LUKUMI AT TWENTY: A LEGACY OF UNCERTAINTY FOR RELIGIOUS LIBERTY AND ANIMAL WELFARE LAWS

By
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Twenty years after the United States Supreme Court's decision in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, uncertainty reigns in the lower courts and among commentators over the issue of constitutionally compelled religious exemptions. Despite the Court's general disavowal of such exemptions in* Employment Division v. Smith*,* Lukumi *appeared to breathe life into a potentially significant exception to* Smith*. Under that exception—which this Article calls the "selective-exemption rule"—the Free Exercise Clause may still require religious exemptions from a law when the government selectively makes available other exemptions from that law. This Article addresses the key unresolved questions about the scope of the selective-exemption rule and challenges the broad interpretation of the rule that leading religious-liberty advocates have been pressing in courts around the country. That broad interpretation, which played a prominent role in the recent animal-sacrifice case of* Merced v. Kasson *and has been further developed in the ongoing* Stormans, Inc. v. Selecky *litigation over emergency contraception, would go a long way to achieving a de facto reversal of* Smith*. But while there are credible arguments for reconsidering* Smith *and its "equal protection" interpretation of the Free Exercise Clause, those arguments should not be advanced through the backdoor of the selective-exemption rule. That rule was adopted as part of the* Smith *paradigm, and it only makes sense to interpret it within that paradigm. Accordingly, this Article makes the case for a more appropriately tailored reading of the selective-exemption rule—a reading grounded in the rule's origins as a tool to prevent intentional discrimination, and a reading that would enable the government to enforce animal-welfare laws that have only an incidental effect of limiting religious animal sacrifice.*

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I. INTRODUCTION

Easy cases may not always make bad law,[1] but the deceptively simple case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[2] has certainly caused its share of legal confusion. Although the Supreme Court unanimously and emphatically concluded in *Lukumi* that the City of Hialeah's prohibition of animal sacrifice constituted impermissible religious persecution,[3] interpretations of the case vary wildly. One prominent commentator has argued that the *Lukumi* decision appears to "create a constitutional right to conduct animal killing exhibitions, invalidating to that extent the cruelty-to-animal laws of

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[1] *But cf. O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 804 (1980) (Blackmun, J., concurring in the judgment):

> Few statements are more familiar to judges than Holmes' pithy observation that "hard cases make bad law." I fear that the Court's approach to this case may manifest the perhaps equally valid proposition that easy cases make bad law. Sometimes, I suspect the intuitively sensed obviousness of a case induces a rush to judgment, in which a convenient rationale is too readily embraced without full consideration of its internal coherence or future ramifications.

[2] 508 U.S. 520 (1993).

[3] *Id.* at 534 ("The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of [Hialeah's] ordinances."); *id.* at 547 (finding that the ordinances were "designed to persecute or oppress a religion or its practices"); *id.* at 564 (Souter, J., concurring in part and concurring in the judgment) ("In being so readily susceptible to resolution by applying the Free Exercise Clause's 'fundamental nonpersecution principle,' this [case] is far from a representative free exercise case." (internal citation omitted)); *id.* at 580 (Blackmun, J., joined by O'Connor, J., concurring in the judgment) ("[T]he present case is an easy one to decide."); *but see* Lino A. Graglia, *Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution*, 85 Geo. L.J. 1, 3 (1996) (contending that the Court's finding of "religious persecution," which "undoubtedly made the case easy," was "extremely implausible").

all states."[4] But another leading scholar could hardly be more dismissive of such claims: "Americans who get their constitutional law from newspaper headlines probably thought . . . that the Supreme Court had announced a constitutional right to engage in animal sacrifice. Of course it did no such thing."[5] So what exactly *did* the Court do in *Lukumi*?

Most fundamentally, the Court reaffirmed and applied the interpretation of the Free Exercise Clause[6] that it had adopted in its controversial 1990 decision, *Employment Division v. Smith*.[7] In *Smith*, the Court took the view that free exercise rights are not implicated when a "neutral law of general applicability" incidentally burdens religious practices,[8] but are implicated when a law is "specifically directed" at a religious practice.[9] In other words, the Constitution does not grant a right to religious exemptions from general legal obligations,[10] but it does provide a shield against religious discrimination.[11] Accordingly, in *Smith*, where the Court found that the State of Oregon had maintained an "across-the-board" prohibition of peyote in its drug laws,

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[4] Graglia, *supra* n. 3, at 30.

[5] Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on* Lukumi, 69 Tul. L. Rev. 335, 335 (1994); *see* Claudia E. Haupt, *Free Exercise of Religion and Animal Protection: A Comparative Perspective on Ritual Slaughter*, 39 Geo. Wash. Intl. L. Rev. 839, 847 (2007) ("As far as a right to engage in animal sacrifice is concerned, assessments of the decision greatly differ."). For a recent example of the media describing the *Lukumi* decision in broad terms, see Susannah Bryan, *Sunrise Commissioner Blocks Muslim Sacrifice of Goats and Lambs*, Sun Sentinel (Nov. 3, 2011) (available at http://www.palmbeachpost.com/news/news/sunrise-commissioner-blocks-muslim-sacrifice-of-go/nLzNk (accessed Apr. 13, 2013)) (describing the decision as upholding "the right for animal sacrifices for religious purposes").

[6] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ." (emphasis added)). The Supreme Court has held that the Fourteenth Amendment incorporates the Free Exercise Clause and makes it applicable to the States. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940).

[7] 494 U.S. 872 (1990); *see generally* Graglia, *supra* n. 3, at 61 (describing the "overwhelming, if not unprecedented, storm of protest that greeted the *Smith* decision").

[8] *Smith*, 494 U.S. at 879 ("[T]he right of free exercise 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).'") (quoting *U.S. v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring in the judgment)).

[9] *Id.* at 877–78 ("It would doubtless be unconstitutional, for example, to ban the casting of 'statutes that are to be used for worship purposes,' or to prohibit bowing down before a golden calf.").

[10] *Id.* at 879 ("'Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.'") (quoting *Minersville School Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594–95 (1940), *overruled on other grounds*, *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)); *but see Wis. v. Yoder*, 406 U.S. 205, 220 (1972) ("[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.").

[11] *Smith*, 494 U.S. at 886 n. 3 ("[W]e strictly scrutinize governmental classifications *based on religion* . . . ." (emphasis added)).

members of the Native American Church had no right to an exemption so they could use the substance in a religious ceremony.[12] In *Lukumi*, by contrast, where the Court found that the City of Hialeah had enacted ordinances constituting a "religious gerrymander" targeting the ritual animal sacrifices of a Santeria church,[13] the ordinances had to "undergo the most rigorous of scrutiny,"[14] which resulted in their invalidation.[15]

If one accepts the Court's finding of religious targeting in *Lukumi*,[16] the doctrinal consequence in that case—application of strict scrutiny[17]—seems unremarkable. Just as content discrimination triggers strict scrutiny under the Free Speech Clause and race discrimination triggers strict scrutiny under the Equal Protection Clause, religious discrimination triggers strict scrutiny under the Free Exercise Clause.[18] The confusion arises because the Court viewed *Lukumi* as an extreme case and deliberately left unclear the appropriate methodology for deciding closer cases. As the Court explained: "In this case, we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights."[19]

The open question after *Lukumi* is just how targeted or selective a law must be before it will be deemed to fail the dual requirements of neutrality and general applicability.[20] At one end of the spectrum are across-the-board laws like the one in *Smith* that are not directed at religion and lack any secular exemptions comparable to the requested religious exemption. At the other end of the spectrum are laws like those in *Lukumi* that are enacted in direct response to religiously mo-

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12 *Id.* at 884–86.

13 *Lukumi*, 508 U.S. at 535 (quoting *Walz v. Tax Commn. of N.Y.C.*, 397 U.S. 664 (1970) (Harlan, J., concurring)).

14 *Id.* at 546.

15 *Id.* at 547.

16 The considerable evidence of religious targeting in *Lukumi* is discussed *infra* Part II, Section A; *but see* Graglia, *supra* n. 3, at 36 (disputing the Court's finding of targeting); Steven Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. Colo. L. Rev. 519, 563–66 (1994) (same).

17 *Lukumi*, 508 U.S. at 546.

18 *See Smith*, 494 U.S. at 886 n. 3 (making this same comparison).

19 *Lukumi*, 508 U.S. at 543.

