acting in a lawful manner within the scope of official authority,"[174] and the necessity exception, which allows a person to claim "that a trespass was justified or excused by either public or private necessity,"[175] are extraordinary and inconsequential exceptions to the general primacy of the sanctity of private property.

Thus, underinclusion appears to be a workable test for general applicability when applied to the law of trespass. However, I will now propose a counter test suite that I believe demonstrates the woeful inadequacy of Volokh's proposed free exercise test, a test which allows a law to be riddled with secular exceptions and still qualify as generally applicable under *Smith* and *Lukumi* so long as the law does not directly target religion for adverse treatment.[176]

Assume that a legislature enacts an exception to trespass law allowing persons to enter the private property of another for the purpose of playing frisbee, touch football or other athletic activities. What

---

[171] Under *Lukumi*, an underinclusive law will fail the requirement of general applicability only when "[t]he underinclusion is substantial, not inconsequential." *Lukumi*, 508 U.S. at 543.

[172] ROGER A. CUNNINGHAM, ET AL., THE LAW OF PROPERTY 807 (2d ed. 1993).

[173] RALPH E. BOYER, ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY 49 (4th ed. 1991).

[174] 8 THOMPSON ON REAL PROPERTY 204 (David A. Thomas ed., 1994). Thus, a police officer does not commit a trespass when he travels on private property in hot pursuit of a fleeing criminal suspect.

[175] *Id.* at 205. For instance, one may trespass "on the land of another in order to stop the spread of a fire that threatens one's own land or the surrounding area in general." *Id.*

[176] *See supra* notes 160-65 and accompanying text.

does this amended test suite tell us about the relative desirability of the competing tests for the general applicability requirement?

This additional exception would almost certainly render the law of trespass substantially underinclusive and thus not generally applicable under my reading of *Smith* and *Lukumi*. Since the legislature has decided to permit a substantial class of secular activities that endangers the right of exclusive possession of private property at least as much (and probably much more) than religiously motivated trespassers, religious defendants should receive strict scrutiny when they assert free exercise claims against enforcement of the highly selective trespass law. However, under Volokh's free exercise test, this outrageously selective law will be upheld as generally applicable, because it does not directly target religion for hostile treatment.

If Volokh is correct and this highly selective and discriminatory law can be enforced against religious conduct without even a whimper from the Free Exercise Clause, religious liberty is indeed dead as a constitutional principle. But Volokh is not correct. Under *Lukumi*, a highly selective law, such as that described in the amended test suite, does not satisfy the requirement of general applicability and almost certainly is unconstitutional under the Free Exercise Clause. This result does not mean that anarchy is lurking around the corner [177] or that the Free Exercise Clause allows one person to interfere with the private rights of another person.[178] It merely means that highly selective laws are not entitled to the special immunity from the Free Exercise Clause that *Smith* bestows upon neutral laws of general application. It is certainly true that "I have no right to walk across my neighbor's land without permission, no matter how vital it may be to my religion or how minor an imposition it may be on my neighbor."[179] However, in a jurisdiction that allows any Tom, Dick, or Mary to trespass on his or her neighbor's land for certain secular reasons, the Free Exercise Clause requires the government to provide a compelling justification when it prohibits me from engaging in analogous conduct for religious reasons. Thankfully, it is unlikely that any state would be so unwise as to pass a highly selective trespass law such as the one in our amended test suite.

2. *The Marijuana Test Suite*

The second test suite, involving a free exercise claim to use the illegal drug marijuana as part of a religious ritual, also appears to concern a law that satisfies the requirement of general applicability. Remember, the law was an across-the-board prohibition of the

---

[177] *See supra* notes 29-37 and accompanying text.

[178] Volokh, *supra* note 125, at 618.

[179] Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 46 (1989).

possession of marijuana with a single exemption for medical use of the drug when prescribed by a physician.[180]

Presumably, the purpose for prohibiting marijuana is to protect citizens against the harmful effects of a dangerous drug.[181] The exception does not render the marijuana law underinclusive with respect to this purpose, because it allows the drug to be used by a patient only when a doctor has prescribed the drug as medically beneficial. Thus, the prescription exception "do[es] not trigger heightened scrutiny [when the law is enforced against religious uses of marijuana] because the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing."[182] In other words, the law satisfies the general applicability requirement because the state's legitimate interest in public health is pursued uniformly against all medically harmful uses of marijuana.

