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A Critique of the Secular Exceptions Approach to Religious Exemptions

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ABSTRACT

Many scholars, some lower courts, and at least one Supreme Court justice support the idea that if a law contains secular exceptions, the Free Exercise Clause compels similar religious exemptions from the law. They argue, for instance, that if a police department with a no-beards policy allows exceptions for medical reasons, it must also allow those who wish to grow their beards for religious reasons to do so.

This Comment rejects the secular exceptions approach to religious exemptions. First, it argues that the secular exceptions principle is inconsistent with current First Amendment doctrine. In *Employment Division v. Smith*, the Supreme Court essentially eliminated religious exemptions from neutral laws of general applicability. Since laws with secular exceptions can be both neutral and generally applicable, the secular exceptions principle grants religious exemptions more broadly than *Smith* allows.

Even if the secular exceptions principle were consistent with *Smith*, courts should not adopt it as the constitutional rule. Under the secular exceptions principle, secular exceptions that undermine a law's general interest make a law underinclusive and therefore not generally applicable. The lack of general applicability triggers strict scrutiny, so the court must grant the religious exemption unless the law is narrowly tailored to a compelling government interest. But because the law was already found to be underinclusive, it is not narrowly tailored to the interest, and so it necessarily fails the strict scrutiny test.

Since nearly all laws contain exceptions, this problem would lead to religious exemptions from some of the country's most important laws—antidiscrimination laws, tax laws, and drug laws, to name a few. That outcome has never been and cannot be the correct understanding of the Free Exercise Clause.

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INTRODUCTION

Nearly all laws have exceptions. Title VII[1] antidiscrimination laws exempt employers with fewer than fifteen employees;[2] the Affordable Care Act's[3] individual mandate exempts those, among others, who do not have to file an income tax return, who recently experienced the death of a close family member, and who are not lawfully present in the United States;[4] state assault weapon bans generally exempt law enforcement officers,[5] military personnel, and those who lawfully obtained the weapon before the ban.[6] Indeed, some laws, like the Copyright Act[7] and Clean Water Act,[8] contain overly broad operative sections with a long list of exceptions.[9] Federal and state tax codes, health and safety codes, and labor codes are riddled with exceptions.

Some scholars maintain that the rule for constitutional religious exemptions should be based on a law's secular exceptions.[10] They argue that when the government exempts certain secular conduct from compliance with a law, the Free Exercise Clause prohibits the government from denying exemptions for similar religious conduct.[11] Secular exceptions that undermine a law's general interest make the law underinclusive with respect to that interest—the law fails to cover certain conduct that undermines the purpose of the law.[12] The underinclusiveness constitutes impermissible discrimination against religious practice, the argument goes, because the law treats religious reasons for exemption as inferior to secular reasons.[13] Thus, such laws should receive a court's highest scru-

1. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2012).
2. *See id.* § 2000e(b).
3. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).
4. 26 U.S.C. § 5000A(e) (2012); *see generally Fees & Exemptions: Exemptions From the Fee for Not Having Health Coverage*, HEALTHCARE.GOV, https://www.healthcare.gov/fees-exemptions/exemptions-from-the-fee (last visited Apr. 6, 2015).
5. Some states even exempt retired law enforcement officers. *See, e.g.*, MASS. GEN. LAWS ch. 140, § 131M (2007); N.Y. PENAL LAW § 265.00 (McKinney 2008).
6. *See, e.g.*, CAL. PENAL CODE §§ 30625–35 (Deering 2012); CONN. GEN. STAT. ANN. § 53-202c (West 2010).
7. 17 U.S.C. §§ 101–810 (2012).
8. 33 U.S.C. §§ 1251–1387 (2012).
9. 17 U.S.C. §§ 106–21 (2012); 33 U.S.C. § 1311(a) (2012).
10. *See* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001); Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, *in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 200 (Stephen M. Feldman ed., 2000).
11. Eisgruber & Sager, *supra* note 10, at 204.
12. Duncan, *supra* note 10, at 868–69.
13. Eisgruber & Sager, *supra* note 10, at 217.

tiny, and they can survive only if they are narrowly tailored to a compelling government interest.[14]

A number of courts have adopted this secular exceptions principle.[15] A primary example is *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,[16] a Third Circuit case written by then-Judge Samuel Alito. The case involved a Newark Police Department policy that prohibited officers from wearing a beard unless they had a medical reason to do so.[17] Two officers, both devout Sunni Muslims with a religious obligation to grow their beards, sought religious exemptions from the no-beards policy.[18] The court held that, because the medical exception undermined the department's interest in a clean-shaven police force, the department could not enforce the no-beards policy against the religious objectors unless the policy passed heightened scrutiny, which generally requires a law to be narrowly tailored to a compelling government interest.[19] Finding no interest to which the policy was sufficiently tailored, the court granted the religious exemption.[20]

This Comment argues that, despite its appeal and adoption by certain courts, the secular exceptions principle is flawed both doctrinally and as a matter of policy. The secular exceptions principle conflicts with the rule set out by the Supreme Court in *Employment Division v. Smith*,[21] in which the Court rejected a challenge to Oregon's drug laws by religious users of peyote. Decided nine years before *Fraternal Order of Police*, *Smith* essentially eliminated constitutional religious exemptions from neutral laws of general applicability. The secular exceptions principle runs counter to *Smith* in two ways: First, it partially restores constitutional religious exemptions from neutral and generally applicable laws; second, it fails to properly account for the prescription exception to the peyote prohibition at issue in *Smith*.[22] By ignoring the secular exception to the law and holding that the Constitution did not compel the religious exemption, the Court in *Smith* implicitly rejected the secular exceptions principle. *Fraternal Order of Police* attempted to distinguish *Smith* and relied on other precedent, but its reasoning is inadequate for reasons discussed in Part II of this Comment.

14. Duncan, *supra* note 10, at 869.
15. *See infra* Part I.B.
16. 170 F.3d 359 (3d Cir. 1999).
17. *Id.* at 360. A typical medical reason is the condition *pseudofolliculitis barbae*. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 366–67.
21. Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).
22. *Id.* at 890.

A separate problem with the secular exceptions principle is its inevitable extension to some of the country's most important laws. Antidiscrimination laws, tax laws, gun laws, and others have exceptions that undermine their general purposes. If religious exemptions must be granted from any law with secular exceptions, they will be granted from nearly every law. Under the pre-*Smith* standard, the Court applied strict scrutiny to laws that burdened religious practice,[23] but unlike strict scrutiny that is considered "fatal in fact" in other contexts, strict scrutiny under the Free Exercise Clause was considered "feeble in fact."[24] The Court essentially balanced the religious exemption against the importance of the law, and it granted religious exemptions in only a few cases.[25] Although courts applying the secular exceptions principle purport to apply the same strict scrutiny, they do so only after finding that the secular exception (like a medical exception to a no-beards policy) undermines the state's interest in the law (like having a uniform police force).[26] Because the secular exception makes the law underinclusive with respect to the government's interest, the court must apply strict scrutiny. And since underinclusive laws are not narrowly tailored to the government's interest, laws with secular exceptions automatically fail strict scrutiny. Thus, the strict scrutiny test under the secular exceptions principle is not the "feeble in fact" strict scrutiny that the Court applied before *Smith*. Instead, it compels religious exemptions from nearly every law, including some vital laws to which the Supreme Court has already rejected religious exemptions. Moreover, if the prevalence of exceptions in laws simply represents lawmakers balancing competing interests, then the real effect of the secular exceptions principle is to deprive lawmakers of effectively balancing competing secular interests without granting religious exemptions.

It is important to distinguish the secular exceptions principle from the more common avenue for religious exemptions, the Religious Freedom Restoration Act (RFRA).[27] Congress enacted RFRA in response to *Smith* to provide a statutory right to religious exemptions.[28] RFRA provides religious exemptions from any law that substantially burdens a person's religion unless the law is the

23. *See id.* at 894 (O'Connor, J., concurring) (noting that, in cases up until *Smith*, the Supreme Court "requir[ed] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest").
24. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994).
25. *See infra* Part I.A.
26. For examples of these cases other than *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), see *infra* Part II.C.
27. 42 U.S.C. § 2000bb (2012).
28. *Id.*

least restrictive means of furthering a compelling government interest.[29] The secular exceptions principle differs from RFRA in the sense that it is a constitutional, rather than statutory, rule for providing religious exemptions. Although RFRA in one way provides more protection to religious objectors (because it requires courts to closely scrutinize laws whether or not there is an analogous secular exception) and has been the focus of religious exemptions cases since its enactment, the secular exceptions principle is significant for three reasons. First, RFRA does not apply to the states,[30] so the secular exceptions principle potentially affects all state laws in states with no RFRA equivalent.[31] Second, the secular exceptions principle places the ultimate power of religious exemptions with the courts rather than with Congress. While Congress can overrule a court's application of RFRA with a majority vote, the secular exceptions principle prevents Congress from effectively balancing competing secular interests without providing religious exemptions to its statutes. Third, the secular exceptions principle is more problematic than RFRA because it would provide religious exemptions to far more laws, including some of the country's most important laws. Whereas RFRA established a least restrictive means test, the test under the secular exceptions principle provides automatic religious exemptions because underinclusiveness both triggers strict scrutiny and causes the law to fail strict scrutiny.

This Comment proceeds as follows. Part I lays the doctrinal and theoretical foundation of the secular exceptions principle. Part II then argues that the secular exceptions principle is irreconcilable with current religious exemptions jurisprudence as announced in *Smith*. It also argues that the authority on which the secular exceptions principle primarily relies—*Sherbert v. Verner*[32] and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[33]—are distinguishable as cases of individualized exemptions mechanisms and of targeted religious discrimination, respectively. Part III uses examples of laws from which the secular exceptions principle would compel religious exemptions to show that, if the secular exceptions principle is taken seriously, it would compel exemptions from some of the country's most important laws. It covers antidiscrimination laws, drug laws, statutory rape laws, animal cruelty laws, and evidentiary laws. Part IV reconciles the secular exceptions principle with RFRA.

29. *Id.* § 2000bb-1(b).
30. *See* City of Boerne v. Flores, 521 U.S. 507, 507–09 (1997).
31. About half the states have a Religious Freedom Restoration Act (RFRA) equivalent, either by statute or state constitution. *See* Eugene Volokh, *Religious Exemption Law Map of the United States*, VOLOKH CONSPIRACY (July 9, 2010, 5:36 PM), http://www.volokh.com/ 2010/07/09/religious-exemption-law-map-of-the-united-states.
32. 374 U.S. 398 (1963).
33. 508 U.S. 520 (1993).

I. THE SECULAR EXCEPTIONS PRINCIPLE

The doctrinal backdrop behind the secular exceptions principle is complex. *Employment Division v. Smith*[34] purported to eliminate constitutionally compelled religious exemptions from neutral laws of general applicability, but it left intact a line of precedent that required religious exemptions from laws with an "individualized governmental assessment of the reasons for the relevant conduct;" specifically, these were all unemployment compensation cases.[35] Three years after *Smith*, the Court decided *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[36] in which it applied strict scrutiny to a city's animal cruelty ordinance that specifically target Santeria practices. Courts that have employed the secular exceptions principle use *Lukumi* and the precedent that survived *Smith* to support their holdings that religious exemptions must be granted from laws with similar secular exceptions unless the law passes strict scrutiny.[37] A number of courts and scholars support this secular exceptions approach to religious exemptions. This Part examines the doctrine underlying the secular exceptions principle, the cases that have employed it, and the various arguments that support it.