20 Although the *Lukumi* opinion was divided into separate "neutrality" and "general applicability" sections, the Court explained that the concepts "are interrelated" and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531. Indeed, the fact that the ordinances in *Lukumi* were dramatically underinclusive played a key role in both inquiries. *Compare id.* at 536 (neutrality section) ("The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice . . . .") *with id.* at 543 (general applicability section) ("[T]he ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice.").

tivated conduct[21] and contain numerous exemptions for comparable secular conduct.[22] Between those two poles lie an enormous number of laws that do not necessarily target religion, but do contain some secular exemptions limiting their reach.[23] Such laws may implicate what this Article calls the "selective-exemption rule"—the idea expressed in both *Smith* and *Lukumi* that although the Free Exercise Clause does not require religious exemptions to be made from uniform legal obligations, religious exemptions will occasionally be required when the government makes available other exemptions to a law.[24]

In the two decades since *Lukumi* was decided, the scope of the selective-exemption rule has been hotly debated,[25] and there are at least five major unresolved questions about the rule:

1. What is the purpose of the selective-exemption rule: is it designed to guard against the danger of intentional discrimination or to address the adverse impact on religious minorities of unintentional neglect or indifference?
2. Does the rule only apply when a law allows for ad hoc, individualized exemptions to an obligation (e.g., discretionary excuses

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[21] *See id.* at 540 (observing that Hialeah's ordinances were enacted "in direct response to the opening of the Church [of the Lukumi Babalu Aye]").

[22] *See id.* at 543–44 ("Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. . . . [M]any of these secular killings fall within the city's interest in preventing the cruel treatment of animals.").

[23] *See* Thomas C. Berg, *Can Religious Liberty Be Protected As Equality?*, 85 Tex. L. Rev. 1185, 1192–93 (2007) (reviewing Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* (Harvard U. Press 2007)) ("Many laws contain exceptions for medical or family needs; antidiscrimination and other employment laws commonly exempt small businesses."); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 743, 772–73 (1998) ("Federal, state, and local laws are full of exceptions for influential secular interests."); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 3 (2000) (observing that "few statutes are genuinely applicable across the board, without exceptions"); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1540 (1999) (observing that "virtually all laws . . . contain many secular exemptions").

[24] *See Lukumi*, 508 U.S. at 537 ("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.'" (quoting *Smith*, 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality))); *see generally* James M. Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation*, 6 U. Pa. J. Const. L. 525, 529, 529 n. 28, 542–43, 557–61 (2004) (utilizing the term "selective-exemption rule" to describe both the individualized-exemption rule applied in *Lukumi* and its extension by some lower courts to situations where categorical exemptions are made from a legal requirement).

[25] *Compare* 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, 881 (2001) (arguing that the selective-exemption rule properly gives religious practice "a kind of most-favored-nation status") *with* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & Pol. 119, 199 (2002) (arguing that "the very foundation for the most favored nation framework is intellectually incoherent"). *See infra* pt. II(B) (discussing the debate in the lower courts).

under a "good cause" or "necessary" standard), or does it also apply when the government makes select categorical exemptions to a law?
3. If the rule applies when categorical exemptions are made, how should courts determine whether an existing categorical exemption to a law is sufficiently analogous to the requested religious exemption to be deemed a relevant comparator?
4. How many comparable categorical exemptions must exist before the selective-exemption rule is triggered by the denial of a religious exemption?
5. What is the appropriate level of judicial scrutiny to be applied once the selective-exemption rule is triggered?[26]

How the Supreme Court answers these questions will shape the future of free-exercise doctrine and will go a long way toward resolving the dispute referenced at the beginning of this Article about whether *Lukumi* effectively granted religious immunity from nearly all of the nation's animal cruelty laws.[27] Indeed, it is entirely possible that the selective-exemption issue could come back to the Court in the context of animal sacrifice, a possibility previewed in the recent case of *Merced v. Kasson*,[28] which involved a challenge to local ordinances prohibiting the keeping and killing of certain animals.[29] Although *Merced* was ultimately disposed of on state-law grounds,[30] the appellate briefs focused primarily on the federal free exercise issues and presented sophisticated arguments about the parameters of the selective-exemption rule.[31]

The selective-exemption rule is also playing a central role in *Stormans, Inc. v. Selecky*,[32] the ongoing litigation about the State of Washington's requirement that pharmacies dispense all lawfully prescribed or approved drugs, including the "morning after" pill known as Plan B.[33] Although the contexts are very different, the arguments in *Merced* and *Stormans* about the selective-exemption rule are remarkably similar. In both cases, the religious adherents seeking exemptions were supported in briefs authored by Professor Douglas Laycock, one

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[26] These questions will hereinafter be referred to as "Question 1," "Question 2," "Question 3," "Question 4," and "Question 5."

[27] *Supra* nn. 4–5 and accompanying text.

[28] 577 F.3d 578 (5th Cir. 2009).

[29] *Id.* at 583–84.

[30] *Id.* at 595.

[31] Br. of Pl.-Appellant Jose Merced, *Merced v. Kasson*, 2008 WL 7241292 at **23–25 (5th Cir. Sept. 24, 2008) (Nos. 08-10358, 08-10506) [hereinafter *Merced Brief*]; Appellees' Brief, *Merced v. Kasson*, 2008 WL 7241291 at **25–28 (5th Cir. Oct. 24, 2008) [hereinafter *Euless Brief*].

[32] 586 F.3d 1109, 1134–35 (9th Cir. 2009), *on remand*, 844 F. Supp. 2d 1172, 1196–98 (W.D. Wash. 2012), *appeal filed*, Nos. 12-35221, 12-35223 (9th Cir. 2012).

[33] *See id.* at 1114 ("Plan B is a postcoital hormonal emergency contraceptive which contains the same hormones as ordinary birth control pills . . . in much stronger doses. It is used to prevent pregnancy after the intended method of birth control fails or after unprotected sexual activity.").

of the nation's foremost experts on religious liberty,[34] and attorneys from the Becket Fund for Religious Liberty, a leading institutional advocate in free exercise cases.[35] Those briefs press for a broad reading of the selective-exemption rule[36]—a reading that would extend to cases of unintentional neglect,[37] and that would almost certainly require religious exemptions from most state and local animal-welfare laws.[38]

Notably, while organizations like Planned Parenthood, the National Women's Law Center, and the Center for Reproductive Rights have been actively involved in defending the pharmacy laws challenged in *Stormans*, not a single animal welfare organization filed a brief defending the animal laws challenged in *Merced*, and some of the strongest arguments in defense of those laws went unmade.[39] This Article develops those dormant arguments and, informed by them and similar arguments relevant to the *Stormans* litigation, outlines the case for a more narrow reading of the selective-exemption rule—a reading grounded in the rule's origins as a tool to prevent intentional discrimination,[40] and a reading that would enable the government to enforce many (though not all) animal-protection laws that have the incidental effect of limiting religious animal sacrifice.

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[34] *See* Thomas C. Berg, *Laycock's Legacy*, 89 Tex. L. Rev. 901, 901 (2011) (reviewing Douglas Laycock, *Religious Liberty, Volume One: Overviews & History* (Wm. B. Eerdmans Publg. Co. 2010)) (describing Laycock as a "towering figure in the law of religious liberty"). Professor Laycock argued *Lukumi* in the Supreme Court on behalf of the prevailing church.

[35] *See* Ricardo Alonso-Zaldivar & Rachel Zoll, Associated Press, *Feds: Religious Employers Must Cover the Pill* (Jan. 20, 2012) (available at http://www.nbcnews.com/id/46076912/ns/health-womens_health (updated Jan. 20, 2012) (accessed Apr. 13, 2013)) (describing the Becket Fund as "a powerhouse law firm based in Washington that tackles religious freedom issues").

[36] *See* Amici Curiae Br. of Const. L. Professors in Support of Appellees, *Stormans, Inc. v. Selecky*, 2012 WL 5915342 at *1–2 (Nos. 12-35221, 12-35223, 9th Cir. (2012)) [hereinafter *Laycock Brief–Stormans*] ("Read together, *Smith* and *Lukumi* create a special kind of equality rule that goes well beyond the traditional bounds of equal protection and nondiscrimination law.").

[37] *See* Response and Reply Br. of Pl. Jose Merced, *Merced v. Kasson*, 2008 WL 7241293 at *14 (Nos. 08-10358, 08-10506, 5th Cir. (2008)) [hereinafter *Merced Reply Brief*] (arguing that the defendant's focus on the lack of "discriminatory intent" is a "red herring" because "the Free Exercise Clause is not confined to actions based on animus" (quoting *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006))).

[38] *Compare Laycock Brief–Stormans*, *supra* n. 36, at *19 ("A single secular exemption triggers strict scrutiny if it undermines the state interest allegedly served by applying the rule to religious conduct.") *with* Pamela Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 Animal L. 69, 75–76 (1999) ("Most anti-cruelty laws include one or more exemptions . . . excluding whole classes of animals, such as wildlife or farm animals . . . . By exempting wildlife or farm animals, a state greatly reduces its ability to prosecute someone who slowly kills and tortures an animal caught in the wild or allows livestock to starve to death.").