Of course, protecting the health of citizens against a harmful drug may not be the sole purpose of the marijuana prohibition. The law may also be intended to protect innocent third parties against the harmful consequences of the use of marijuana by others, such as risks resulting from persons driving under the influence of the drug, lost productivity caused by use of the drug, or other real or perceived consequences of marijuana use.[183] But even if the law is found to be underinclusive for these purposes, it will still satisfy the test of general applicability so long as the law addresses at least one legitimate governmental purpose and is not underinclusive with respect to that purpose. Thus, the marijuana law in our test suite is generally applicable, even if it is designed to serve multiple purposes, because it is not underinclusive with respect to at least one such purpose: the government's legitimate interest in protecting the health of persons against the unregulated use of a dangerous drug.[184]

But now allow me to suggest a modification to our test suite that may deepen our inquiry. Imagine, for example, that the California legislature prohibits the use of marijuana, but carves out a special interest exception permitting the recreational use of marijuana at rock

---

[180] *See supra* note 169 and accompanying text. *See also* McBride v. Shawnee County, Kansas Court Services, 71 F. Supp. 2d 1098 (D. Kan. 1999) (law prohibiting marijuana enforced against persons who use the drug as part of the religious practice of the Rastafarian faith).

[181] *See* Fraternal Order of Police v. Newark, 170 F.3d 359, 366 (1999) (discussing how a state has an interest in "curbing the unregulated use of dangerous drugs").

[182] *Id.* The underinclusion test requires the purpose for each secular exemption to be compared with the purposes for the law's general rule "in order to determine whether the secular departure and general rule are consistent." Sansom, *supra* note 25, at 769.

[183] I wish to express my appreciation to Professor Eugene Volokh for raising this issue when commenting on a draft of this article.

[184] As I have already shown, the exemption for medical use of the drug when prescribed by a doctor does not render the law underinclusive for this purpose, because it allows the drug to be used by a patient only when it is beneficial–and thus, not harmful–to her health as determined by her physician.

concerts and alumni receptions at Cal-Berkeley. Surely, this law is substantially underinclusive[185] and its enforcement against religious users of the drug will trigger strict scrutiny under *Lukumi*.

As in the previous test suite, the general applicability requirement is satisfied so long as the state treats religious users of marijuana no worse than others whose use of the drug similarly threatens the purpose or purposes served by the restriction. Strict scrutiny for religious claimants is triggered only when the state selectively seeks to further its purpose of discouraging use of a harmful drug.

Interestingly, under Professor Volokh's test for religious liberty, this highly selective law permitting recreational but not sacramental use of marijuana would be considered generally applicable and thus perfectly constitutional under the Free Exercise Clause. In my opinion, this demonstrates that Volokh's concept of general applicability is suspect because it fails to protect religious liberty even against discriminatory laws that substantially burden religious conduct while permitting far less worthy secular conduct of the same type.

3. *The Housing Discrimination Test Suite*

The final test suite, involving a statute that prohibits discrimination in housing on the basis of sexual orientation and exempts owner-occupied dwellings with four units or less, concerns a law that appears to fail the requirement of general applicability. The exception for owner-occupied duplexes, triplexes, and four-plexes undoubtedly removes a significant number of rental units from the law's regulatory restrictions.[186] Thus, the law appears to be substantially underinclusive, because the exception for owner-occupied buildings threatens the state's purpose in protecting tenants against discrimination on the basis of sexual orientation at least as much as discrimination by religiously motivated landlords.[187]

---

[185] The law is substantially underinclusive because it allows the recreational use of marijuana in certain situations that endanger state interests at least as much as religious use of the drug. Smoking pot at a rock concert or alumni reception is at least as harmful to health as smoking the drug as part of a religious ritual. Thus, the exception renders the law non-generally applicable within the meaning of *Smith* and *Lukumi*.