A. The Doctrine Underlying the Secular Exceptions Principle

There was never a time in First Amendment history in which the Court broadly granted religious exemptions.[38] In the few decades before *Smith*, the Court applied strict scrutiny to religious exemption cases: If a law burdened a sincere religious practice, an exemption would be granted unless the law was narrowly tailored to a compelling government interest.[39] Although strict scrutiny in other constitutional contexts has notoriously been termed "strict in theory and fatal in fact," strict scrutiny in the Free Exercise Clause context was considered "feeble in fact."[40] With a few exceptions, the Court before *Smith* typically found either that the law did not substantially burden a religious practice or that the law

34. Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).
35. *Id.* at 873.
36. 508 U.S. 520 (1993).
37. *See, e.g.*, Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999).
38. *See* EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 995–96 (4th ed. 2011).
39. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring); Hernandez v. Comm'r, 490 U.S. 680, 698 (1989); Sherbert v. Verner, 374 U.S. 398, 403 (1963).
40. Eisgruber & Sager, *supra* note 24, at 1247 (internal quotation marks omitted).

was narrowly tailored to a compelling government interest.[41] In one of its earliest free exercise cases, for example, the Court refused to provide a Mormon in the Utah Territory an exemption from a criminal prohibition of polygamy.[42] More recently, the Court denied an exemption from social security taxes to an Amish employer because of the government's overriding interest in maintaining a comprehensive social security system.[43]

Although the Court denied the overwhelming majority of religious exemptions, it granted them in two types of cases, only one of which is important to the secular exceptions principle.[44] In *Sherbert v. Verner*,[45] a Seventh-day Adventist was discharged for refusing to work Saturdays, her Sabbath day.[46] South Carolina's Employment Security Commission denied her unemployment benefits pursuant to the rule that a claimant is ineligible for benefits if she has failed without "good cause" to accept available suitable work, and she challenged that rule under the Free Exercise Clause.[47] After finding that the rule substantially burdened the claimant's religious practice, the Court rejected the state's asserted interest in preventing spurious claims because, even if that interest were compelling (and the record failed to sustain that it was), the state could not show that no alternative forms of regulation would combat abuse without infringing First Amendment rights.[48] Thus, the Employment Security Commission could not deny the claimant unemployment benefits.[49]

In 1990, *Smith* changed the religious exemptions landscape by rejecting the strict scrutiny approach that had been applied in previous religious exemption cases.[50] In *Smith*, an Oregon law prohibited the knowing or intentional

41. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990).
42. Reynolds v. United States, 98 U.S. 145, 166 (1878).
43. United States v. Lee, 455 U.S. 252, 257 (1982).
44. The other line of cases involved "hybrid" rights. In *Wisconsin v. Yoder*, for instance, the Court granted an exemption from compulsory high school education to Amish parents who believed that high school education was contrary to their religious way of life. 406 U.S. 205, 234–36 (1972). *Smith* deemed *Yoder* and similar cases "hybrid situations" in which the free exercise claim connected with parental rights or other First Amendment rights. *Smith*, 494 U.S. at 881–82. The secular exceptions principle does not present a "hybrid situation," and the cases that invoke it do not rely on hybrid rights cases.
45. 374 U.S. 398, 398 (1963).
46. *Id.* at 399.
47. *Id.* at 400–01.
48. *Id.* at 404, 407.
49. *Id.* at 409–10.
50. Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884–85 (1990) ("Although . . . we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach

possession of a "controlled substance" unless the substance had been prescribed by a medical practitioner.[51] The respondents, members of the Native American Church, sought an exemption for their religious, ceremonial use of peyote.[52] Justice Scalia, writing for the majority of the Court, stated that while the Free Exercise Clause prohibits the government from regulating religious *beliefs* as such, and it would likely prohibit the government from regulating conduct engaged in only for religious purposes, "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[53] More specifically, the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[54] Since the peyote ban was neutral and of general applicability, the Court denied the exemption and advised religious objectors to seek accommodation through the legislature.[55]

Even though it seemed to eliminate religious exemptions from neutral laws of general applicability, *Smith* did not overrule the unemployment compensation cases. Instead, *Smith* distinguished them as cases where the state had in place a system of individualized exemptions.[56] Since the "good cause" standard in the unemployment compensation context created a mechanism for individualized exemptions, the state could not refuse to accept religious practice as "good cause" without compelling reason.[57] Oregon's drug law was not a mechanism of individualized exemptions, but an across-the-board prohibition on particular conduct, so the *Sherbert* test did not apply.[58]

Three years after *Smith*, the Court had an opportunity to clarify the meaning of "neutral and generally applicable" in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[59] Shortly after a Santeria church leased land in the City of Hialeah, Florida, the city council adopted multiple ordinances criminalizing animal sacrifice, including one that punished "[w]hoever . . . unnecessarily or cruelly . . .

in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges.") (citations omitted).

51. *Id.* at 874 (citing OR. REV. STAT. § 475.992(4) (1987)).
52. *Id.*
53. *Id.* at 878–79.
54. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).
55. *Id.* at 890.
56. *Id.* at 884.
57. *Id.*
58. *Id.* at 884–85 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.").
59. 508 U.S. 520 (1993).

kills any animal," and another that criminalized sacrifices "for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed."[60]

Justice Kennedy, writing for the Court, recognized that neutrality and general applicability are interrelated but analyzed separately.[61] The Court held that, even though the ordinances were facially neutral, they failed neutrality because their object was to suppress religious practice.[62] One example the Court used was the city's interpretation of "unnecessarily kills": "The city, on what seems to be a *per se* basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary," such that "religious practice is being singled out for discriminatory treatment."[63] Interpreting "unnecessarily kills" in this manner created a sort of individualized exemptions mechanism akin to that in *Sherbert*, which still triggers strict scrutiny after *Smith*.[64]

The Court next analyzed general applicability and focused its analysis on the ordinances' underinclusiveness.[65] The city asserted interests in public health and preventing cruelty to animals, but numerous exceptions meant that the city "forb[ade] few killings but those occasioned by religious sacrifice."[66] One example was an exception for commercial operations that slaughter small numbers of hogs and cattle.[67] Since small commercial operations should implicate the city's desires to promote public health and prevent cruelty to animals, but they were not prohibited by the ordinances, the ordinances were underinclusive with respect to those interests.[68] Thus, the Court concluded that since "each of Hialeah's ordinances pursue[d] the city's governmental interests only against conduct motivated by religious belief," they were not generally applicable.[69]

60. *Id.* at 525–28.
61. *Id.* at 531–32.
62. *Id.* at 542. Justice Scalia in his concurrence (joined by Chief Justice Roberts) analyzed the two issues slightly differently: "In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion . . . whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment." *Id.* at 557 (Scalia, J., concurring) (citations omitted).
63. *Id.* at 537–38 (majority opinion).
64. *Id.* The secular exceptions principle would come to rely heavily on an important line in Justice Kennedy's analysis: "Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment." *Id.*
65. *Id.* at 542–46.
66. *Id.* at 543.
67. *Id.* at 545.
68. *Id.*
69. *Id.* at 545–46.

Given that the ordinances were not neutral and not generally applicable, the Court proceeded to apply strict scrutiny.[70] Even if the city's asserted interests were compelling, they were not narrowly tailored to the state's asserted interests because they were, as already described, underinclusive.[71] Particularly important to the Court's holding was the concept of "religious gerrymandering": "The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings . . . ."[72]

Thus, *Smith*, what the Court left of *Sherbert*, and *Lukumi* comprise the doctrine on which the secular exceptions principle relies.

B. Cases Applying the Secular Exceptions Principle

The backlash against *Smith* came in various forms. Congress created a general statutory religious exemptions scheme through the Religious Freedom Restoration Act (RFRA),[73] and Oregon amended its drug laws to make religious use an affirmative defense against prosecution for the use of peyote.[74] A number of scholars criticized *Smith* and suggested alternative means of protecting religious

70. *Id.* at 533 (citations omitted) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.").

71. *Id.* at 546. The Court held that certain other ordinances were unconstitutionally overbroad. *Id.*

72. *Id.* at 542.

73. 42 U.S.C. §§ 2000bb-1(a) to -1(b) (2012) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, ... [unless the rule] (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."). After Congress nearly unanimously passed RFRA, the rule guiding constitutional religious exemptions became somewhat irrelevant because religious objectors seemingly had stronger recourse through RFRA than through a Free Exercise Clause argument under *Smith*. But when the Court decided that RFRA was unconstitutional as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997), *Smith* again became the relevant law for religious exemptions from neutral and generally applicable state laws. About half of the states have since responded with RFRA equivalents, but *Smith*, *Sherbert*, and *Lukumi* remain relevant to the half of the states that declined to provide statutory religious exemptions. *See supra* Part I.A.

74. OR. REV. STAT. § 475.752(4) (2013) ("In any prosecution under this section for manufacture, possession or delivery of that plant of the genus Lophophora commonly known as peyote, it is an affirmative defense that the peyote is being used or is intended for use: (a) In connection with the good faith practice of a religious belief; (b) As directly associated with a religious practice; and (c) In a manner that is not dangerous to the health of the user or others who are in the proximity of the user.").

liberty.[75] Certain lower courts responded in a different way: They pushed the boundary of constitutional religious exemptions by holding that, when laws provide secular exceptions that undermine the law's general interest, the Constitution entitles religious objectors to analogous exemptions. This Subpart describes the cases that applied this secular exceptions principle.

Rader v. Johnston[76] was the earliest case to employ the secular exceptions principle. The University of Nebraska-Kearney (UNK) required all full-time freshmen to live on campus their freshman year, but it made exceptions for students living with their parents, students nineteen years of age or older, married students, and some unarticulated reasons on an ad hoc basis.[77] Douglas Rader, an incoming freshman, requested that he be permitted to live in the Christian Student Fellowship housing facility because the immoral atmosphere of the dormitories would have made it impossible for him to live the life of high moral standards that his religion required.[78] After UNK denied his request, Rader challenged the policy as prohibiting his free exercise of religion.[79]

The District Court of Nebraska held that UNK's freshman housing policy was subject to strict scrutiny because it granted exceptions for secular reasons but did not grant exceptions for religious reasons.[80] The court remarked: "If a law or policy provides exemptions for certain reasons, such as medical treatment, then it should provide similar exemptions for religious purposes, unless the state can show an overriding compelling interest."[81] Thus, UNK had to justify its policy by demonstrating that it was narrowly tailored to further a compelling governmental interest.[82] The court found that UNK's asserted interests in "promoting

75. *See, e.g.*, James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91, 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 7–10 (1990); McConnell, *supra* note 41, at 1111; Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 196 (1991).

76. 924 F. Supp. 1540, 1588 (D. Neb. 1996).

77. *Id.* at 1544. Additional reasons for granting exceptions included students with "serious medical need[s] and single parent pregnancies . . . [as well as] a student, living outside the 'Kearney community,' who wished to drive his pregnant sister to classes at UNK; a student who was depressed and experienced headaches; a student with learning disabilities; a student who was mourning the death of a parent and a close friend; a student who wished to help care for her great-grandmother; and a student who was a noncustodial parent entitled to visitation with his son on alternating weekends." *Id.* at 1546–47.

78. *Id.* at 1545.

79. *Id.* at 1548.

80. *Id.* at 1553 ("[A]lthough exceptions are granted by the defendants for a variety of non-religious reasons, they are not granted for religious reasons.").

81. *Id.* at 1555 (internal quotation marks omitted). In Part II.A, I argue that *Rader* was rightly decided because the ad hoc exceptions created an "individualized exemptions mechanism," but that the court wrongly understood even a single, specific exception to trigger strict scrutiny. *See infra* Part II.A.