[39] *See infra* pt. II(C) (discussing this in detail).

[40] *See Roy*, 476 U.S. at 708 (plurality) (first proposing the selective-exemption rule and explaining that where a State has "created a mechanism for individualized exemptions," its "refusal to extend an exemption to an instance of religious hardship *suggests a discriminatory intent*" (emphasis added)).

II. THE UNCERTAIN BREADTH AND UNCLEAR PURPOSE OF *LUKUMI*'S SELECTIVE-EXEMPTION RULE

A. The Treatment of Selective Exemptions in Lukumi

As a preliminary matter, it is important to note that the selective-exemption rule was first recognized by a majority of the Court in *Smith*, and was done so for the purpose of distinguishing and limiting prior cases that had required religious exemptions.[41] Although those cases had long been understood to stand for the proposition rejected in *Smith*—that incidental burdens imposed on religious conduct by "neutral and uniform" laws must be justified by strict scrutiny[42]—*Smith* read them as standing for the considerably more limited 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."[43] The Court did not find this version of the selective-exemption rule to be implicated by the facts in *Smith* and left some doubt about whether the rule would ever be applied outside the "distinctive" context of unemployment compensation programs in which it had arisen.[44]

Notwithstanding this inauspicious start, the selective-exemption rule received a considerable boost in *Lukumi*, where it was reaffirmed and applied outside the unemployment compensation context.[45] Yet, just as with *Smith*, caveats are in order. Though relied upon in part, the selective-exemption rule played a decidedly limited role in *Lukumi*, as evidenced by the fact that the remedy in the case went far beyond the granting of a religious exemption to ensure parity. Instead, the *Lukumi* Court *completely voided* Hialeah's ordinances after determining that they were "designed to persecute or oppress a religion or its practices."[46]

In support of its finding of intentional discrimination, the Court relied on (1) the text of Hialeah's resolutions and ordinances, which expressed "concern" about "certain religions," and used the terms "ritual" and "sacrifice" to describe the prohibited conduct;[47] (2) a finding that, in operation, Hialeah's ordinances accomplished a "religious ger-

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[41] *See Smith*, 494 U.S. 882–85 (discussing *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Bd. of the Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Commn. of Fla.*, 480 U.S. 136 (1987)).

[42] *Hobbie*, 480 U.S. at 141 (internal quotation marks omitted).

[43] *Smith*, 494 U.S. at 884 (quoting *Roy*, 476 U.S. at 708) (plurality) (emphasis added).

[44] *Id.* ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field . . . .").

[45] *Lukumi*, 508 U.S. at 537–38; *see generally* Duncan, *supra* n. 25, at 883 ("The Free Exercise Clause has evolved into a leaner, meaner religious-liberty-protecting machine in the wake of . . . *Smith* and *Lukumi*.").

[46] *Lukumi*, 508 U.S. at 547; *see id.* at 524 ("We invalidate the challenged enactments . . . .").

[47] *Id.* at 534–35; *see id.* at 542 (explaining that "the ordinances by their own terms target this religious exercise" of Santeria adherents).

rymander" ensuring that "almost the only conduct subject" to prohibition was "the religious exercise of Santeria church members";[48] and (3) a finding that the ordinances "were drafted in tandem to achieve this result."[49]

The Court also observed that the ordinances were "enacted . . . in direct response to the opening of the church,"[50] and described the context in which the gerrymandered ordinances were drafted: "The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session . . . ."[51] Against that background, and in light of the text and operation of the resulting ordinances, the Court had little difficulty concluding that "Santeria alone was the exclusive legislative concern" of the City Council.[52] And the concern was obviously not benign: "The pattern we have recited discloses animosity to Santeria adherents and their religious practices . . . ."[53]

So what role did the selective-exemption rule play in this case where the evidence of religious persecution was so overwhelming?

The first, and only explicit, invocation of the selective-exemption rule came in the "neutrality" section of the Court's opinion,[54] where the rule appeared as a backup argument for finding fault with one of Hialeah's ordinances. The ordinance in question incorporated Florida's animal-cruelty statute and, unlike some of the other challenged ordinances, did not include any language about "religion," "ritual," or "sacrifice." The Court began its discussion of the ordinance by noting that it was "broad on its face, punishing '[w]hoever . . . unnecessarily . . . kills any animal.'"[55] But in response to Hialeah's claim that the

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[48] *Id.* at 535.

[49] *Id.*; *see Lukumi*, 508 U.S. at 536 ("[C]areful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished."); *id.* at 543 ("[T]he ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice.").

[50] *Id.* at 540.

[51] *Id.* at 526.

[52] *Id.* at 536.

[53] *Id.* at 542. In addition to the aforementioned evidence relied upon by the Court to support its finding of animosity, two Justices—including the author of the Court's opinion—would also have relied on statements made by members of the City Council and other city officials when the ordinances were enacted. *Lukumi*, 508 U.S. at 540–42 (Kennedy, J., joined by Stevens, J.) (quoting several councilmen, including one who argued that the "Bible says we are allowed to sacrifice an animal for consumption . . . but for any other purposes, I don't believe that the Bible allows that"); *but see id.* at 558 (Scalia, J., joined by Rehnquist, C.J., concurring in part and concurring in the judgment) (not joining the legislative history section of Justice Kennedy's opinion because "it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers*" (emphasis in original)).

[54] *See supra* n. 20 (discussing how the Court divided its opinion into separate "neutrality" and "general applicability" sections).

[55] *Lukumi*, 508 U.S. at 537.

breadth of the ordinance made it the "epitome of a neutral prohibition," the Court highlighted evidence of an operational gerrymander:

> The problem . . . is the interpretation given to the ordinance by [Hialeah] and the Florida attorney general. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. 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. There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary. Indeed, one of the few reported cases . . . concludes that the use of live rabbits to train greyhounds is not unnecessary.[56]

"Further," the Court continued, turning to the selective-exemption rule, because the necessity standard in the animal-cruelty ordinance inherently required "an evaluation of the particular justification for the killing," it represented "a system of 'individualized governmental assessment of the reasons for the relevant conduct.'"[57] The Court continued:

> 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 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.[58]

Although this was the only explicit discussion of the selective-exemption rule in *Lukumi*, and although the discussion was limited to situations where the government had made "individualized exemptions" available, later portions of the Court's opinion imply that the selective-exemption rule might also extend to situations where the government has made categorical exemptions to a law. For example, the Court began its discussion of "general applicability" with the following passage, which shared the same core concerns about devaluing religion and discriminatory treatment of religion as its earlier discussion of individualized exemptions:

> 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 "protect[s] 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.[59]

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[56] *Id.* (internal citations omitted).

[57] *Id.* (quoting *Smith*, 494 U.S. at 884).

[58] *Id.* at 537–38 (quoting *Smith*, 494 U.S. at 884 (quoting *Roy*, 476 U.S. at 708 (plurality))) (internal citations omitted); *see also Roy*, 476 U.S. at 708 (plurality) (explaining that the failure to grant a religious exemption if individualized exemptions are available "suggests a discriminatory intent").

[59] *Lukumi*, 508 U.S. at 542–43 (quoting *Hobbie*, 480 U.S. at 148 (Stevens, J., concurring in the judgment)) (internal citations omitted).

Of course, the phrase "only against conduct with religious motivation" at the end of this passage—like the phrase "singled out for discriminatory treatment" in the previous passage—is a reminder that the gerrymandering in *Lukumi* went well beyond the granting of just one or two selective exemptions. Nonetheless, while *Lukumi* does not compel the conclusion that heightened scrutiny should apply to the denial of a religious exemption whenever the government makes categorical exemptions for comparable conduct, some support for that conclusion can be found in the Court's subsequent discussion of one specific ordinance that contained only a single categorical exemption.

That ordinance prohibited the slaughter of animals outside of areas zoned for slaughterhouses, but contained an exemption for commercial slaughter of "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law."[60] The Court found it troubling that Hialeah "classified Santeria sacrifice as slaughter, subjecting it to this ordinance," while it did "not regulate other killings for food in like manner" due to the exemption.[61] According to the Court, Hialeah had "not explained why commercial operations that slaughter 'small numbers' of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health"—the very interests the city was relying upon to justify its prohibition of Santeria sacrifice.[62]

The Court's discussion of the small-farm exemption from Hialeah's slaughter ordinance has understandably been read by some to support broad application of the selective-exemption rule and a presumptive requirement that religious exemptions be granted whenever government makes so much as a single exemption to a law for analogous secular conduct.[63] Yet, immediately after its discussion of the slaughter ordinance, the Court indicated that it was treating that ordinance as another example of extreme gerrymandering:

> We conclude, in sum, that *each* of Hialeah's ordinances pursues the city's governmental interests *only against conduct motivated by religious belief*. The ordinances have every appearance of a prohibition that society is prepared to impose upon Santeria worshippers but not upon itself. This precise evil is what the requirement of general applicability is designed to prevent.[64]

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[60] *Id.* at 545 (quoting Fla. Stat. § 828.24(3) (1991)).