[186] Depending on the housing markets in any given state, the exemption might well remove thousands or even tens of thousands of rental units from the law's protection against discrimination on the basis of sexual orientation. For example, in his study of homelessness and housing policy, William Tucker gathers data demonstrating that a significant percentage of rental units nationwide are in one-, two-, three-, or four-family buildings. *See* WILLIAM TUCKER, THE EXCLUDED AMERICANS: HOMELESSNESS AND HOUSING POLICIES 194-95 (1990). Many of these buildings are likely to be owner-occupied, because, as Tucker points out, "becoming a landlord is often the *first step* in upward mobility for members of the lower-middle-class . . . . Affluent professional people with good incomes become the owners of single-family houses. People with a little money buy duplexes, triplexes, and sometimes small apartment houses. They become landlords." *Id.* at 196.

[187] Presumably, the purpose of the fair housing law under discussion is to ensure equal access to housing without regard to sexual orientation. *See* McCready v. Hoffius, 586 N.W.2d 723, 729

For example, suppose this fair housing law is enforced against a Christian landlady, say Mrs. Murphy, when she refuses to rent a unit in her (non-owner-occupied) five-plex to a homosexual couple because she believes it would be sinful for her to facilitate homosexual conduct. Mrs. Murphy's free exercise claim should be entitled to strict scrutiny under *Lukumi*, because the fair housing law is not a law of general application.

This is so even if we accept that Mrs. Murphy's religiously motivated decision "imposes *some* real harm on the tenants" who are excluded from residing on her property.[188] Tenants are "harmed" no more by religious exemptions under the Free Exercise Clause than by the analogous secular exemptions approved by the legislature. They have a "right" to be protected against the "harm" of housing discrimination only because the legislature decided to create such a "right" when it enacted the fair housing law. As I read the doctrine of *Lukumi*, when the legislature enacts underinclusive laws and thereby chooses to permit certain secular "harms" but not similar religious "harms," the Free Exercise Clause operates to protect the free exercise of religion. Perhaps the legislature has decided wisely that the associational interests of certain landlords[189] outweigh the "right" of tenants to equal housing opportunities. However, *Lukumi* requires that the free exercise claims of religious landlords receive equal accommodation under the law, unless the state has a compelling justification for its highly selective fair housing law. Moreover, the underinclusiveness of the statute should make it almost impossible for the state to justify the law, because the allowance of secular exemptions "is substantial evidence that religious exemptions would not threaten the statutory scheme."[190]

D. Free Exercise As Equal Regard: A Unifying Theory And A Reasonable Compromise

Smith and *Lukumi* have transformed the Free Exercise Clause from a liberty rule, under which religiously motivated conduct was protected–at least in theory–against any substantial governmental burden, to an equality rule, under which religious practice is entitled to a kind of most-favored-nation status.[191] In other words, an across-the-

(Mich. 1998) (holding that the purpose of law prohibiting marital status discrimination in housing was to "ensure that no one be denied equal access to housing on the basis of . . .their marital status.").

[188] Volokh, *supra* note 161, at 1520.

[189] *See id.* at 1541 (discussing "freedom of association concerns" and exceptions for "small companies" from employment discrimination laws).

[190] Laycock, *supra* note 5, at 50.

[191] *Id.* at 49. By most-favored-nation status, I mean that religious activities must be treated no worse than comparable secular activities. "If the state grants exemptions from its law for secular reasons, then it must grant comparable exemptions for religious reasons" or be prepared to

board prohibition of some class of behavior may be enforced against religiously motivated conduct, but when the government pursues underinclusive restrictions against religious practices, the Free Exercise Clause is triggered and the selective regulatory scheme will be reviewed under a compelling interest test that is strict in theory and usually fatal in fact.[192] This is an equality rule not a liberty rule, because religious exercise is protected, not as an end in itself, but only to the extent that analogous secular conduct is protected.