82. *Rader*, 924 F. Supp. at 1555–56.

academic success, fostering diversity, [and] promoting tolerance among UNK students" were not compelling, and even if they were, the policy was not narrowly tailored to them, because UNK already allowed many exceptions that undercut each of the interests.[83] Therefore, the court granted Rader an exemption from the housing policy.[84]

In *Horen v. Commonwealth*,[85] Timothy and Diane Horen were convicted for the possession of owl feathers and feet.[86] They violated a Virginia law that prohibited possession of wild bird parts but made exceptions for taxidermists, academics, researchers, museums, and educational institutions.[87] Because they possessed the owl parts as part of their Iroquois religion, they challenged the law as violating their free exercise of religion.[88] The Court of Appeals of Virginia held that the law impermissibly discriminated against religious practice because, "while allowing for a variety of legitimate secular uses of owl feathers, [the law] inexplicably denie[d] an exception for bona fide religious uses . . . ."[89] The court likened the exceptions to the individualized exemptions mechanism in *Sherbert* and concluded that the law was not neutral under *Lukumi* because it made exceptions for some secular uses while excluding religious uses.[90] The court then applied strict scrutiny: Even if the state's interest in protecting wild birds was compelling, the law was not narrowly tailored to the interest because exemptions were already made for secular purposes.[91] Thus, the Horens were granted an exemption from the law.[92]

The most prominent and thoroughly reasoned application of the secular exceptions principle is *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,[93] a Third Circuit case written by then-Judge Alito.[94] An internal policy of

83. *Id.* at 1557.
84. *Id.* at 1558.
85. 479 S.E.2d 553 (Va. Ct. App. 1997).
86. *Id.* at 553.
87. *Id.* at 557.
88. *Id.* at 553, 556.
89. *Id.* at 557.
90. *Id.*
91. *Id.* at 560.
92. *Id.*
93. 170 F.3d 359 (3d Cir. 1999).
94. No other federal court of appeals has applied the secular exceptions principle. The court in *Mitchell County v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012), states that the Eleventh Circuit used similar reasoning to *Fraternal Order of Police* in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), but *Midrash* should not be understood as a case that employs the secular exceptions principle. In *Midrash*, the town passed a zoning ordinance providing for retail shopping with the goal of protecting "retail synergy" in the business district. *Midrash*, 366 F.3d at 1220–22, 1234. The ordinance excluded religious assemblies from the area, but allowed private clubs and lodges. *Id.* at 1220. The court held that the city's ordinance as applied constituted a religious gerrymander because

the Newark Police Department required police officers to shave their beards, but it made an exception for officers who could not shave for medical reasons (typically because of *pseudofollicultis barbae*, a skin condition suffered predominately by black males[95]).[96] Two Sunni Muslims with a religious obligation to grow their beards sought an exemption from the policy, which the police department denied them.[97] They argued that the department's refusal to make religious exemptions from its no-beards policy should be reviewed under strict scrutiny because the department discriminated against their religious practice by making secular, but not religious, exceptions to its policy.[98]

The Third Circuit agreed.[99] First, the court rejected the department's argument that the court should not apply strict scrutiny because a medical exception is not a mechanism for individualized exemptions like the one in *Sherbert* and its progeny:

> While the Supreme Court did speak in terms of "individualized exemptions" in Smith and Lukumi, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but

its goal of retail synergy was applied "only against religious assemblies, but not other non-commercial assemblies." *Id.* at 1234. Thus, like *Lukumi*, the ordinance in *Midrash* specifically targeted and discriminated against religious practice, whereas the categorical exceptions discussed in this Subpart, though secular, do not carve out all secular conduct in order to target religion. The same is true of the Sixth Circuit's decision in *Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012), in which the court decided that a jury could reasonably find targeted religious discrimination based on the ad hoc application of a university's antidiscrimination policy. Similarly, the Third Circuit's decision in *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 151–52 (3d Cir. 2002), involved selective enforcement of a city ordinance that prohibited affixing materials to utility poles against Orthodox Jews, who were prohibited from affixing lechis (thin black strips designating where pushing and carrying is permitted on the Sabbath) to the utility poles. The town allowed almost every other affixation—house numbers, lost animal signs, holiday displays, church directional signs, and orange ribbons—but selectively enforced the ordinance against Orthodox Jews. *Id.* at 167. Thus, *Midrash*, *Ward*, and *Tenafly* did not hold that categorical secular exceptions trigger strict scrutiny; they correctly followed *Lukumi*'s direction to apply strict scrutiny where a law punishes religious conduct but excludes "almost all" secular conduct such that the law targets religious conduct for distinctive treatment. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

95. *See* Bradley v. Pizzaco of Nebraska, Inc., 939 F.2d 610, 613 (8th Cir. 1991) (finding that a plaintiff who challenged Domino's no-beards policy established a prima facie case of disparate impact because the policy made no exception for those unable to shave because of *pseudofollicultis barbae*, from which about 50% of black males suffer and which does not affect white males as harshly).

96. *Fraternal Order of Police*, 170 F.3d at 360.

97. *Id.* at 360–61.

98. *Id.* at 364.

99. *Id.* at 363–65.

> instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.[100]

The court then rested its decision on *Lukumi* and quoted in full this excerpt from the case:

> As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of "religious hardship" without compelling reason. Respondent's application of the test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus religious practice is being singled out for discriminatory treatment.[101]

Just like *Lukumi*, the court asserted, the police department had devalued the plaintiffs' religious reasons for wearing beards by judging them to be less important than medical reasons, so "the decision to provide medical exemptions while refusing religious exemptions [was] sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*."[102]

Last, the court responded to the police department's argument that granting the exemption would be inconsistent with *Smith* because there was a prescription exception to the peyote prohibition that did not prompt the Court to apply strict scrutiny in that case:

> The Department's decision to allow officers to wear beards for medical reasons undoubtedly undermines the Department's interest in fostering a uniform appearance through its "no-beard" policy. By contrast, the prescription exception to Oregon's drug law does not necessarily undermine Oregon's interest in curbing the unregulated use of dangerous drugs. Rather, the prescription exception is more akin to the Department's undercover exception, which does not undermine the Department's interest in uniformity because undercover officers obviously are not held out to the public as law enforcement personnel. The prescription exception and the undercover exception do not trigger heightened scrutiny 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.[103]

100. *Id.* at 365.
101. *Id.* at 364–65 (emphasis omitted) (quoting Church of the Lukumi Bablu Aye, Inc. v. City of Haileah, 508 U.S. 520, 537–38 (1993)).
102. *Id.* at 365.
103. *Id.* at 366 (citations omitted) (internal quotation marks omitted).

Based on that reasoning, the court applied strict scrutiny.[104] The court considered the department's asserted interests in uniformity of appearance, public identification of police officers (and therefore public safety), and police force morale, but it found that, even if those interests were important enough, the no-beards policy was not sufficiently tailored to any of them.[105] Wearing a beard for medical reasons undermined uniformity, identification, and morale just as wearing a beard for religious reasons would, so the policy was underinclusive with respect to each of the asserted interests.[106] Thus, the department must exempt those who wear beards for religious reasons.[107]

The Third Circuit revisited the issue in *Blackhawk v. Pennsylvania*.[108] The Pennsylvania Game Commission charged fifty dollars for permits required to possess exotic wildlife, but it did not require zoos or "nationally recognized circuses" to carry permits.[109] The Commission also waived the permit fee for: (1) animal possession consistent with the intent of the Game and Wildlife Code, which the Commission interpreted as possession intended for release into the wild, and for (2) Native Americans possessing a Bureau of Indian Affairs identification card, who were entitled to exemptions under federal law.[110] Blackhawk, an Iroquois who did not possess a Bureau of Indian Affairs identification card, sought an exemption from the permit fee for bears that he possessed for Native American religious purposes.[111]

The court held that Pennsylvania's permit regime was not generally applicable for two reasons. First, it created a mechanism of individualized exemptions because it "[did] not categorically disfavor the keeping of wild animals in captivity," the policy allowed discretionary exceptions and even allowed anyone

104. *Id.* at 365. The court actually purported to apply intermediate scrutiny rather than strict scrutiny: "While *Smith* and *Lukumi* speak in terms of strict scrutiny when discussing the requirements for making distinctions between religious and secular exemptions, we will assume that an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department's actions cannot survive even that level of scrutiny." *Id.* at 366 n.7 (citations omitted). The exact level of scrutiny makes no difference for the purposes of this Comment. Because most cases occur outside the public employment context, because *Lukumi* applies strict scrutiny, and because other cases that employ the secular exceptions principle apply strict scrutiny, this Comment uses strict scrutiny throughout.

105. *Id.* at 366–67.

106. *Id.*

107. The Supreme Court denied certiorari later that year. City of Newark v. Fraternal Order of Police Newark Lodge No. 12, 528 U.S. 817 (1999).

108. 381 F.3d 202, 211 (3d Cir. 2004).

109. *Id.* at 205.

110. *Id.*

111. *Id.*

to possess wild animals if they paid a fifty-dollar fee.[112] Second, the categorical exceptions for zoos and circuses independently triggered strict scrutiny because they made the law underinclusive: They undermined Pennsylvania's interests in raising revenue and discouraging possession of wild animals at least as much as Blackhawk's possession would.[113] The court then proceeded to apply strict scrutiny.[114] The state's asserted interests in promoting the welfare and prosperity of wildlife populations and maintaining the fiscal integrity of its permit fee system were not compelling because the law allowed certain secular conduct that undermined the interests.[115] Similarly, the law was not narrowly tailored to the interests because, as already found by the court, it was underinclusive: Zoos and circuses detracted from the prosperity of wildlife populations and the fiscal integrity of the permit fee system, but they were not required to have permits.[116] Thus, the court granted Blackhawk an exemption from the permit fee.[117]

The most recent and far-reaching case to apply the secular exceptions principle is *Mitchell County v. Zimmerman*,[118] a 2012 decision by the Supreme Court of Iowa. Mitchell County passed an ordinance that prohibited driving on hard-surfaced roadways with steel-cleated wheels (among other types), but it made an exception for school buses and fire department emergency vehicles.[119] Zimmerman received a citation for operating a tractor in violation of the ordinance, and he sought an exemption because, as a member of the Old Order Groffdale Conference Mennonite Church, his religion forbade him from driving tractors without steel-cleated wheels.[120] The court held that the ordinance was underinclusive, and therefore not generally applicable, because of the secular exceptions for school buses and emergency vehicles.[121] The ordinance could only survive if it passed strict scrutiny, and since it was not narrowly tailored to the county's interest in road

112. *Id.* at 210.
113. *Id.* at 211 ("Yet under the statute noted above, all zoos are exempted. Accordingly, the challenged fee provisions are substantially 'underinclusive' with respect to its asserted goals, and they thus fail the requirement of general applicability.").
114. *Id.* at 213.
115. *Id.* at 213–14.
116. *Id.* at 214 ("[E]ven if the Commonwealth's asserted interests are compelling, the fee scheme is not narrowly tailored to further them. . . . [T]he scheme is substantially underinclusive for the reasons already set out.").
117. *Id.*
118. 810 N.W.2d 1 (Iowa 2012).
119. *Id.* at 4–5.
120. *Id.* at 4.
121. *Id.* at 16.

preservation (assuming arguendo that road preservation was a compelling interest) because "other events cause road damage," the court granted the exemption.[122]

Although *Mitchell* seems to be the same as any of the cases above, it departed from those cases in one important respect. The other cases used the secular exceptions to infer discriminatory intent by the government.[123] No matter how unfounded that inference is, it brought the cases closer to *Lukumi*, in which the court inferred discriminatory intent from religious gerrymandering.[124] In contrast, the court in *Mitchell* "agree[d] with the district court that religious practice [was] not being intentionally discriminated against."[125] Thus, as discussed in Part II.B, *Mitchell* represents an even further departure from *Lukumi* because the court found that there was no discriminatory intent but held that the First Amendment compels religious exemptions when a law contains secular exceptions.

II. INCONSISTENCY WITH THE CURRENT DOCTRINE

This Part analyzes whether the secular exceptions principle conforms to current religious exemptions doctrine. It concludes that the secular exceptions principle is not only a dramatic extension of the current doctrine, but it is actually inconsistent with it.