[61] *Id.*

[62] *Id.* Recent developments in Florida would appear to lend credence to the Court's suspicion that exempting small-farm slaughter runs the risk of undermining any interest in preventing animal cruelty. *See* Animal Leg. Def. Fund, *Backyard Butchers*, http://aldf.org/article.php?id=2237 (Dec. 4, 2012) (accessed Apr. 13, 2013) (announcing a lawsuit against, and releasing graphic video evidence from, two unregulated small farms where animals allegedly are "routinely dragged, bludgeoned, stabbed, and butchered while still alive").

[63] *Infra* pt. II(B).

[64] *Lukumi*, 508 U.S. at 545–46 (internal citation, brackets, and quotation marks omitted; emphasis added).

Interestingly, while this closing passage from the "general applicability" section of the Court's opinion characterized the slaughter ordinance as "only" applying to religious conduct, the earlier "neutrality" section of the Court's opinion acknowledged just the opposite when it observed that the slaughter ordinance "does appear to apply to substantial nonreligious conduct."[65] In that section, rather than finding "each" of the city's ordinances to be targeted at religion, the Court pointedly declined to decide whether the single-exemption slaughter ordinance "could survive constitutional scrutiny if it existed separately."[66] Instead, explaining that the "four substantive ordinances may be treated as a group for neutrality," the Court held that the slaughter ordinance "must be invalidated because it functions, with the rest of the enactments in question, to suppress . . . religious worship."[67]

All of which is to say, while *Lukumi* contained its fair share of tea leaves, it ultimately provided no definitive guidance as to how courts should approach laws that do not operate as invidious religious gerrymanders, but do contain some selective categorical exemptions.[68]

B. The Debate over Selective Exemptions in the Lower Courts

The leading post-*Lukumi* decision on selective exemptions was written by Justice Alito when he was a court of appeals judge on the Third Circuit. The case, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,[69] involved a police department policy that prohibited uniformed officers from wearing beards.[70] After two officers requested religious exemptions from the policy, the department announced a "Zero Tolerance" policy for non-compliance with the no-beard rule, but made an exception for officers who had received "medical clearance" to wear beards.[71] The department then pursued disciplinary proceedings against the two officers who refused to shave for religious reasons, and the officers brought suit arguing that the police department had "devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons."[72] The Third Circuit agreed and gave the following explanation for why the police department's categorical exemption for medically required

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65 *Id.* at 539.

66 *Id.* at 540.

67 *Id.*

68 *See* Brownstein, *supra* n. 25, at 198–99 (2002) (describing *Lukumi* as "far from clear as to the meaning of general applicability and the individualized exemptions exception"); Kenneth D. Sansom, Student Author, *Sharing the Burden: Exploring the Space between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 Tex. L. Rev. 753, 768 (1999) (observing that "one cannot discern from the *Lukumi* opinion alone how the *Lukumi* Court would have dealt with (1) fewer or (2) more principled secular departures").

69 170 F.3d 359 (3d Cir. 1999).

70 *Id.* at 360 (citing Special Order from the Chief of Police No. 71-15, 2).

71 *Id.* at 361 (citing Memorandum from the Chief of Police No. 97-30).

72 *Id.* at 361, 365.

beards should trigger the same heightened scrutiny as would a scheme allowing for individualized exemptions:

> 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 instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.[73]

Consistent with that reasoning, the court found that "the medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not."[74]

Newark Lodge has been celebrated by many religious-liberty advocates,[75] who broadly read the case as standing for the propositions that (1) the selective-exemption rule applies equally to individualized and categorical exemptions; (2) the selective-exemption rule is triggered so long as a law contains a single categorical exemption that is comparable to the requested religious exemption; and (3) the Free Exercise Clause does more than just provide protection against intentional discrimination, since the selective-exemption rule applies to categorical exemptions, and such exemptions are often included in laws for reasons having nothing to do with religious bias.[76]

This broad reading of *Newark Lodge*, however, is in considerable tension with the language of the decision itself and appears to overlook critical facts in the case. With regard to the decision's language, the Third Circuit explicitly and repeatedly relied on the Supreme Court's prior characterizations of the selective-exemption rule as a tool for protecting against "discriminatory treatment" when government decisionmaking "tends to exhibit hostility . . . towards religion" or suggests "discriminatory intent."[77] Indeed, the Third Circuit's conclusion about the selective-exemption rule hardly could have been clearer on this

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[73] *Id.* at 365.

[74] *Newark Lodge*, 170 F.3d at 366; *see also id.* ("[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.").

[75] Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J.L. & Pub. Policy 627, 646 (2003) (noting that *Newark Lodge* "has been heralded as a great win for religious liberty").

[76] *See infra* text accompanying nn. 140–141, 183–187 (examining the Becket Fund's analysis of *Newark Lodge* and the selective-exemption rule in *Merced v. Kasson* and *Stormans, Inc. v. Selecky*).

[77] *Newark Lodge*, 170 F.3d at 362 (quoting "discriminatory intent" language from *Roy*, 476 U.S. at 708 (plurality)); *see also id.* at 365 (quoting "discriminatory treatment" language from *Lukumi*, 508 U.S. at 537–38); *id.* at 365 n. 5 (quoting "discriminatory intent" and "tends to exhibit hostility" language from *Roy*, 476 U.S. at 708 (plurality)).

point: "[W]e 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 . . . .*"[78]

Beyond making plain its focus on discriminatory intent, the court's application of the selective-exemption rule in *Newark Lodge* also included the key phrase, "while refusing."[79] That phrase is a reminder of an important but underappreciated fact in the case: the categorical medical exemption was *not* part of the original no-beard policy and was only adopted *after* the request for the religious exemptions was made.[80] Under those circumstances, granting the categorical medical exemption while denying the religious exemptions would, as the court notes, seem to raise the same risk of devaluing religion as a situation in which individualized exemptions are available and religious exemptions are denied. It is important to note, however, that the very reason there was a risk of devaluing religion in *Newark Lodge*—that the denied religious exemption was considered alongside other granted exemptions—is a dynamic likely to be absent in many categorical exemption cases, where exemptions are written into a law or policy separate from any consideration of a request for a religious exemption. In those more typical categorical-exemption cases, there would seem to be considerably less reason to draw an inference of discriminatory intent from the adoption of a categorical exemption.

Returning to the five major questions about the selective-exemption rule that were identified in the introduction of this Article,[81] the aspects of *Newark Lodge* discussed so far would seem to offer the following answers to Questions 1, 2, and 4:

1. The selective-exemption rule is designed to guard against the danger of discriminatory intent.
2. Given that purpose, the rule can (in appropriate cases) extend beyond individualized-exemption cases to categorical-exemption cases, but only to categorical-exemption cases where the adoption of the categorical exemption occurred in the same context as the denial of a religious exemption.
4. The recognition of a single categorical exemption can be enough to trigger the selective-exemption rule when a religious exemption is denied, provided the context is such as to suggest discriminatory intent.

Newark Lodge also offered guidance relevant to Question 3, concerning how courts should determine whether an approved categorical exemption is sufficiently analogous to the requested religious exemption to be deemed a relevant comparator. Observing that the police de-

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[78] *Newark Lodge*, 170 F.3d at 365 (emphasis added).
[79] *Id.*
[80] *Id.* at 361.
[81] *Supra* text accompanying n. 26.

partment also made an exemption to its no-beard policy for undercover officers, the Third Circuit explained that this exemption did not implicate the selective-exemption rule because, unlike the medical exemption, it did not undermine the purpose of the no-beard policy: to foster a uniform appearance among those officers who were "held out to the public as law enforcement personnel."[82]

This methodology for determining whether an approved secular exemption and a denied religious exemption are sufficiently analogous to be relevant comparators—asking if both similarly undermine the government's interest in its underlying rule—is reminiscent of the Supreme Court's discussion of underinclusion in *Lukumi*. There, in explaining why the City of Hialeah's ordinances were underinclusive for the alleged ends of protecting public health and preventing cruelty to animals, the Court emphasized that the ordinances "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice."[83] The Third Circuit's adaptation of this principle in *Newark Lodge*[84] to help define the contours of the selective-exemption rule has been favorably received.[85] But as we shall soon see, the tasks of correctly identifying the government's interest in a rule and accurately describing an exemption's relation to that interest can present some of the thorniest challenges in selective-exemption cases.[86]

Finally, with respect to Question 5—the level of judicial scrutiny to be applied once the selective-exemption rule is triggered—*Newark Lodge* was relatively unusual because it arose in the public employment context. As a result, while recognizing that "*Smith* and *Lukumi* speak in terms of strict scrutiny when discussing the requirements for making distinctions between religious and secular exemptions," the court assumed that "an intermediate level of scrutiny" should be applied and found that the department's denial of the religious exemptions could not survive "even that level of scrutiny."[87]

Newark Lodge was not the only selective-exemption case to come before Justice Alito during his time on the Third Circuit. Five years

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[82] *Newark Lodge*, 170 F.3d at 366 (internal quotation marks and brackets omitted).