Smith and *Lukumi* strike a reasonable compromise between the concerns of those who fear religious liberty as a strain on the social contract and of those who believe that religious freedom is an essential component of ordered liberty, between the concerns of those who fear anarchy and of those who fear religious persecution, between the concerns of those who believe that free exercise exemptions create an unfair constitutional preference for religion over non-religion and of those who believe that the absence of free exercise exemptions in a modern secular state unfairly exposes religious individuals and subgroups to the powerful forces of assimilation and secularization.[193] Under *Smith* and *Lukumi*, the majority may rule without any fear of religious anarchy, so long as the burdens it creates are not imposed selectively. However, if the majority decides to impose civic obligations or restrictions selectively by enacting underinclusive laws, the Free Exercise Clause requires strict scrutiny when the government seeks to enforce these non-generally-applicable burdens against religiously motivated practices. Rather than creating a constitutional preference for religion over non-religion, *Smith* and *Lukumi* interpret the Free Exercise Clause as requiring only that religious conduct be treated no worse than analogous secular behavior that is exempted or otherwise sheltered from burdens or restrictions imposed by government.[194]

Lukumi and its emphasis on protecting religious liberty against underinclusive laws also provides an important degree of balance to *Smith's* emphasis on majoritarian decisionmaking.[195] It properly recognizes that the most "serious threat to religious pluralism today is a

---

pass strict scrutiny. *Id.* at 50.

[192] *See supra* notes 101-04 and accompanying text. When a state enacts an underinclusive law granting secular exemptions but not comparable religious exemptions, the secular exemptions are powerful evidence "that religious exemptions would not threaten the statutory scheme." Laycock, *supra* note 5, at 50. Thus, although it is possible that the state may have a compellingly important reason for granting secular exemptions but not religious exemptions, "such cases should be quite rare." *Id.*

[193] *See supra* notes 29-45 and accompanying text.

[194] The underinclusion test also recognizes wisely that when the government exempts influential secular interests, but refuses to exempt analogous religious interests, it is reasonable to suspect that this unequal treatment may be "animated by diminished respect and concern for the religious group whose practice" is selectively burdened. Michael J. Perry, *Freedom of Religion in the United States*: Fin de Siècle *Sketches*, 75 IND. L. J. 295, 303 (2000).

[195] *See* McConnell, *supra* note 8, at 168.

combination of indifference to the plight of religious minorities and a preference for the secular in public affairs."[196] By focusing on underinclusiveness as the test for general applicability, *Lukumi* defers to majority rule, but only when the majority treats religious exercise with equal regard vis-à-vis its treatment of comparable secular activities. Although some worthwhile free exercise claims will go unprotected when burdened by laws that are truly neutral and generally applicable, *Lukumi* strikes a reasonable compromise that will often provide a high degree of protection for religious liberty and religious pluralism.

Lukumi and its underinclusion test can also be understood as harmonizing free exercise doctrine with the Court's equal protection analysis concerning legislative classifications that unequally burden fundamental rights.[197] In *Lukumi*, the Court interpreted the Free Exercise Clause as requiring the same strict scrutiny standard for underinclusive laws burdening religion that the fundamental rights/equal protection doctrine mandates for "underinclusive government action that burdens the right to procreation, the right to travel, and other fundamental constitutional rights."[198]

Finally, the general applicability requirement also serves as a unifying principle that plausibly explains not only *Smith* and *Lukumi*, but also the two landmark free exercise cases that survived *Smith*, *Sherbert* and *Yoder*. As I have explained previously, *Smith* reclassified *Sherbert* as a case in which strict scrutiny was properly applied because free exercise was unequally burdened by South Carolina's individualized–and thus non-generally applicable–unemployment compensation process.[199] Interestingly, although *Yoder* is usually classified as a case involving a neutral and generally applicable law requiring "every child under sixteen . . . to attend state-approved schools,"[200] in fact the Wisconsin mandatory school law contained an individualized exception process covering "any child exempted for good cause by the school board of the district in which the child resides."[201] Thus, under *Smith* and *Sherbert* (as *Sherbert* is now understood), *Yoder* can be explained as

---

[196] *Id.* at 169.