A. Are Categorical Secular Exceptions Individualized Exemptions Mechanisms?

Cases that employ the secular exceptions principle often justify their application of strict scrutiny by equating categorical secular exceptions with the system

122. *Id.* at 17–18 ("Given the lack of evidence of the *degree* to which the steel lugs harm the County's roads, the undisputed fact that other events cause road damage, and the undisputed fact that the County had tolerated steel lugs for many years before 2009, it is difficult to see that an outright ban on those lugs is necessary to serve a compelling state interest."). Though the court here lumped together three reasons that the ordinance was not narrowly tailored to a compelling interest, only the underinclusiveness caused by the secular exceptions speaks to tailoring. The degree of harm and the fact that the harm was tolerated before the ordinance existed might suggest whether the interest in the law is compelling, but they do not show that the law is insufficiently tailored to the interest. That "other events" cause road damage cannot refer to those outside the county's control, like weather, so the only factor to make tailoring insufficient is the underinclusiveness caused by the secular exceptions.

123. *See, e.g.*, Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) ("We conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.").

124. *See supra* notes 60–72 and accompanying text.

125. *Mitchell*, 810 N.W.2d at 10.

of individualized exemptions at issue in *Sherbert*[126] and the other unemployment compensation cases. As detailed in Part I.A, *Smith*[127] did not overrule *Sherbert* and its progeny, but it limited them to cases of individualized exemptions mechanisms (if not exclusively to the unemployment compensation context).[128] "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field," the Court said in *Smith*, "we would not apply it to require exemptions from a generally applicable criminal law."[129] The question, then, is whether laws with categorical secular exceptions should be treated like laws with individualized exemptions mechanisms (which trigger strict scrutiny) or like generally applicable laws with no exceptions (from which courts grant no exemptions pursuant to *Smith*).

Rader[130] is a good example of the difference between an individualized exemptions mechanism and a categorical exception. In that case, the university's rule contained categorical exceptions for students over nineteen and married students, but the university also granted exemptions on an ad hoc basis to certain students, such as a student who wished to drive his pregnant sister to classes at UNK and a student who wished to help care for her great-grandmother.[131] The court applied strict scrutiny because the university's ad hoc application of its rule created a mechanism of individualized exemptions that risked discrimination against religious practice.[132] The court went beyond this narrow approach, however, when it implied that any categorical secular exception, like a medical exception, triggers strict scrutiny: "If a law or policy provides exemptions for certain reasons, such as medical treatment, then it should provide similar exemptions for religious purposes, unless the state can show an overriding compelling interest."[133]

Similar to the *Rader* court's reasoning, Richard Duncan argues that, if individualized exemptions trigger strict scrutiny, surely wholesale categorical

126. Sherbert v. Verner, 374 U.S. 398 (1963).
127. Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).
128. *See Smith*, 494 U.S. at 884; *see also Mitchell*, 810 N.W.2d at 8 ("*Smith* distinguished *Sherbert* as an unemployment case.").
129. *Smith*, 494 U.S. at 884.
130. Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996).
131. *Id.* at 1544, 1547. Other ad hoc exemptions were granted to "a student who was depressed and experienced headaches; a student with learning disabilities; a student who was mourning the death of a parent and a close friend; . . . and a student who was a noncustodial parent entitled to visitation with his son on alternating weekends." *Id.* at 1547.
132. Indeed, the administrator who evaluated Rader's application decided that Rader's objections to the residence halls were "simply not true" based on his personal experience as a Baptist minister. *Id.* at 1554.
133. *Id.* at 1555 (internal quotation marks omitted) (citing Thomas J. Cunningham, *Considering Religion as a Factor in Foster Care in the Aftermath of* Employment Division v. Smith, 28 U. RICH. L. REV. 53, 67 (1994)).

exceptions should.[134] The court in *Fraternal Order of Police*[135] agreed with his argument: "If anything, [the concern that the government is treating secular motivations as more important than religious motivations] is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection."[136]

But the reason for subjecting individualized exemptions mechanisms to strict scrutiny is not the government's treatment of secular motivations as more important than religious motivations. Laws treat secular interests as more important than religious interests whenever a law burdens religious practice, whether the law contains exceptions or not.[137] Instead, the concern is that individualized exemptions mechanisms allow for too much government discretion in deciding whether to grant exemptions. "The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons

134. Duncan, *supra* note 10, at 861 n.89. Richard Duncan makes this argument based on his view that the rule for individualized exemptions mechanisms is a mere subset of general applicability. If a few individual exemptions make the law not generally applicable, he argues, surely wholesale secular exceptions make the law not generally applicable. *Smith*'s concern with individualized exemptions mechanisms, however, was not lack of general applicability, but that they give the government too much discretion: "The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . [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." Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990). I address the argument that laws with categorical secular exceptions lack general applicability in Part II.D.

135. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).

136. *Id.* at 365. The court cites *Lukumi* for this proposition, but *Lukumi* does not support the court's argument. The portion of *Lukumi* that *Fraternal Order of Police* cites and quotes says that the "categorical" treatment of *religious* conduct, not *secular* conduct, is improper: "All 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. The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being *pursued only against conduct with a religious motivation*." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542–43 (1993) (emphasis added) (citation omitted) (internal quotation marks omitted). Other circuit courts have interpreted *Lukumi* in this manner. *See, e.g.*, Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1309 (11th Cir. 2006) ("To prove this kind of statutory violation, Primera would have to show that the challenged zoning regulation separates permissible from impermissible assemblies or institutions in a way that burdens 'almost only' religious uses."). Thus, *Lukumi* focused on the categorical treatment of religion to infer targeted religious discrimination. I address the argument that secular exceptions constitute targeted religious discrimination in Part II.B.

137. Thus, under the logic of *Fraternal Order of Police*, all laws that burden religious practice—not just those that contain secular exceptions—should be subject to strict scrutiny. This is exactly what the Court rejected in *Smith*.

for the relevant conduct. . . . [A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment . . . ."[138]

If the government is able to exercise substantially unguided discretion in determining how and against whom a law will be enforced, there is "ample opportunity for discrimination against religion in general or unpopular faiths in particular."[139] The risk of bias and discrimination by the government is such that, "[i]f a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."[140] Thus, when the government chooses to exercise unfettered authority against religious practice, it must justify its decision under strict scrutiny.[141] Categorical secular exceptions, on the other hand, should not be subjected to strict scrutiny because their application is not discretionary; in fact, the government exercises no more discretion in deciding whether an exception applies than it does in deciding whether the law applies at all. A government decision regarding whether a certain exception applies—whether someone growing a beard has a medical condition, whether someone who possesses a bear is operating a zoo, or whether someone driving with steel-cleated wheels is driving a school bus—leaves substantially no opportunity for government discrimination against religion. Thus, the *Rader* court should have applied strict scrutiny only because the university granted ad hoc exemptions, but not because the university policy enumerated certain specific exceptions.

Critics of the distinction between individualized exemptions mechanisms and categorical secular exceptions need not look far for a similar distinction. In the free speech context, the constitutionality of laws that allow government officials to license expressive activity depends on the amount of discretion the law provides. While the unconstrained discretion of government officials to issue permits is unconstitutional because of the risk of content-based discrimination, licensing schemes that sufficiently limit the authority of government officials can be constitutional.[142] Similarly, laws that allow government discretion that

138. *Smith*, 494 U.S. at 884.

139. *See* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 193–94 (2002); Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith*,* Sherbert*, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1187 (2005); Laycock, *supra* note 75, at 48.

140. Bowen v. Roy, 476 U.S. 693, 708 (1986).

141. Duncan, *supra* note 139, at 1187.

142. *Compare* Lovell v. City of Griffin, 303 U.S. 444, 447, 451–52 (1938) (invalidating an ordinance that prohibited the distribution of literature of any kind without a permit from the city manager because it was purely discretionary), *with* Cox v. New Hampshire, 312 U.S. 569, 571, 576 (1941) (upholding a licensing scheme that allowed government officials to

risks discrimination against religious practice are subject to strict scrutiny, whereas laws that contain one or few categorical secular exceptions sufficiently constrain the discretion of government officials such that they fall under the rule of *Smith*.[143]

B. Do Laws With Secular Exceptions Suggest Targeted Religious Discrimination?

Of course, a law that uses various secular exceptions to leave only similar religious conduct prohibited suggests targeted religious discrimination that *Lukumi*[144] described as "religious gerrymandering."[145] But some laws contain single (or few) secular exemptions that leave much of both religious and secular conduct subject to the law.[146] Should courts infer targeted religious discrimination from such laws?

Legislatures typically use exceptions not to intentionally burden religious practice, but to balance competing interests. If the legislature finds that helping those with a medical condition is worth sacrificing some police force uniformity,[147] or that the need for school buses and emergency vehicles to use steel cleats is worth the damage to the roads, its decision does not speak of intentional religious discrimination. The court in *Mitchell*[148] recognized that "Mitchell County enacted the ordinance, not to persecute members of a particular faith, but to protect its $9 million investment in newly repaved roads."[149] The other cases employing the

issue permits for parades based on time, place, and manner restrictions). *See also* Duncan, *supra* note 139, at 1187 n.66.

143. *See* Bowen v. Roy, 476 U.S. 693, 707 (1986) ("Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference.").

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

145. *Id.* at 535.

146. *See supra* Part I.B.

147. The police department in *Fraternal Order of Police* may have actually provided the medical exception to avoid fighting lawsuits under the Americans with Disabilities Act and Title VII antidiscrimination laws. *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) (rejecting the argument that the department's distinction between medical exemptions and religious exemptions did not represent an impermissible value judgment because medical exemptions were made only to comply with the Americans with Disabilities Act); Bradley v. Pizzaco of Nebraska, Inc., 939 F.2d 610, 613 (8th Cir. 1991) (finding that a plaintiff who challenged Domino's no-beards policy established a prima facie case of disparate impact under Title VII because the policy made no exception for those unable to shave because of *pseudofolliculitis barbae*, from which about 50 percent of black males suffer and which does not affect white males as harshly).

148. Mitchell Cnty. v. Zimmerman, 810 N.W.2d 1 (Iowa 2012).

149. *Id.* at 10.

secular exceptions principle, on the other hand, inferred targeted religious discrimination from the secular exceptions,[150] but this inference is inconsistent with *Smith* and *Lukumi*.