[83] 508 U.S. at 543; *supra* text accompanying n. 62.

[84] 170 F.3d at 364–65.

[85] *See* Lund, *supra* n. 75, at 640–41 ("Most commentators . . . have generally come to the conclusion that the question is really whether the secular exceptions endanger the purposes of the legislation to a similar or greater degree than a religious exemption would . . . ."); *see also* Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 Ind. L.J. 77, 119 (2000) ("Religion is treated unequally only if nonexempted religious conduct is in the same relationship to the purpose of a law as exempted secular conduct.").

[86] *Infra* pt. II(C) & pt. II(D).

[87] *Newark Lodge*, 170 F.3d at 366 n. 7; *see Tenafly Eruv Assn., Inc. v. Borough of Tenafly*, 309 F.3d 144, 166 n. 27 (3d Cir. 2002) (explaining that *Newark Lodge* applied intermediate scrutiny rather than strict scrutiny because "First Amendment rights are limited in the public employment context by a government's need to function efficiently").

later, he wrote that court's opinion in *Blackhawk v. Pennsylvania*,[88] an animal-law case involving the owner of two black bears who sought a religious exemption from a state permit fee for keeping wildlife in captivity. The owner, Dennis Blackhawk, used the bears in religious rituals that were attended by American Indians from across the country.[89] After paying the requisite fee for several years, Blackhawk sought an exemption under a provision allowing for a waiver of the fee "where hardship or extraordinary circumstance warrants," so long as the waiver is "consistent with sound game or wildlife management activities or the intent of [the Game and Wildlife Code]."[90] The Third Circuit held that Pennsylvania's denial of an exemption to Blackhawk implicated the selective-exemption rule on two grounds. First, the State maintained a system of individualized exemptions that it refused to extend to cases of religiously motivated conduct.[91] Second, the State maintained categorical exemptions for zoos and circuses that "undermine[d] the interests served by the fee provision"—raising money and discouraging the keeping of wild animals in captivity—"to at least the same degree as would an exemption for . . . Blackhawk."[92] Accordingly, the court subjected the fee scheme to strict scrutiny[93] and found the scheme sorely lacking. In particular, because the annual permit fees were so modest,[94] and because zoos and circuses were exempt from the fees altogether, the Court found it difficult to believe that the State had a compelling interest either in raising money from the fee scheme or using it to discourage the keeping of wild animals in captivity.[95]

The major doctrinal development in *Blackhawk* was that it appeared to decouple the rationales for applying heightened scrutiny to situations involving individualized exemptions and situations involving select categorical exemptions. Unlike *Newark Lodge*, which focused on the danger of "discriminatory intent" when addressing both types of exemptions,[96] *Blackhawk* only tied the risk of discriminatory intent to individualized exemptions,[97] opening the door to a broader view of when categorical exemptions might trigger strict scrutiny:

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[88] 381 F.3d 202, 204 (3d Cir. 2004).

[89] *Id.* at 204–05.

[90] *Id.* at 205 (quoting 34 Pa. Consol. Stat. Ann. § 2901(d) (West 1997)) (internal quotation marks omitted, brackets in original).

[91] *Id.* at 209–10 (noting that the State "rules out waivers for persons, like Blackhawk, who wish to keep animals for religious reasons").

[92] *Id.* at 211.

[93] *Id.* at 213 ("In order to survive strict scrutiny, the fee scheme 'must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.'" (quoting *Lukumi*, 508 U.S. at 546)).

[94] *See Blackhawk*, 381 F.3d at 214 (observing that fees for menagerie and exotic wildlife permits were set at $100 and $50, respectively).

[95] *Id.* at 214; *see id.* at 210 ("These modest fees, which are comparable to many municipal dog license fees, can hardly be viewed as expressing a hard policy against the keeping of wild animals.").

[96] *Newark Lodge*, 170 F.3d at 365.

[97] *See Blackhawk*, 381 F.3d at 209 (explaining that "a law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime cre-

> A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.[98]

Applying this general applicability standard to the categorical exemptions that had been written into the Pennsylvania Game & Wildlife Code for zoos and circuses—exemptions that had been adopted by the legislature years before Blackhawk ever requested a religious exemption from the game commission[99]—the court concluded that the categorical exemptions in the law triggered strict scrutiny because they rendered the challenged fee provision "substantially 'underinclusive' with respect to its asserted goals."[100]

In short, the *Blackhawk* court appeared to take an expansive view of the selective-exemption rule as broadly applying to situations involving categorical exemptions, even if there was no reason to suspect discriminatory intent in the original adoption of those exemptions. So long as categorical exemptions render a law substantially underinclusive, *Blackhawk* indicates strict scrutiny will apply to the subsequent denial of a religious exemption.

The broad interpretation of the selective-exemption rule in *Blackhawk* has not been uniformly adopted in the lower courts, several of which have taken a considerably narrower view of the rule. The Ninth Circuit, for example, provided the following explanation for why it declined to apply the rule in a case involving the denial of a religious exemption from a law containing other categorical exemptions:

> Underinclusiveness is not in and of itself a talisman of constitutional infirmity; rather, *it is significant only insofar as it indicates something more sinister*. In *Lukumi*, the Court considered the ordinances' lack of neutrality and general applicability as a *proxy of the Hialeah lawmakers' illicit intention* to single out the Santeria religion for unfavorable treatment. The Court observed that the pattern of exemptions present in the Hialeah ordinances *betrayed their object as one of suppressing religious exercise*. Because the ordinances were "designed to persecute or oppress a religion or

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ates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that *discriminates against* religiously motivated conduct" (emphasis added)).

98 *Id.*

99 The statutory exemptions were enacted in 1986. 34 Pa. Consol. Stat. Ann. § 2965 (West 1997); 1986 Pa. Laws 442. Blackhawk first requested an exemption in 1998. *Blackhawk*, 381 F.3d at 205.

100 *Id.* at 211; *see id.* at 208 (noting that the ordinances challenged in *Lukumi* failed the general applicability requirement because they were "'underinclusive,'" and the "underinclusion [was] substantial, not inconsequential" (quoting *Lukumi*, 508 U.S. at 543) (internal quotes omitted, brackets in original)).

> its practices," the Court concluded that the permissive *Smith* standard did not apply.[101]

The Ninth Circuit saw an important difference between the gerrymandered ordinances in *Lukumi*—which "'were drafted with care to forbid few killings but those occasioned by religious sacrifice'"[102]—and more routine laws that contain some categorical exemptions, but still apply to a wide swath of conduct.[103] In the latter situation, there may be "no hint" of an effort to target religion and "no indication that . . . lawmakers were impelled by a desire to target or suppress religious exercise."[104]

Other courts have been similarly reticent to apply the selective-exemption rule broadly, with several explicitly limiting it to situations involving individualized exemptions, not categorical exemptions. The Tenth Circuit's explanation is typical:

> Our Circuit has held that a system of individualized exemptions is one that "give[s] rise to the application of a subjective test." Such a system is one in which case-by-case inquiries are routinely made, such that there is an "individualized governmental assessment of the reasons for the relevant conduct" that "invite[s] considerations of the particular circumstances" involved in the particular case . . . . Smith's "individualized exemption" exception is limited, then, to systems that are designed to make case-by-case determinations. *The exception does not apply to statutes that, although otherwise generally applicable, contain express exceptions for objectively defined categories of persons*.[105]

The importance of this debate over whether the selective-exemption rule broadly applies to categorical exemptions can be seen in recent cases challenging the contraception-coverage mandate that is being implemented pursuant to the Patient Protection and Affordable Care Act (ACA).[106] Several of these cases involve for-profit companies

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101 *Thomas v. Anchorage Equal Rights Commn.*, 165 F.3d 692, 701–02 (9th Cir. 1999) (quoting *Lukumi*, 508 U.S. at 547) (emphasis added, internal citations omitted), *vacated on ripeness grounds on rehearing en banc*, 220 F.3d 1134 (9th Cir. 2000).

102 *Id.* at 701 (quoting *Lukumi*, 508 U.S. at 543).

103 *Id.*

104 *Id.* at 702.