[197] *See* Gedicks, *supra* note 4, at 104-19. Professor Gedicks does not read *Lukumi* this broadly. *Id.* at 113-14. Rather, Gedicks argues that religious liberty ought to be treated the same as "privacy, speech, travel, and other fundamental rights." *Id.* at 120. I believe Gedicks is correct in placing a high value on religious liberty, but incorrect in reading *Lukumi* so narrowly. In my judgment, *Lukumi* already requires underinclusive laws restricting religious exercise to be evaluated under a very toothy compelling interest test. *See supra* notes 113-59 and accompanying text.

[198] Gedicks, *supra* note 4, at 120

[199] *See supra* notes 80-93 and accompanying text.

[200] Epps, *supra* note 37, at 600.

[201] Wisconsin v. Yoder, 406 U.S. 205, 207-08 n.2 (1972) (quoting WIS. STAT. § 118.15 (1969)). The law also contained an exemption for "any child who is not in proper physical or mental condition to attend school." *Id.* Under this exception, "[t]he certificate of a reputable physician in general practice shall be sufficient proof that a child is unable to attend school." *Id.*

standing "for the proposition that 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."[202]

IV. CONCLUSION

The Free Exercise Clause has evolved into a leaner, meaner religious-liberty-protecting machine in the wake of the Supreme Court's recent decisions in *Smith* and *Lukumi*. Although *Smith* announced that government may prohibit what religion requires or require what religion prohibits so long as it acts through neutral laws of general application,[203] *Lukumi* emphasized that a "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[204] Moreover, *Lukumi* made clear that once a law burdening religious exercise fails to meet *Smith's* requirements of neutrality and general applicability, the free exercise claim will be protected by a very toothy compelling interest test that the state will be able to satisfy "only in rare cases."[205] Thus, although some legitimate free exercise claims will be summarily rejected under *Smith* when brought against laws that are truly neutral and generally applicable, many religious liberty claims will receive more protection than ever under *Lukumi* when brought against laws that are not neutral or not generally applicable.[206]

Under *Lukumi*, a law that directly targets religion for discriminatory treatment falls "well below" the minimum requirement of general applicability.[207] Although *Lukumi* did not define with precision the boundary between general applicability and non-general applicability, it did make clear that "categories of selection" and "underinclusion" are the earmarks of laws which, although facially neutral with respect to religion, nonetheless fail to satisfy the general applicability requirement.[208] In other words, selective laws that fail to pursue legislative ends with equal vigor against both religious practice and analogous secular conduct are not governed by *Smith*; such underinclusive laws are subject to surpassingly strict scrutiny under the Free Exercise Clause and *Lukumi*.

---

[202] Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

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

[204] Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 546 (1993).

[205] *Id.*

[206] "If the standard is lack of general applicability, then many statutes violate *Smith* and *Lukumi*. Federal, state, and local laws are full of exceptions for influential secular interests .... Where a law has secular exceptions or an individualized exemption process, any burden on religion requires compelling justification under a reasonable interpretation of *Smith* and *Lukumi*." Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 772 (1998).

[207] *Lukumi*, 508 U.S. at 543.

[208] *Id.* at 542-43.

This approach to the Free Exercise Clause appears to be a reasonable compromise between the concerns of those who fear religious liberty as a potential source of anarchy and as a serious threat to democratic self-government, and of those who believe that religious freedom is an essential component of ordered liberty in a modern, pluralistic society. Moreover, the Free Exercise Clause that emerges from *Smith* and *Lukumi* does not create an unfair preference for religion over non-religion. Rather, it requires only that government treat religious activities with equal regard vis-à-vis its treatment of comparable secular activities. Finally, the general applicability requirement serves as a unifying principle that explains not only *Smith* and *Lukumi*, but also *Sherbert* and *Yoder*.

The reports of the death of free exercise in the wake of *Smith* were more than premature, they were seriously mistaken. Under *Smith* and (especially) *Lukumi*, religious liberty will often prevail against burdens imposed by underinclusive (and thus, non-generally applicable) laws and governmental policies. I think Mark Twain would be delighted.