Laws with specific secular exceptions surely have an adverse impact on religious practice, but "adverse impact will not always lead to a finding of impermissible targeting."[151] The Court in *Smith* likened religious exemptions to equal protection jurisprudence: Just as race-neutral laws that have the effect of disproportionately disadvantaging a particular racial group do not trigger strict scrutiny, neither do generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice.[152] All laws that incidentally burden religious practice, whether they contain exceptions or not, treat certain secular interests as more important than religious interests, and laws with specific secular exceptions place only as much of an incidental burden on religious practice as do laws with no secular exceptions. The burden that laws with secular exceptions place on religion, like the burden that any neutral and generally applicable law places on religion, is merely coincidental. And "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense."[153] Thus, it does not seem that the real concern in *Smith* and *Lukumi* was the government deciding that secular interests are more important than religious interests. So long as burdening religious practice is "not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[154]

C. Are Laws With Secular Exceptions Not Neutral?

Justice Scalia in his concurring opinion in *Lukumi* understands "neutrality" as facial neutrality.[155] If the text of the law refers to the conduct in both a secular

150. *See, e.g.*, *Fraternal Order of Police*, 170 F.3d at 365.
151. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993).
152. Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 886 n.3 (1990) (citing Washington v. Davis, 426 U.S. 229 (1976)).
153. *Id.* at 885 (citations omitted) (internal quotation marks omitted) (citing Reynolds v. United States, 98 U.S. 145, 167 (1878)).
154. *Id.* at 878.
155. *See Lukumi*, 508 U.S. at 557 (Scalia, J., concurring) ("In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e.g.,* a law excluding members of a certain sect from public benefits) . . . ." (citations omitted)).

and religious context, it is facially neutral.[156] Under this interpretation, laws with secular exceptions easily pass the neutrality test: A rule of "no beards except for medical reasons" refers equally to secular and religious conduct.[157]

The majority in *Lukumi*, however, did not end its analysis at facial neutrality. It evaluated whether "the object or purpose of a law is the suppression of religion or religious conduct."[158] "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . ."[159] As the previous Subpart argues, laws with categorical secular exceptions do not on their face suggest that religious discrimination is the purpose of the law.[160] Whether courts should engage in a deeper investigation of a law's purpose by analyzing legislative history or lawmakers' intent is part of a larger debate.[161] But even if the Court were willing to conduct such an investigation, it certainly would not find that all laws with categorical exceptions have religious discrimination as their objective. The court in *Mitchell* acknowledged that much: "Mitchell County enacted the ordinance, not to persecute members of a particular faith, but to protect its $9 million investment in newly repaved roads."[162] Thus, if the neutrality requirement aims to invalidate those laws whose purpose is religious discrimination, the secular exceptions principle is dramatically overbroad, because it does not require any evidence of discriminatory purpose—it simply asserts that exempting certain secular conduct, but not analogous religious conduct, is discriminatory in itself.

The court in *Mitchell* rightly found that the ordinance prohibiting steel-cleated wheels, even with the secular exceptions for school buses and emergency vehicles, was neutral.[163] Similar to *Lukumi*, the court analyzed the issue as "whether religious practice [was] being singled out for discriminatory treatment."[164] Because the legislature did not religiously gerrymander the ordinance

156. *Id.* at 534 (majority opinion) (finding that "sacrifice" and "ritual" were facially neutral because they also have secular meanings).
157. *Cf.* Mitchell Cnty. v. Zimmerman, 810 N.W.2d 1, 10 (Iowa 2012) (internal quotation marks omitted) ("[T]he language of the statute refers to the use of steel wheels in a secular and nonreligious context. Therefore, the ordinance is facially neutral.").
158. *Lukumi*, 508 U.S. at 534.
159. *Id.* at 533.
160. *See supra* Part II.B.
161. Justice Scalia, joined by Chief Justice Rehnquist, refused to join the part of the *Lukumi* opinion in which the Court analyzed legislative history, so that section failed to garner a majority. *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring).
162. *Mitchell*, 810 N.W.2d at 10.
163. *Id.* at 10, 15.
164. *Id.* at 10.

to target religious conduct, and because there was no other evidence of intentional discrimination, the court held that the ordinances were operationally neutral.[165]

It is possible to read the neutrality requirement more broadly than targeted religious discrimination, but to the extent courts seek to treat laws as nonneutral because they treat religious motivations with less import than secular motivations, the argument is the same as the one over general applicability, to which I now turn.[166]

D. Are Laws With Secular Exceptions Not Generally Applicable?

Because the neutrality inquiry is relatively narrow, the general applicability requirement does most of the work in cases that employ the secular exceptions principle.[167] The cases rely heavily on *Lukumi*, but the Court in that case did "not define with precision the standard used to evaluate whether a prohibition is of general application" because the ordinances "[fell] well below the minimum standard necessary to protect First Amendment rights."[168] Thus, it is unclear exactly how the Court understands the general applicability requirement.

While *Smith* provides no real analysis of the general applicability requirement, *Lukumi* focuses on underinclusiveness. The City of Hialeah asserted interests in public health and preventing cruelty to animals to justify its animal cruelty laws, but the law did not cover almost any secular conduct that implicated those interests, like hunting or slaughter for food.[169] Because they covered killings motivated by religious practice, but almost no secular killings that implicated the interests, the ordinances were not generally applicable.[170] Underinclusiveness can show discriminatory intent if the law's application undermines the state's purported interest so much that it suggests that animosity toward religion, rather than the government's purported interest, was the true motivation behind the law.[171] This is precisely the manner in which

165. *Id.*

166. *Lukumi* recognized that the two requirements are "interrelated" and "substantially overlap." *Lukumi*, 508 U.S. at 531, 557.

167. *See supra* Part I.B; *see also* Duncan, *supra* note 10, at 866.

168. *Lukumi*, 508 U.S. at 564.

169. *Id.* at 545.

170. *Id.* ("[E]ach of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances 'ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.'" (second and third alterations in original)).

171. *Id.* at 542. ("The pattern we have recited discloses animosity to Santeria adherents and their religious practices . . . ."). The majority opinion even relied on various statements made by the city council to show the discriminatory purpose behind the ordinances, but that particular part of the opinion did not garner a majority of the Court. *Id.* at 540–42.

Justice Scalia understands the general applicability requirement: "[T]he defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment."[172] Thus, the general applicability requirement uses underinclusiveness to smoke out targeted religious discrimination. This understanding of the general applicability requirement makes religious exemptions jurisprudence parallel to equal protection jurisprudence by essentially requiring plaintiffs to show discriminatory intent in order to trigger strict scrutiny.[173] But if a law does not lead to an inference of intentional discrimination—if nothing in a law's design, construction, or enforcement targets religious practice—the law is generally applicable, and it is not subject to strict scrutiny. As discussed in Part II.B, laws with secular exceptions do not suggest targeted religious discrimination, so they are generally applicable.

Duncan and the cases that apply the secular exceptions principle understand the general applicability requirement more broadly.[174] Duncan derives the following general formula from *Lukumi*: "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.'"[175] The first problem with this understanding is its emphasis on degree: What exactly should a court look for to determine the "degree" to which conduct endangers a state interest or to determine the "substantiality" of underinclusiveness? On one hand, if "substantial" means that the law covers mostly religious conduct while allowing all or most secular conduct, then it is just a reiteration of the understanding described above.[176] On the other hand, "greater degree" and "substantiality" could depend on the number of instances the exception allows, or how serious the deviation is from the stated interest, but those standards seem fatally unwieldy, and no court has applied them.[177]

172. *Id.* at 557 (Scalia, J., concurring).

173. *See* Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 886 n.3 (1990) (citing Washington v. Davis, 426 U.S. 229 (1976)).

174. *See* Duncan, *supra* note 10, at 867 ("[S]ome 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.").

175. *Id.*

176. *See supra* Part II.A–II.B.

177. The court in *Mitchell*, for instance, at one point phrases the issue as whether "the secular exemptions threaten the statutory purposes to an equal or greater degree than a religious exemption." Mitchell Cnty. v. Zimmerman, 810 N.W.2d 1, 11 (Iowa 2012). But the exception for school buses and emergency vehicles seems to undermine the county's interest to a low degree because the county

Unsurprisingly, neither Duncan nor the cases that employ the secular exceptions principle emphasize the "substantiality" of the underinclusiveness. Instead, they conclude that any law with an exception that undermines the law's interest is not generally applicable.[178] This understanding of the general applicability requirement creates two distinct problems. First, it makes the test too strong: If any underinclusiveness triggers strict scrutiny, and underinclusive laws are not narrowly tailored to the government's interest, courts will automatically grant religious exemptions from every law with secular exceptions that undermine the law's interest. In other words, under the secular exceptions principle, secular exceptions both trigger strict scrutiny and cause the law to fail strict scrutiny. And since nearly every law contains secular exceptions, many of which undermine the law's overall interest, the Constitution would compel religious exemptions from nearly every law. This result is exactly what *Smith* meant to eliminate.[179] I elaborate on this argument further in Part III.

Second, parties and courts can easily frame a government interest to include or exclude certain exceptions. Take as an example *Fraternal Order of Police*,[180] in which the court applied strict scrutiny because the medical exception to the no-beards policy undermined the police department's interests in uniformity of appearance, public identification of police officers, and police force morale.[181] Suppose the Newark Police Department framed its interest slightly differently as "having a clean, healthy, and well-kempt looking police force," and that shaven police officers look clean, healthy, and well-kempt compared to those with beards, and those with beards look clean, healthy, and well-kempt compared to those with *pseudofolliculitis barbae*.[182] Rather than undermining the interest, the medical exception is now consistent with the state's interest and actually

controls those vehicles and can decide when it is appropriate to use steel cleats, whereas the religious exemptions might undermine the interest to a high degree if there are many objectors in the county and they frequently drive their tractors on the public highways. Thus, it is difficult to take the degree requirement seriously as a limiting factor in cases that invoke the secular exceptions principle.

178. *See* Duncan, *supra* note 10, at 868 ("[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."); *supra* note 177 and accompanying text.

179. Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990) ("To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense." (citations omitted) (internal quotation marks omitted)).

180. 170 F.3d 359 (3d Cir. 1999).

181. *Id.* at 366.

182. *See Pseudofolliculitis Barbae*, DERMATOPEDIA, http://www.dermatopedia.com/pseudofolliculitis-barbae (last updated Nov. 6, 2008).

furthers it. Since the exception no longer undermines the asserted interest, the law is not underinclusive, so it is generally applicable. The ease of recasting the interest to include or exclude the exception suggests that courts might apply the rule ad hoc. Thus, the sounder understanding of the general applicability requirement is that it looks at a law's design, construction, and enforcement to smoke out targeted religious discrimination.

Moreover, the prescription exception to the peyote prohibition in *Smith* further suggests that laws can be generally applicable despite secular exceptions that undermine their interest. The Oregon law at issue in *Smith* prohibited the use of peyote "unless the substance ha[d] been prescribed by a medical practitioner."[183] This prescription exception seems analogous to the medical exception in *Fraternal Order of Police*, but *Fraternal Order of Police* distinguished *Smith*: "[T]he prescription exception to Oregon's drug law does not necessarily undermine Oregon's interest in curbing the unregulated use of dangerous drugs," whereas "[t]he Department's decision to allow officers to wear beards for medical reasons undoubtedly undermines the Department's interest in fostering a uniform appearance . . . ."[184]

The first issue with the court's argument is that it framed Oregon's interest as "curbing the unregulated use of dangerous drugs."[185] None of the various opinions in *Smith* characterized Oregon's interest that way; they referred to Oregon's interest as "prohibiting the possession of peyote by its citizens," "abolishing drug trafficking," or "protecting the health and safety of its citizens from the dangers of unlawful drugs."[186] Including the word "unregulated" in the interest seems to save any exception. For example, in *Mitchell*, the exceptions for school buses and fire emergency vehicles do not undermine an interest in preventing *unregulated* road damage because school buses and emergency vehicles are regulated.[187]

But no matter which of these interests a party asserts or a court adopts, the prescription exception in *Smith* does undermine Oregon's interest. Prescription drugs cause the increased possession,[188] trafficking,[189] and abuse of illegal

183. *Smith*, 494 U.S. at 874.
184. *Fraternal Order of Police*, 170 F.3d at 366.
185. *Id.*
186. *Smith*, 494 U.S. at 904–06.
187. The court actually framed the interest as "preserving and protecting [the] highways." Mitchell Cnty. v. Zimmerman, 810 N.W.2d 1, 8 (Iowa 2012).
188. *See* Dana A. Forgione, Patricia Neuenschwander, & Thomas E. Vermeer, *Diversion of Prescription Drugs to the Black Market: What the States Are Doing to Curb the Tide*, 27 J. HEALTH CARE FIN. 65 (2001) (addressing the various ways that prescription drugs are diverted to the black market).
189. *See id.*; Parija Kavilanz, *Prescription Drugs Worth Millions to Dealers*, CNN MONEY (June 1, 2011, 8:51 AM), http://money.cnn.com/2011/06/01/news/economy/prescription_drug_abuse (discussing how a recent increase in prescription drug abuse has lead prescription drug trafficking to become

drugs.[190] The Court—and specifically the author of *Smith*—has recognized this phenomenon in another context: "[M]arijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State."[191] Thus, the prescription exception undermined Oregon's interests in curbing the unregulated use of dangerous drugs, prohibiting possession, prohibiting trafficking, and preserving health and safety.