105 *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297–98 (10th Cir. 2004) (internal citations omitted); *see also Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) ("General applicability does not mean absolute universality. Exceptions do not negate that [laws] are generally applicable."); *Chabad Lubavitch of Litchfield Co., Inc. v. Borough of Litchfield, Conn.*, 853 F. Supp. 2d 214, 223 (D. Conn. 2012) ("Where the statute contains particular exceptions, the court considers whether the exceptions apply to specific categories, or whether they are made on an ad hoc basis. The fact that a law contains particular exceptions does not cause the law not to be generally applicable, so long as the exceptions are broad, objective categories, and not based on religious animus." (citing *Ungar v. N.Y. Hous. Auth.*, 363 Fed. Appx. 53, 56 (2d Cir. 2010)) (internal citations omitted)).

106 Pub. L. No. 111-148, 124 Stat. 119 (2010) (amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in various sections of 26 and 42 U.S.C.)). The Act requires an employer's group health plan to cover women's "preventive care." Pub. L. No. 111-148 § 2713(a)(4), 124

whose owners have religious objections to paying for contraceptive coverage. These owners contend that the mandate is not generally applicable because it contains "numerous exemptions,"[107] including for "employers with fewer than 50 full-time employees," for "'grandfathered' plans," and for "nonprofit religious employers."[108] At least five district judges have rejected this argument,[109] largely along the following lines:

> [T]he regulations are generally applicable, as they do not in a selective manner impose burdens only on conduct motivated by religious belief. The exemptions . . . do not undermine the general applicability of the regulations within the meaning of Free Exercise Clause jurisprudence. *General applicability does not mean absolute universality*. . . . Instead, exemptions undermining general applicability *are those tending to suggest disfavor of religion* . . . . The regulations in this case apply to all employers not falling under an exemption, regardless of those employers' personal religious inclinations . . . . Furthermore, the system of exemptions which exists under the ACA is *categorical, and not individualized*, so plaintiffs cannot claim a

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Stat. 131 (codified at 42 U.S.C.A. § 300gg-13 (West 2010)). As recommended by the Institute of Medicine, the Department of Health and Human Services (HHS) has defined preventive care as including contraception methods approved by the Food and Drug Administration (FDA). Press Release, U.S. Dept. of Health & Human Servs., *Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost* (Aug. 1, 2011) (available at http://www.hhs.gov/news/press/2011pres/08/20110801b.html (accessed Apr. 13, 2013)).

[107] *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1290 (W.D. Okla. 2012), *application for injunction pending appellate review denied*, 2012 WL 6698888 (U.S. Dec. 26, 2012) (Sotomayor, J., in chambers), *petition for initial en banc hearing and expedited oral argument granted*, No. 12-6294 (10th Cir. Mar. 29, 2013) (available at http://www.becketfund.org/wp-content/uploads/2013/03/2013-03-29-Tenth-Cir-Order-Granting-En-Banc1.pdf (accessed Apr. 13, 2013)). In addition to raising arguments under the Free Exercise Clause, challenges to the ACA contraception mandate also raise arguments under the Religious Freedom Restoration Act of 1993 (RFRA). 42 U.S.C. §§ 2000bb–2000bb-4. Although the Supreme Court found RFRA unconstitutional as applied to the States, *City of Boerne v. Flores*, 521 U.S. 507 (1997), RFRA continues to apply to the federal government. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). The full extent of RFRA's protections are beyond the scope of this Article, but its central purpose is to require religious exemptions from neutral and generally applicable laws that have the incidental effect of substantially burdening religious practices. In one important respect, proving a RFRA claim is easier than proving a free exercise claim, since a party need not show the challenged government law lacks neutrality and general applicability to prevail under RFRA. But in another important respect, proving a RFRA claim can be harder than proving a free exercise claim, since a party needs to demonstrate that their practice has been substantially burdened to prevail under RFRA.

[108] *Korte v. U.S. Dept. of Health & Human Servs.*, 2012 WL 6553996 at *7 (S.D. Ill. Dec. 14, 2012) (Reagan, J.) (internal citations omitted), *injunction pending appeal granted on other grounds*, 2012 WL 6757353 (7th Cir. Dec. 28, 2012).

[109] *See id.* at **7–8; *Hobby Lobby*, 870 F. Supp. 2d at 1290; *O'Brien v. U.S. Dept. of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1161–62 (E.D. Mo. Sept. 28, 2012); *Conestoga Wood Specialties Corp. v. Sebelius*, 2013 WL 140110 at **8–9 (E.D. Pa. Jan. 11, 2013); *Grote Indus., LLC v. Sebelius*, 2012 WL 6725905 at **7–8 (S.D. Ind. Dec. 27, 2012) (Barker, J.), *injunction pending appeal granted on other grounds*, (7th Cir. Jan. 30, 2013).

> Free Exercise Clause violation under the [reasoning of the Supreme Court's] unemployment insurance benefits cases.[110]

In sum, the treatment of the selective-exemption rule in the lower courts has varied greatly. Some decisions have treated the rule as limited to individualized exemptions; others have treated it as extending to categorical exemptions in contexts where discriminatory intent can be inferred; and yet others have treated it as broadly extending to categorical exemptions regardless of whether discriminatory intent can be inferred.[111]

These unresolved questions have the potential to greatly impact the fate of animal-welfare laws that—like the laws in the *Merced* case—are challenged pursuant to the selective-exemption rule.

C. Animal-Welfare Organizations Sit Out the Selective-Exemption Debate: Merced v. Kasson

One of the most interesting things about the *Merced* litigation is that the opening appellate brief for the religious adherent in the case—a Santeria priest named José Merced—devoted twenty-five pages of its argument to the federal Free Exercise Clause before finally turning to a much shorter argument grounded in the Texas Religious Freedom Restoration Act (TRFRA).[112] The reason this is so intriguing is that the authors of the brief almost certainly knew that the TRFRA claim represented their client's best shot of prevailing, and they eventually acknowledged as much in the brief: "By design, the TRF[R]A gives significantly *greater* protection to religious exercise than does the Constitution's Free Exercise Clause."[113] And, in fact, the Fifth Circuit was able to avoid the federal free exercise issue entirely by basing its ruling for Merced on the TRFRA.[114]

So why all the focus on the free exercise issues? The answer would appear to be that, for the religious-liberty advocates representing Merced—Professor Laycock and the Becket Fund[115]—his case was a nearly ideal vehicle in which to press for a broad interpretation of *Lukumi* and the selective-exemption rule. Atmospherically, the case

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110 *O'Brien*, 894 F. Supp. 2d at 1161–62 & n. 9 (emphasis added, internal citations and quotation marks omitted).

111 These questions also divide the commentators. *Compare* Laycock, *supra* n. 23, at 772 ("Where a law has secular exceptions *or* an individualized exemption process, any burden on religion requires compelling justification under a reasonable interpretation of *Smith* and *Lukumi*." (emphasis added)) *with* Brownstein, *supra* n. 25, at 193–202 (contending that the selective-exemption rule is "arguably coherent" if limited to situations where the government makes individualized exemptions, but unworkable if extended to cases involving categorical exemptions) *and* Volokh, *supra* n. 23, at 1539–42 (contending that the selective-exemption rule is unwise and unworkable as applied to categorical exemptions).

112 Texas Religious Freedom Restoration Act, Tex. Civ. Prac. & Rem. Code Ann. § 110.003 (West 2011).

113 *Merced Brief*, *supra* n. 31, at *51 (emphasis in original).

114 *Merced*, 577 F.3d at 595.

115 *Supra* nn. 34–35 and accompanying text.

would certainly allow for ready comparisons to *Lukumi*, since both cases involved city ordinances that were applied to prevent Santeria animal sacrifice.[116] And since it was undisputed that the city ordinances challenged in *Merced* were not animated by discriminatory intent,[117] a victory for Merced on free exercise grounds would go a long way towards countering the widespread perception that *Smith* had limited free exercise claims to situations involving intentional discrimination.[118]

If the *Merced* case represented an opportunity for religious-liberty advocates to seek an expansion of *Lukumi* in the animal-sacrifice context, it also represented an opportunity for animal-welfare advocates to try to draw a principled line in defense of animal ordinances that are not tainted by the type of bias that infected the ordinances in *Lukumi*.[119] Yet, not a single animal-welfare organization filed an amicus brief in *Merced*, leaving the City of Euless on its own in defending its ordinances. This represented a dramatic change from the response of animal-welfare groups to the *Lukumi* case, in which they played a very prominent role in supporting the City of Hialeah from start to finish.[120] Then again, perhaps the animal-welfare community's extraordinarily high level of involvement in *Lukumi* is precisely what explains the community's reticence about jumping into *Merced*. One might naturally expect a 9–0 loss in the Supreme Court to lead to some reconsideration of strategy and priorities. Furthermore, given the unfortunate rhetoric used by some representatives of the animal-welfare community in *Lukumi*,[121] there may well have been concern about the risk of the movement being perceived as anti-religious. Whatever the

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116 *See Merced*, 577 F.3d at 586 (noting that "this case shares many similarities with *Lukumi*").