Since the prescription exception undermined Oregon's interests in its drug law, the exception in *Smith* is indistinguishable from the one in *Fraternal Order of Police*. The prescription exception, however, did not prevent the law from being generally applicable even though Oregon treated certain secular motivations as more important than religious motivations.[192] *Smith* effectively forecloses the argument that exceptions that undermine the state's interest automatically trigger strict scrutiny, so the secular exceptions principle is inconsistent with current religious exemptions doctrine.

III. THE PROBLEM WITH UNDERINCLUSIVENESS: INEVITABLE EXTENSIONS OF THE SECULAR EXCEPTIONS PRINCIPLE

The exemptions in the secular exceptions cases may seem innocuous—why not let Muslim officers wear beards,[193] Native Americans keep animal parts,[194] or Groffdale Mennonites drive with steel-cleated wheels?[195] The problem is not the outcome of those specific cases;[196] the problem is the reasoning underlying

close to a billion-dollar industry); Jordan Wirfs-Brock, Lauren Seaton & Andrea Sutherland, *Colorado Medical Marijuana Surplus Leaks to Black Market*, DAILY CAMERA NEWS (July 31, 2010, 11:06 PM), http://www.dailycamera.com/news/ci_15644376 (noting that excesses of marijuana grown for medical purposes in Colorado (before the state legalized recreational use) went to feed the black market in Colorado and neighboring states).

190. *See Topics in Brief: Prescription Drug Abuse*, NAT'L INST. ON DRUG ABUSE, http://www.drugabuse.gov/publications/topics-in-brief/prescription-drug-abuse (last visited Apr. 6, 2015) (noting that, as of 2010, approximately seven million Americans abused prescription drugs, and one reason for the high number is increased availability).

191. Gonzales v. Raich, 545 U.S. 1, 40 (2005) (Scalia, J., concurring). The majority opinion agreed: "[T]he danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious." *Id.* at 32 (majority opinion).

192. *See* Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

193. *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999).

194. *See* Horen v. Commonwealth, 479 S.E.2d 553, 553 (Va. Ct. App. 1997).

195. *See* Mitchell Cnty. v. Zimmerman, 810 N.W.2d 1, 3 (Iowa 2012).

196. That some religious objections are innocuous may be more of a reason to leave them to the legislature. The legislature can grant specific exemptions without courts balancing the importance of

the secular exceptions principle. Under the secular exceptions principle, secular exceptions make a law underinclusive and therefore not generally applicable.[197] The lack of general applicability triggers strict scrutiny, so the court must grant the religious exemption unless the law is narrowly tailored to a compelling government interest. But the law cannot be narrowly tailored to the interest because it was already found to be underinclusive, so it necessarily fails the strict scrutiny test. Using underinclusiveness to trigger strict scrutiny therefore makes strict scrutiny "fatal in fact," and religious exemptions must be granted from nearly every law.[198]

Moreover, the legislature's inability to define a right in a single phrase should not dictate whether the Constitution compels religious exemptions.[199] Legislatures use exceptions to balance competing government interests, and the interest underlying the exception can be even more important than the interest underlying the law.[200] Legislatures should not be compelled to grant religious exemptions merely because they seek to balance two or more competing interests in a single law. This Part presents a variety of laws to which the secular exceptions principle would extend if courts take it seriously. There are many laws that belong in this Part—laws with numerous secular exceptions that religious objectors have challenged or could challenge, like tax,[201] copyright,[202] or conscription laws[203]—but those here are important and extensive laws common among the states and federal government.

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general laws against the significance of religious practice and without the Constitution compelling so many exemptions that "every citizen [] become[s] a law unto himself." *Smith*, 494 U.S. at 890. *But see* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1481 (1999) (noting that it can be difficult to get even uncontroversial exemptions if the group is small, unpopular, or not politically well-organized).

197. *See supra* Part II.D.

198. *See* Gillette v. United States, 401 U.S. 437, 452 (1971) ("Of course, this contention of de facto religious discrimination, rendering § 6(j) fatally underinclusive, cannot simply be brushed aside. The question of governmental neutrality is not concluded by the observation that § 6(j) on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses. Still a claimant alleging 'gerrymander' must be able to show the absence of a neutral, secular basis for the lines government has drawn.") (citations omitted).

199. *See* Volokh, *supra* note 196, at 1542.

200. *Id.*

201. *See* United States v. Lee, 455 U.S. 252 (1982) (rejecting an Amish employer's request for an exemption from social security taxes).

202. Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000) (holding that copyright laws did not violate the free exercise rights of a church that copied religious text for its members in violation of the Copyright Act).

203. *Gillette*, 401 U.S. 437 (rejecting the claim that the draft violated the religious objector's free exercise rights).

A. Antidiscrimination Laws

Antidiscrimination laws typically force businesses to treat people alike regardless of their race, sex, religion, or other protected status.[204] They have clashed with religious freedom throughout their history: Certain religious objectors have asserted the right to discriminate based on race,[205] sex,[206] marital status,[207] and sexual orientation,[208] among others.[209]

All antidiscrimination laws contain secular exceptions. The federal government exempts employers with fewer than fifteen employees from employment discrimination laws,[210] and many states exempt private membership clubs,[211] employers who do not operate for more than twenty weeks a year,[212] or all tax-exempt organizations.[213] If the goal of antidiscrimination laws is to eliminate discrimination against a protected group, each of these exceptions undermines that interest by allowing discrimination in certain cases.[214] Since the laws are underinclusive with respect to the state's interest in eliminating discrimination, the laws are not generally applicable. The antidiscrimination laws must then face strict scrutiny. Although the interest in eliminating discrimination is certainly compelling, the laws are not narrowly tailored to that interest because they are underinclusive.

204. *See, e.g.*, 42 U.S.C. § 2000e (2012).
205. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (rejecting the assertion that the Internal Revenue Service's construction of 501(c)(3) requirements violated a university's right to engage in racial discrimination on the basis of sincerely held religious beliefs).
206. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (finding that the Free Exercise Clause barred a suit by a nun who claimed discrimination based on her sex).
207. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994) (holding that laws prohibiting marital discrimination in housing did not violate a Christian objector's free exercise rights).
208. *See* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).
209. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) (upholding the ministerial exception, which allows religious organizations to discriminate on any grounds in hiring those who preach their beliefs).
210. 42 U.S.C. § 2000e(b) (2012).
211. *E.g.*, MD. CODE ANN., STATE GOV'T § 20-601(d)(3) (LexisNexis 2009).
212. *E.g.*, NEV. REV. STAT. ANN. § 613.310 (LexisNexis 2012).
213. *E.g.*, *id.* § 613.320 ("The provisions of NRS 613.310 to 613.435, inclusive, concerning unlawful employment practices related to sexual orientation and gender identity or expression do not apply to an organization that is exempt from taxation pursuant to 26 U.S.C. § 501(c)(3).").
214. As explained in Part II.C., the interest can be crafted to exclude the secular exception, such as by calling the interest "eliminating discrimination by large employers," but this results in ad hoc application of the rule and certainly cannot be the state's "general" interest. *See* Mitchell Cnty. v. Zimmerman, 810 N.W.2d 1, 14 (Iowa 2012).

Richard Duncan acknowledges that the secular exceptions principle compels religious exemptions from antidiscrimination laws. He argues that a Christian landlady's refusal to rent to a homosexual couple should be entitled to strict scrutiny, and "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."[215] Duncan's analysis equally applies to religiously motivated discrimination on the basis of any characteristic that antidiscrimination laws protect—the secular exceptions principle would thus grant religious exemptions to employers who seek to discriminate on the basis of race or sex (among other characteristics). A legislature's decision that countervailing rights control under certain conditions (such as the right of association in small businesses) or that a law will be difficult to enforce in certain instances should not in itself prevent the legislature from enforcing its laws against religiously motivated harmful conduct.[216]

The most recent clash between religious freedom and antidiscrimination laws concerns a religious right to discriminate based on sexual orientation.[217] In *Elane Photography, LLC v. Willock,*[218] a wedding photographer refused on religious grounds to photograph a same-sex marriage, and the plaintiff filed a discrimination claim with the New Mexico Human Rights Commission.[219] New Mexico exempts sales or rentals of single-family homes from its housing discrimination laws if the owner does not own more than three houses, so the photographer argued that the antidiscrimination law was not generally applicable because this exception impermissibly preferred the secular to the religious. But the New Mexico Supreme Court refused to apply strict scrutiny:

> Unlike the exemptions in *Lukumi Babalu Aye,* the exemptions [here] apply equally to religious and secular conduct. Neither subsection discusses motivation; homeowners who meet the criteria . . . are permitted to discriminate regardless of whether they do so on religious or nonreligious grounds. Therefore, the NMHRA does not target only

215. Duncan, *supra* note 10, at 880 (internal quotation marks omitted).
216. *See* Volokh, *supra* note 196, at 1542.
217. Ten states cover sexual orientation in their antidiscrimination laws and have no RFRA equivalent: California, Colorado, Delaware, Iowa, Maryland, Nevada, New Hampshire, New Jersey, Oregon, Vermont. *Compare* Eugene Volokh, *Religious Exemptions — A Guide for the Confused*, VOLOKH CONSPIRACY (Mar. 24, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/24/religious-exemptions-a-guide-for-the-confused, *with Non-Discrimination Laws: State by State Information - Map*, ACLU, https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map (last visited Apr. 6, 2015).
218. 309 P.3d 53 (N.M. 2013).
219. *Id.* at 60. New Mexico actually has a RFRA equivalent, but the New Mexico Supreme Court interpreted it not to apply in this case. *Id.* at 76.

> religiously motivated discrimination, and these exemptions do not prevent the NMHRA from being generally applicable. These exemptions also do not indicate any animus toward religion by the Legislature that might render the law nonneutral; similar exemptions commonly appear in housing discrimination laws, including the federal Fair Housing Act.[220]

The New Mexico Supreme Court effectively rejected the secular exceptions principle. The court correctly understood the general applicability requirement to trigger strict scrutiny of laws that target religious conduct or indicate animus. Laws with secular exceptions do not target religious conduct merely because they exempt some secular conduct that undermines the overall interest. States are divided over whether antidiscrimination laws should cover sexual orientation, but since New Mexico decided that they should, it should not be compelled to grant religious exemptions to its laws solely because it allows certain secular exceptions.

B. Controlled Substances Laws

Drug laws at both the federal and state levels prohibit the manufacture, importation, possession, use, and distribution of certain substances.[221] Medical use is a common secular exception to drug prohibition. While the federal government recognizes no medical use for Schedule I substances, Schedule II substances all have a recognized medical use and can be taken with a prescription.[222] Schedule II substances include many notorious narcotics, like cocaine, which can be used as a topical anesthetic;[223] methamphetamine, which is used in some attention deficit hyperactivity disorder medications;[224] and morphine, oxycodone, and other opioids, which are common analgesics.[225] State laws tend to mirror federal law. The two broadest medical exceptions in state drug laws are for marijuana and methadone use: Twenty-three states and the District of Columbia

220. *Id.* at 74.
221. *E.g.*, 21 U.S.C. §§ 841–43 (2012).
222. 21 U.S.C. § 1306.11(a) (2012) ("A pharmacist may dispense directly a controlled substance listed in Schedule II . . . .").
223. *See Cocaine*, AM. C. MED. TOXICOLOGY, http://www.acmt.net/Cocaine.html (last visited Apr. 6, 2015).
224. *See Methamphetamine*, DRUGS.COM, http://www.drugs.com/methamphetamine.html (last visited Apr. 6, 2015).
225. *See Do You Know . . . Prescription Opioids*, CENTRE FOR ADDICTION & MENTAL HEALTH, http://www.camh.ca/en/hospital/health_information/a_z_mental_health_and_addiction_information/oxycontin/Pages/opioids_dyk.aspx (last visited Apr. 6, 2015).

have legalized medical marijuana use,[226] and forty-seven states have methadone clinics, which typically require opiate addiction or extreme pain for legal use.[227]

Drug use is common in religious practice: Catholics use alcohol, many Native American tribes use tobacco or peyote, and Rastafarians use marijuana. In fact, some religions have originated around the use of drugs. The THC Ministry, the Church of Cognizance, and Temple 420 were founded with marijuana as their sacrament.[228] The Temple of the True Inner Light believes that psychedelics—DPT, psilocybin mushrooms, LSD, peyote, DMT—are the Flesh of God and that ingesting them leads to spiritual awakening.[229] Given the pluralistic nature of religious drug use in America, religious practice is bound to clash with controlled substances laws, and indeed it has. *Smith*,[230] of course, concerned the religious use of peyote by members of the Native American Church.[231] More recently, the Court held that RFRA[232] protected the religious use of hoasca, a tea brewed from DMT, by members of O Centro Espírita Beneficente Uniã do Vegetal.[233]

Under the secular exceptions principle, a religious objector could seek an exemption from the prohibition of any controlled substance that is permitted for medical purposes. Duncan asserts that medical exceptions to drug laws do not trigger strict scrutiny because the exception does not undermine the state's interest,[234] but as described in Part II.D, medical exceptions to drug laws cause the increased possession, trafficking, and abuse of illegal drugs, and courts have recognized that fact. Medical exceptions therefore undermine the state's interest in

226. *23 Legal Medical Marijuana States and DC*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last updated Jan. 8, 2015, 2:50 PM).

227. *Locate Methadone Treatment Centers by State*, METHADONE.US, http://www.methadone.us/methadone-clinics (last visited Apr. 6, 2015).

228. *See* Brad A. Greenberg, *Temple Weeds out 'Tree of Life'*, L.A. DAILY NEWS, http://www.dailynews.com/general-news/20070227/temple-weeds-out-tree-of-life (last updated Feb. 26, 2007); Stephen Lemons, *Arizona's Marijuana-Worshipping Church of Cognizance Seeks a Legal, Spiritual High*, PHX. NEW TIMES (Mar. 6, 2009, 12:03 PM), http://blogs.phoenixnewtimes.com/bastard/2009/03/arizonas_marijuana-worshipping.php; Mark Oppenheimer, *As a Religion, Marijuana-Infused Faith Pushes Commonly Held Limits*, N.Y. TIMES (July 19, 2013), http://www.nytimes.com/2013/07/20/us/marijuana-infused-faith-challenges-the-definition-of-religion.html. Other religions that use marijuana include the Ethiopian Zion Coptic Church, the Santo Daime church, the Way of Infinite Harmony, Cantheism, the Cannabis Assembly, Green Faith Ministries, the Church of the Universe, and the Free Life Ministry Church of Canthe. *Entheogenic Use of Cannabis: Other Modern Religious Movements*, WIKIPEDIA http://en.wikipedia.org/wiki/Entheogenic_use_of_cannabis (last visisted Apr. 6, 2015).

229. *The Psychedelic Is the Creator*, TEMPLE TRUE INNER LIGHT, http://psychede.tripod.com/psychede.html (last visited Apr. 6, 2015).

230. Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

231. *Id.* at 874.

232. 42 U.S.C. § 2000bb (2012).

233. *See* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 439 (2006).

234. Duncan, *supra* note 10, at 878.

drug laws, so drug laws are not generally applicable. They must undergo strict scrutiny, and even though the state's interests are compelling, the laws are not narrowly tailored to those interests because they allow certain secular conduct that undermines those interests.

In *Olsen v. Mukasey*,[235] a member of the Ethiopian Zion Coptic Church (EZCC) sought a religious exemption from federal and state controlled substances acts (CSAs) for his sacramental use of marijuana.[236] He argued "the CSAs are not generally applicable because they exempt the use of alcohol and tobacco, certain research and medical uses of marijuana, and the sacramental use of peyote."[237] The Eighth Circuit rejected this argument outright: "Olsen does not allege that the object of the CSAs is to restrict the religious use of marijuana or target the EZCC. . . . General applicability does not mean absolute universality. Exceptions do not negate that the CSAs are generally applicable."[238] The court ignored the law's underinclusiveness because Olsen had conceded the issue of religious targeting. The court did not focus on the law's disparate impact nor whether the medical exception undermined the government's interest—it flatly rejected that secular exceptions, without any evidence of targeted religious discrimination, trigger strict scrutiny. As discussed in Part II.D, to hold otherwise would run counter to *Smith*.

C. Statutory Rape Laws

Statutory rape laws typically outlaw sexual conduct with minors or deem persons below a certain age incapable of consenting to sexual conduct.[239] The laws have two main exceptions: First, an adult can legally have sex with his or her minor spouse; second, Romeo and Juliet exceptions allow sex between minors and adults within a certain age difference (typically the adult must be no more than three to five years older than the minor, but Utah has a range of ten years,[240] and Delaware has a range of fourteen years[241]). Hawaii's statute provides a common example:

235. 541 F.3d 827 (8th Cir. 2008).
236. *Id.* at 830.
237. *Id.* at 832.
238. *Id.*
239. *See, e.g.*, ALA. CODE § 13A-6-70 (LexisNexis 2005) ("[I]t is an element of every offense defined in this article . . . that the sexual act was committed without consent of the victim. . . . A person is deemed incapable of consent if he is . . . [l]ess than 16 years old . . . ."); CAL. PENAL CODE § 261.5 (Deering 2008) ("Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor.").
240. UTAH CODE ANN. § 76-5-401.2 (LexisNexis 2012).
241. DEL. CODE ANN. tit. 11, § 770 (2007).

> (1) A person commits the offense of sexual assault in the first degree if . . .
>
> (c) The person knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old; provided that:
>
> (i) The person is not less than five years older than the minor; and
>
> (ii) The person is not legally married to the minor.[242]

Thus, a twenty-year-old in Hawaii can legally have sex with a fourteen-year-old if they are married or a fifteen-year-old regardless of marital status.

Legal challenges to statutory rape laws by religious objectors tend to relate to polygamy.[243] In *State v. Fisher*,[244] for instance, the defendant took a second wife (not legally recognized by the state) who moved into the defendant's house along with her thirteen- or fourteen-year-old daughter, J.S.[245] The defendant took J.S as his third wife, and at the age of seventeen, she gave birth to his child.[246] A jury convicted him of sexual conduct with a minor.[247] As a member of the Fundamentalist Church of Jesus Christ of Latter-Day Saints, he argued that his prosecution violated his right to the free exercise of religion.[248] Specifically, he argued that Arizona's prohibition of polygamy was unconstitutional because absent the prohibition he would have legally married the minor and their sexual conduct would not have violated the state's statutory rape law.[249]

The defendant could also have made an argument based on the secular exceptions principle. Under Arizona law, the defendant could have legally had sex with J.S. if he were legally married to her or if he were no more than two years older than her.[250] These exceptions in no way suggest targeting of those who have sex with minors as part of religious practice, but they do show that the legislature treats certain secular conduct as more deserving of an exception than

242. HAW. REV. STAT. ANN. § 707-730 (LexisNexis 2013).
243. *See, e.g.*, State v. Holm, 137 P.3d 726 (Utah 2006).
244. 199 P.3d 663 (Ariz. Ct. App. 2008).
245. *Id.* at 665.
246. *Id.*
247. *Id.* at 666.
248. *Id.*
249. *Id.* The court rejected his argument under the binding precedent of *Reynolds v. United States*, 98 U.S. 145 (1878). *Id.* at 667.
250. ARIZ. REV. STAT. ANN. § 13-1407(D) (2008) ("It is a defense to a prosecution pursuant to § 13-1404 or 13-1405 that the person was the spouse of the other person at the time of commission of the act."); *id.* § 13-1407(F) ("It is a defense to a prosecution pursuant to §§ 13-1405 and 13-3560 if the victim is fifteen, sixteen or seventeen years of age, the defendant is under nineteen years of age or attending high school and is no more than twenty-four months older than the victim and the conduct is consensual.").

similar religious conduct. The *Mitchell*[251] court might suggest that these exceptions do not make the law underinclusive because they do not undermine the state's interest. But if the state's interest is in preventing sexual exploitation and abuse of children,[252] the exceptions do in fact undermine the interest because abuse can occur even when the minor and adult are legally married or when the adult is within the statutory age range. Larger ranges of Romeo and Juliet exceptions, like Delaware's, which allows a twenty-nine-year-old to have sex with a sixteen-year-old, especially undermine that interest. A twenty-nine-year-old who wants to have sex with a sixteen-year-old for secular reasons undermines any state interest as much as a thirty-year-old who wants to have sex with a sixteen-year-old for religious reasons.

If the exceptions undermine the interest, the law is underinclusive and therefore not generally applicable. The court must then consider whether the law is narrowly tailored to a compelling government interest. It seems unfathomable that statutory rape laws might fail strict scrutiny, but the law was already determined to be underinclusive. Since the law is underinclusive, it is not narrowly tailored, so the religious exemption must be granted.

Statutory rape laws and their exceptions present a good example of legislative balancing. They show that the legislature's interests cannot be defined in a single phrase; the legislature is balancing the protection of minors with what it judges to be relatively innocuous conduct and the importance of marriage. Legislatures should be able to do this balancing without providing religious exemptions to statutory rape laws.

D. Evidentiary Rules

Rules of evidence require witnesses to testify when subpoenaed,[253] but the federal rules and all state rules make exceptions for certain privileges.[254] California, for instance, exempts many relationships from the duty to testify: lawyer-client, spousal, physician-patient, therapist-patient, clergy-penitent, sexual assault counselor-victim, and human trafficking counselor-victim.[255]

251. Mitchell Cnty. v. Zimmerman, 810 N.W.2d 1, 13 (Iowa 2012).
252. Reply Brief of Appellant at 10, *Fischer*, 199 P.3d 663 (No. 1 CA-CR 06-0682), 2007 WL 4203447, at *10.
253. *See, e.g.*, CAL. EVID. CODE § 911 (Deering 2012) ("Except as otherwise provided by statute: (a) No person has a privilege to refuse to be a witness. (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.").
254. *See, e.g.*, *id.* §§ 950–1038; FED. R. EVID. 502.
255. *See* CAL. EVID. CODE §§ 950–1038 (Deering 2012).

Witnesses in a number of cases have refused to testify on religious grounds. A Jewish witness objected to testifying against her father, a Rabbi;[256] Jewish parents refused to testify against their son;[257] a Mormon refused to testify against his mother;[258] and a marijuana grower refused to testify against his dealer.[259] Some objectors may refuse to testify on the basis of religious relationships, like that with a minister. Under the secular exceptions principle, any of these religious objectors could have argued that the state cannot force them to testify against their religious beliefs while allowing secular exceptions for similar relationships. By privileging certain testimony, each of the exceptions undermines the state's interests in investigating and successfully prosecuting crimes,[260] obtaining testimony pursuant to subpoena,[261] and pursuing truth.[262] The law is underinclusive with respect to those interests, so it is not generally applicable, and the court must apply strict scrutiny. The law will fail strict scrutiny because the exceptions make the law underinclusive.