117 *See Merced Reply Brief*, *supra* n. 37, at *12 ("Merced has admitted all along that Euless did not enact the ordinances . . . with the intent of suppressing Santeria sacrifice.").

118 *See* Christopher C. Lund, *Religious Liberty after* Gonzales*: A Look at State RFRAs*, 55 S.D. L. Rev. 466, 471 (2010) ("The narrowest reading of *Smith*, though a common one, is that it forbids only intentional discrimination.").

119 *See supra* nn. 46–53 and accompanying text (discussing the evidence of bias in *Lukumi*).

120 David M. O'Brien, *Animal Sacrifice and Religious Freedom:* Church of the Lukumi Babalu Aye v. City of Hialeah 41 (U. Press Kan. 2004) ("As soon as the controversy over the Church of Lukumi erupted, the regional office of the [Humane Society of the United States] intervened. It urged Hialeah's city council to enact a law banning ritual animal sacrifices."); *id.* at 84 (recounting expert testimony from a national Humane Society official at the *Lukumi* trial describing Santeria sacrifice as inhumane); *id.* at 102–03 (naming eighteen different animal-welfare and animal-rights groups who signed on to five separate amicus briefs in support of Hialeah in the Supreme Court).

121 *Id.* at 83 (quoting trial testimony from a state Humane Society official describing Santeria as a "bloody cult . . . whose continued presence further blights the image of South Florida"); *id.* at 150 (quoting the president of the American Society for the Prevention of Cruelty to Animals describing Santeria as a "voodoo-like religion" that "is not legitimate in the context of modern America"); *id.* at 151 (quoting a state Humane Society official who asserted that the Supreme Court's ruling in *Lukumi* meant "that tens of thousands of animals can now be legally sacrificed at the altar of religious freedom").

reason, the lack of involvement in *Merced* was a missed opportunity to help provide a robust defense of customary animal-protection laws. Since the issue will almost certainly arise again,[122] it is worth taking a close look at *Merced* to see where the arguments made in support of Euless's ordinances might have been bolstered.

The four principal ordinances involved in *Merced* prohibited (1) slaughtering animals,[123] (2) killing animals,[124] (3) keeping more than four animals in a residence,[125] and (4) keeping livestock within 100 feet of a residence.[126] The ban on killing animals in the second ordinance was not absolute; the city's ordinances explicitly permitted the use of rodent-control materials, the killing of rabid or vicious animals by designated city employees, and the killing of "domesticated fowl considered general tablefare such as chicken or turkey."[127] In addition to those explicit exemptions, the city also observed two unwritten exceptions, declining to enforce its ordinances against homeowners who kill rats, mice, or snakes; or against veterinarians who put down animals.[128] Euless's ordinances were adopted in 1974,[129] sixteen years before Merced moved to the city and thirty-two years before he filed suit seeking to enjoin enforcement of the ordinances.[130]

The fact that Merced was performing animal-sacrifice ceremonies in his home first came to the attention of the Euless police in 2004 after a neighbor made a complaint; when responding to a second com-

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122 *See* Jose A. Lammoglia, *Legal Aspects of Animal Sacrifice within the Context of Afro-Caribbean Religions*, 20 St. Thomas L. Rev. 710, 716 (2008) ("The environment is ripe for conflicts between Afro-Caribbean Religion practitioners and the cities where they worship."); *Freehold Resident Charged in Animal Sacrifices*, Asbury Park Press (Mar. 19, 2011) (available at 2011 WLNR 5751474) ("A borough resident was charged with eight counts of animal cruelty after the remains of numerous animals, including chickens, guinea hens and a slider turtle, were found in his yard last week . . . .").

123 *Merced*, 577 F.3d at 583 ("It shall be unlawful to slaughter or to maintain any property for the purpose of slaughtering any animal in the city." (quoting Code Ordin. Euless (Tex.) § 10-3 (1993))).

124 *Id.* at 584 ("[A person shall not] beat, cruelly ill treat, torment[,] abuse, overload, overwork or otherwise harm an animal or cause, instigate or permit any dog fight, cock fight, bullfight or other combat between animals or between animals and humans . . . [nor] willfully wound, trap, maim or cripple by any method any animal, bird or fowl. It shall also be unlawful for a person to kill any animal, bird or fowl, except domesticated fowl considered as general tablefare such as chicken or turkey, within the city." (quoting Code Ordin. Euless at § 10-65)).

125 *Id.* ("It shall be unlawful to keep or harbor more than four dogs, cats or other animals, or combination of animals, beyond the normal weaning age on any premises . . . ." (quoting Code Ordin. Euless § 10-68)).

126 *Id.* ("It shall be unlawful to keep and maintain any mule, donkey, mare, horse, colt, bull, cow, calf, sheep, goat, cattle or other livestock at a distance closer than 100 feet from any building located on adjoining property that is used for human habitation . . . ." (quoting Code Ordin. Euless § 10-104)).

127 *Id.* at 585.

128 *Id.*

129 *Euless Brief*, *supra* n. 31, at *9.

130 *Merced*, 577 F.3d at 582 (noting that Merced moved to Euless in 1990 and brought suit in 2006).

plaint in 2006, the police informed Merced that sacrifices in his home were likely illegal.[131] In response, Merced attempted to obtain a permit so he could continue performing sacrifices in the future, but was told by the city permits office that no such permit existed since animal slaughter was strictly prohibited in the city.[132] As a result, Merced was unable to perform a planned initiation ceremony for a new priest,[133] a ceremony that "generally involves a sacrifice of five to seven four-legged animals (lambs or goats), a turtle, a duck, ten to fourteen chickens, five to seven guinea hens, and ten to fourteen doves."[134]

Notwithstanding the similarities between the types of sacrifices involved in *Merced* and *Lukumi*,[135] the contexts in which the two cases arose were dramatically different. As discussed above, the City of Hialeah drafted its ordinances in direct response to concerns about Santeria sacrifice, explicitly directed some of those ordinances at "rituals" and "sacrifice," and gerrymandered its ordinances to prohibit no animal killing other than Santeria sacrifice.[136] By contrast, the City of Euless enacted its ordinances long before any concerns were raised about Santeria sacrifice and it regularly enforced the various provisions of its animal code against non-Santeria citizens.[137]

Despite these fundamental differences, Laycock and the Becket Fund (collectively, the Becket Fund) framed Merced's case as being "on all fours with *Lukumi*."[138] That assertion was, to put it mildly, a stretch.[139] But it was completely in keeping with the larger strategy evident in a great deal of religious-liberty litigation in recent years—a strategy to portray *Lukumi* as a decision that protects against much more than just intentional discrimination.

To that end, the Becket Fund's lead contention to the Fifth Circuit was essentially the broad version of the selective-exemption rule: if a law includes any categorical exemptions from its requirements, the government must also grant religious exemptions from those require-

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131 *Id.* at 583.

132 *Id.*

133 *Id.*

134 *Id.* at 582.

135 *Lukumi*, 508 U.S. at 525 ("Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles.").

136 *Supra* nn. 46–53 and accompanying text.

137 *Euless Brief, supra* n. 31, at **10–11.

138 *Merced Brief*, *supra* n. 31, at *3.

139 *Compare* Transcr., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (argument of Douglas Laycock) ("This is a case about open discrimination against a minority religion. The four ordinances challenged here were enacted in direct response to the church's announcement that it would build a church and practice in public. They were enacted for the express purpose of preventing the central rituals of this faith.") (available at http://www.oyez.org/cases/1990-1999/1992/1992_91_948 (accessed Apr. 13, 2013)) *with Merced Reply Brief*, *supra* n. 37, at **1–2 (coauthored by Douglas Laycock) ("Merced . . . agrees that Euless did not intend to discriminate against (or even know about) Santeria in 1974. But these facts are beside the point. *Lukumi* did not turn on . . . the existence of discriminatory animus.").

ments.[140] In making this argument, the Becket Fund relied heavily on *Newark Lodge*, describing that case as one that required religious exemptions even though there was "no evidence in the record that the offending laws were enacted on the basis of discriminatory intent."[141] But as discussed above, the *Newark Lodge* court explicitly tied its application of the selective-exemption rule to the danger of intentional discrimination.[142] It explained that the rule was implicated in that case because the "decision to provide medical exemptions while refusing religious exemptions is *sufficiently suggestive of discriminatory intent* so as to trigger heightened scrutiny."[143]

Ignoring this language and its import, the Becket Fund's brief persists in claiming that Euless's categorical exemptions are "just like" the medical exemption in *Newark Lodge*.[144] But Euless's categorical exemptions were adopted *before* there was ever a request for a religious exemption, while the medical exemption in *Newark Lodge* was adopted *after* the request for a religious exemption.[145] Thus, at the time it enacted its categorical exemptions, Euless, unlike the Newark police department, was not in a position where it inherently had to make "a value judgment"[146] about the relative importance of a religious practice. Under those circumstances, there is simply no basis for concluding Euless's decision to adopt its categorical exemptions was "sufficiently suggestive of discriminatory intent"[147] to trigger application of the *Newark Lodge* version of the selective-exemption rule.