Of the circuit courts that have addressed an objection to the duty to testify, not one has granted the exemption, but none has addressed the secular exceptions principle directly.[263] All three have held that, despite the burden on religious practice, the state's rule compelling testimony is narrowly tailored to a compelling interest.[264] In doing so, the Tenth Circuit noted:

> Testimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence. As such, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.[265]

The privileges represent the legislature's decision that the privacy of certain relationships or fostering communication in those relationships transcends the

256. *In re* Grand Jury Empaneling of Special Grand Jury, 171 F.3d 826, 828 (3d Cir. 1999).
257. Port v. Heard, 764 F.2d 423, 431 (5th Cir. 1985).
258. *In re* Grand Jury Proceedings of John Doe v. United States, 842 F.2d 244, 245 (10th Cir. 1988).
259. *In re* Chinske, 785 F. Supp. 130, 133 (D. Mont. 1991).
260. *In re Grand Jury Empaneling*, 171 F.3d at 830.
261. *Id.* at 831.
262. *Port*, 764 F.2d at 433.
263. One district court actually granted a religious exemption from the duty to testify, but it was pre-*Smith*, so the court applied strict scrutiny without resorting to secular exceptions. *See In re* Grand Jury Proceedings (Greenberg), 11 Fed. R. Evid. Serv. 579 (D. Conn. 1982).
264. *See supra* notes 256–258.
265. *In re* Grand Jury Proceedings of John Doe v. United States, 842 F.2d 244, 246 (10th Cir. 1988) (citations omitted) (internal quotation marks omitted).

need for witness testimony. The legislature should not be compelled to grant religious exemptions simply because it recognizes that some secular interests override other secular interests in certain situations.

E. Animal Protection Laws

Laws protecting animals also frequently clash with religious practice. Many federal and state laws prohibit cruelty to animals or seek to protect particularly vulnerable animals.[266] But many of these laws carve out specific exceptions for certain groups or certain reasons for the cruelty. The Bald and Golden Eagle Protection Act, for instance, prohibits the possession or sale of any bald eagle part, but creates a permit regime to allow exemptions for certain Native American tribes.[267] Similarly, a New York statute prohibits cruelty to animals but provides an exception for "any properly conducted scientific tests, experiments or investigations, involving the use of living animals, performed or conducted in laboratories or institutions, which are approved for these purposes by the state commissioner of health."[268]

The major case involving animal cruelty laws was, of course, *Lukumi*.[269] But since that case involved laws that were gerrymandered to target religious practice, it does not answer the hypothetical case of a Santeria practitioner who challenges New York's animal cruelty statute under the theory that the secular exception for scientific tests impermissibly favors secular slaughter over religious slaughter. Under the secular exceptions principle, the religious exemption would be granted in this hypothetical case.[270] Scientific experimentation frequently involves injuring, maiming, mutilating, or killing animals, so the experimentation undermines the state's interest in preventing cruelty to animals, and the underinclusiveness

266. *E.g.*, 16 U.S.C. § 1531(b) (2012) ("The purposes of this chapter are to . . . provide a program for the conservation of such endangered species and threatened species . . . .").

267. 16 U.S.C.A. § 668a (2012). Although the law exempts certain tribes for religious purposes, the exemption applies only to those whom the government grants a permit, so those without a permit who possess bald eagle feathers for religious purposes fall outside the exemption. *Compare* Gibson v. Babbitt, 223 F.3d 1256 (11th Cir. 2000) (granting a religious exemption under the Free Exercise Clause), *and* United States v. Hardman, 297 F.3d 1116 (10th Cir. 2002) (same), *with* United States v. Antoine, 318 F.3d 919 (9th Cir. 2003) (denying the religious exemption under RFRA despite the permit regime).

268. N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 2004).

269. Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

270. Indeed, the Third Circuit in a case following *Fraternal Order of Police* held that the Constitution compelled a religious exemption for a Lokota Indian who held a black bear captive for religious purposes without paying the fee required by Pennsylvania law because the law exempted circuses and zoos. *See* Blackhawk v. Pennsylvania, 381 F.3d 202, 211 (3d Cir. 2004).

triggers strict scrutiny. The law must be narrowly tailored to a compelling state interest, but an interest in preventing cruelty to animals does not seem compelling when the state permits certain cruelty for secular reasons. Similarly, the law is not narrowly tailored when it permits a certain category of secular conduct that undermines the interest, so the court will grant the exemption.

The exception here, however, simply suggests that the state's interest in preventing cruelty to animals is not absolute. The state has decided that animal cruelty is undesirable, but the benefit of using animals for scientific purposes outweighs the cost of animal cruelty, so it limits the cruelty to those instances. The secular exceptions principle would allow a general prohibition on animal cruelty to burden religious practice, but it would compel a religious exemption when an exception for scientific testing exists. It seems arbitrary to allow a law to burden religious practice when one secular interest is at stake but compel religious exemptions when two secular interests are at stake. But that is precisely what the secular exceptions principle does: It prevents the legislature from balancing competing interests without opening the law to religious exemptions.

While not every case discussed in this Part addressed the secular exceptions principle, the examples in this Part demonstrate realistic challenges to some of the country's most important laws. If courts take the secular exceptions principle seriously, they will grant religious exemptions from these laws and others. That outcome has never been and cannot be the correct understanding of the Free Exercise Clause.[271]

IV. RECONCILING THE SECULAR EXCEPTIONS PRINCIPLE WITH RFRA

As the previous Part demonstrates, the secular exceptions principle could lead to exemptions from some of the country's most important laws. But if RFRA[272] already applies strict scrutiny to most of the country's laws, how is the secular exceptions principle different from the current regime? The secular exceptions principle is important even in jurisdictions where RFRA applies for two reasons: First, strict scrutiny under the secular exceptions principle is "fatal in fact," whereas RFRA sought to restore the "feeble in fact" strict scrutiny that existed before *Smith*;[273] second, the secular exceptions principle leaves the ultimate

271. *See supra* notes 38–43 and accompanying text.
272. 42 U.S.C. § 2000bb (2012).
273. The Court in *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997), and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767, 2792–93 (2014), however, noted that RFRA's least restrictive means test is different from the pre-*Smith* test and actually provides broader protection for religious liberty than was available before *Smith*.

power of granting religious exemptions with the courts, whereas RFRA leaves it with the legislature.

The underlying problem with the secular exceptions principle is that, if laws with secular exceptions are considered underinclusive, and that underinclusiveness both triggers strict scrutiny and spells the death of the law under the strict scrutiny test, courts will automatically grant religious exemptions to any law with secular exceptions. This means the test for religious exemptions is particularly strong because courts will grant religious exemptions from some extremely important laws.[274] RFRA's least restrictive means test, on the other hand, is relatively weak.[275] Courts applying RFRA often overlook the underinclusiveness of secular exceptions or defer to the legislature's judgment of the best way to protect the interests.[276] Indeed, in *Burwell v. Hobby Lobby Stores, Inc.*,[277] the Court noted the exceptions to the Affordable Care Act's[278] contraceptive mandate for grandfathered plans and employers with fewer than 50 employees, but it declined to decide the case on that ground.[279] The focus on underinclusiveness in cases applying the secular exceptions principle, however, makes it difficult to overlook

274. *See supra* Part III.

275. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 860 (2006) (noting that under the RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 72 percent of challenged laws survived, whereas laws in other areas subject to Constitution-based strict scrutiny survived only 20 or 30 percent of challenges).

276. *See* United States v. Friday, 525 F.3d 938, 959 (10th Cir. 2008) (deferring to the government's judgment of the best way to protect eagles when it criminalized their killing by Native Americans but agreed to exercise prosecutorial discretion for electric companies whose power lines killed thousands of eagles a year if the companies entered into avian protection plans); United States v. Antoine, 318 F.3d 919, 924 (9th Cir. 2003) (denying a religious exemption under RFRA to a Native American who failed to obtain a permit to possess eagle feathers despite the permitting regime that allowed most tribes to possess them).

277. 134 S. Ct. 2751, 2764–65 (2014).

278. 42 U.S.C. §§ 18011(a), (e).

279. *Hobby Lobby*, 134 S. Ct. at 2780. The Court instead relied on the fact that the government had already established an accommodation for other religious objectors. *Id.* at 2782; *id.* at 2786 (Kennedy, J., concurring) ("RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation."). However, the Court more fully embraced the underinclusiveness inquiry in its alternative holding in *Holt v. Hobbs*, No. 13-6827, slip op. at 14 (U.S. Jan. 20, 2015) (granting an exemption under the Religious Land Use and Institutionalized Persons Act, RFRA's sister statute, to a Muslim inmate who was not allowed to grow his beard half an inch even though the Arkansas Department of Corrections allowed longer hair on inmates' heads and quarter-inch beards for medical reasons, because allowing analogous nonreligious conduct suggested that the Department's policy was not the least restrictive means of achieving a compelling government interest). Even if *Holt* signals the Court's transition to reliance on underinclusiveness in the RFRA analysis, the ultimate power in these cases still rests with the legislature.

that underinclusiveness for purposes of tailoring. Thus, exemptions from the country's most important laws are less likely to be granted under RFRA than under the secular exceptions principle.

The second crucial distinction between the secular exceptions principle and RFRA is that the former is constitutional, while the latter is statutory. With RFRA, the legislature decided that granting religious exemptions broadly is preferable to granting them law-by-law; the legislature simply set the default as allowing exemptions.[280] If Congress wants to refuse an exemption that RFRA would otherwise provide, grant an exemption that RFRA fails to provide, overturn a court's decision, or repeal RFRA altogether, it can do so by majority vote. By contrast, the secular exceptions principle represents a constitutional constraint on the legislature. Since nearly every law has exceptions, the Free Exercise Clause would require nearly every law to undergo strict scrutiny without the possibility of a statutory override. This method of constitutional religious exemptions is precisely what *Smith*[281] meant to eliminate:

> [The purpose of the parade of horribles] is not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would constantly be in the business of determining whether the 'severe impact' of various laws on religious practice . . . suffices to permit us to confer an exemption. . . . It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.[282]

Since RFRA is statutory, courts need not hesitate to weigh the significance of religious practices against the importance of general laws because the power of religious exemptions from general laws ultimately lies with the legislature.

Even if *Smith* was wrongly decided, and the secular exceptions principle would claw back some (and perhaps most, considering that nearly all laws have exceptions) of the ground that was lost in that case, it would do so in an inconsistent manner. Laws with no exceptions, those that seek to further only a single secular interest, would remain insulated from judicial review. Courts would not subject those laws to strict scrutiny even if the interest was not compelling and the

280. *See Hobby Lobby*, 134 S. Ct. at 2785 ("Congress, in enacting RFRA, took the position that the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests. The wisdom of Congress's judgment on this matter is not our concern.") (citation omitted) (internal quotation marks omitted).

281. Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

282. *Id.* at 889–90 n.5.

burden on religious practice was severe. At the same time, laws with secular exceptions—those that, as I have argued throughout, merely balance multiple secular interests—would be subject to heightened scrutiny and would almost certainly lead to religious exemptions. Instead, the constitutional rule should be the same for laws that balance competing secular interests as those that further a single secular interest. The secular interest underlying an exception might be just as important as the secular interest underlying the law itself, but by compelling religious exemptions only when secular interests compete, the secular exceptions principle hinders the ability of the legislature to effectively balance competing interests.[283]

CONCLUSION

A number of courts and legal scholars support the secular exceptions approach to religious exemptions. This Comment first showed that the secular exceptions principle is inconsistent with current religious exemptions doctrine: The secular exceptions principle overstates the general applicability requirement and would essentially require the Court to overrule *Smith*. Second, it demonstrated the policy problems that the secular exceptions principle creates: The rule would lead to automatic exemptions from some of the country's most important laws, and it would hamstring legislatures for simply attempting to balance competing secular interests. Because nearly all laws contain secular exceptions, the secular exceptions principle cannot be the correct understanding of the Free Exercise Clause.

283. *See* Volokh, *supra* note 196, at 1542.