This rebuttal to the Becket Fund's misplaced reliance on *Newark Lodge* was never made by Euless, and the issue ultimately proved moot given the Fifth Circuit's decision to resolve the case on state-law grounds.[148] But the very same issue could arise in future litigation challenging animal-cruelty laws containing categorical exemptions, and defenders of those laws might do well to challenge overly broad readings of *Newark Lodge*.

On a related note, defenders of nondiscriminatory animal laws in future cases might want to aggressively challenge the Becket Fund's

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140 *See Merced Brief*, *supra* n. 31, at *23 ("*First*, Euless's laws are *not generally applicable* because they create categorical exemptions for the secular, but not religious, killing of animals." (emphasis in original)).

141 *Id.* at 34.

142 *Supra* nn. 77–78 and accompanying text.

143 *Newark Lodge*, 170 F.3d at 365 (emphasis added).

144 *Merced Brief*, *supra* n. 31, at *34; *see also Merced Reply Brief*, *supra* n. 37, at *19 (contending that the "situation here is identical to the one before the Third Circuit" in *Newark Lodge*).

145 170 F.3d at 361.

146 *Id.* at 366.

147 *Id.* at 365; *cf. Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 269–70 (1977) (finding no evidence of purposeful racial discrimination in a zoning-decision case, despite disparate impact, where there was "little about the sequence of events leading up to the decision that would spark suspicion" and where the decision was consistent with a policy adopted "long before" the disadvantaged parties "entered the picture").

148 *Merced*, 577 F.3d at 595.

position that "*Lukumi* did not turn on . . . the existence of discriminatory animus."[149] In making this argument in the *Merced* case, the Becket Fund twice relied on a phrase from *Lukumi* about how courts in free exercise cases should look to the "effect of a law in its real operation."[150] The Becket Fund uses this language to argue that the Free Exercise Clause, unlike the Equal Protection Clause, protects not only against discriminatory intent, but also against adverse impact that is not intentionally caused.[151] The problem with the Becket Fund's argument is that it leaves out the key words surrounding the excerpted phrase from *Lukumi*. Here is the full passage, with the phrase quoted by the Becket Fund coming in the second sentence:

> It becomes evident that these ordinances *target* Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is *strong evidence of its object*. To be sure, *adverse impact will not always lead to a finding of impermissible targeting*. For example, a social harm may have been a legitimate concern of government for reasons quite apart from *discrimination*. The subject at hand does implicate, of course, multiple concerns unrelated to *religious animosity*, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together *disclose an object remote from these legitimate concerns*. The design of these laws accomplishes instead a *religious gerrymander*, an *impermissible attempt to target petitioners and their religious practices*.[152]

This passage makes abundantly clear that the Court was not viewing the "effect of a law in its real operation" as being the constitutional violation in itself but, rather, as *evidence* of the constitutional violation, which was enacting a law with the impermissible "object" of targeting religion.[153] As the Ninth Circuit has put it, "[u]nderinclusiveness is not in and of itself a talisman of constitutional infirmity; rather, it is significant only insofar as it indicates something

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[149] *Merced Reply Brief*, *supra* n. 37, at **1–2.

[150] *Id.* at 2 (quoting *Lukumi*, 508 U.S. at 535).

[151] *Id.* at 14 ("Although animus is *sufficient* to prove a Free Exercise claim, it is not *necessary* . . . ." (emphasis in original)).

[152] *Lukumi*, 508 U.S. at 535 (internal citations and quotation marks omitted, emphasis added).

[153] *See id.* at 542:

> 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; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense.

See also id. at 534 ("The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances."); *id.* at 547 (explaining that the ordinances violated the principle that laws must not be "designed to persecute or oppress a religion or its practices").

more sinister."[154] Unlike the gerrymandering in *Lukumi*, there is nothing sinister about the routine adoption of categorical exemptions like the ones in Euless's animal laws, and a strong argument can be made that such exemptions should not trigger the selective-exemption rule.

Even assuming the selective-exemption rule can extend to situations involving innocently adopted categorical exemptions, there was another good argument available in *Merced* as to why the rule should not have applied—an argument that likely would have been made more effectively had animal-welfare groups been involved in the case. The argument was that the activity Euless exempted from its ordinances was not sufficiently analogous to Merced's activity to be deemed a relevant comparator for purposes of the selective-exemption rule. Recall, *Newark Lodge* taught that relevant comparators are activities that similarly undermine the government's interest in its underlying rule.[155] So, to avoid the selective-exemption rule, Euless needed to show that the activity it exempted from its ordinances did not undermine its interests—public health and animal welfare—to the degree Merced's activity would.

Euless's brief to the Fifth Circuit focused almost exclusively on its interest in public health,[156] but the animal-welfare interest would have been a more promising basis for distinguishing the approved ex-

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[154] *Thomas v. Anchorage Equal Rights Commn.*, 165 F.3d 692, 701–02 (9th Cir. 1999), *vacated on ripeness grounds on rehearing en banc*, 220 F.3d 1134 (9th Cir. 2000); *see also Tenafly*, 309 F.3d at 168 n. 30 ("*Lukumi* and *Fraternal Order of Police inferred discriminatory purpose from the objective effects* of the selective exemptions at issue without examining the responsible officials' motives." (emphasis added)).

For an excellent discussion of the difference between the discriminatory intent of a law, which the Court infers from a variety of objective indicators, and the discriminatory motive of individual lawmakers, which may or may not be treated as one of those objective indicators, see Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 Wm. & Mary Bill Rts. J. 89, 103–11, nn. 92, 104, 105, 107 (1997) ("The doctrine of impermissible intent that the Court has constructed tends to ignore the subjective intentions of the lawmakers, but encourages inquiry into the objective purpose of the law."). Those who dispute that free exercise protections post-*Smith* are limited to situations involving laws with a discriminatory intent often conflate these two issues. *See e.g. Laycock Brief–Stormans*, *supra* n. 36, at **30–31 (arguing that the lack of consensus in *Lukumi* about the propriety of examining the discriminatory *motives* of individual *legislators* means that free exercise violations are not limited to situations involving *laws* animated by discriminatory *intent*); *but see Flores*, 521 U.S. at 529 (describing "the free exercise of religion as defined by *Smith*" as a protection against "laws which are enacted with the unconstitutional object of targeting religious beliefs and practices" (citing *Lukumi*, 508 U.S. at 533)); Carol M. Kaplan, Student Author, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. Rev. 1045, 1080 (2000) (maintaining that the function of the "neutrality and general applicability inquiries is to *identify intentionally discriminatory laws*, whether they do their work overtly or covertly, that impose a burden on plaintiffs *because of their religion*" (emphasis added)).

[155] *Supra* nn. 82–85 and accompanying text.

[156] *See Merced*, 577 F.3d at 592 ("The two interests Euless claims are compelling are public health and animal treatment, the emphasis being on the former.").

emptions from Merced's requested exemption. Focusing on animal welfare, there are at least three arguments that could have been made: First, some of the approved exemptions—like allowing city officials and veterinarians to put down rabid and suffering animals—would appear to *advance* Euless's interest in animal welfare, not *undermine* it.[157] To that extent, they clearly should not trigger the selective-exemption rule. Second, even to the extent city officials and veterinarians might kill animals for reasons that do not serve the interest of the animal, the city council could reasonably have believed that the risk of causing unnecessary pain to animals during their killing would be lower if those killings were only done by trained city officials and veterinarians. If that is true, the approved exemptions for city officials and veterinarians would not undermine the city's interest in animal welfare as much as granting religious exemptions would. Third, the exemptions Euless approved for homeowners were limited to rodents, snakes, and fowl, whereas Merced was seeking an exemption that would additionally allow him to kill lambs and goats. Unless all animals must be treated as fungible when a city seeks to advance an interest in animal welfare, a strong argument could be made that Euless had a greater interest in preventing the unregulated killing of goats than the unregulated killing of rats. But Merced's argument to the Fifth Circuit *did* treat all animal killings as fungible. Indeed, at one point, Merced's brief went so far as to suggest that the boiling of lobsters would undermine Euless's interest in animal welfare as much as Merced's killing of goats.[158]

Would this reasoning extend to the federal ban on killing dolphins?[159] Must the federal government make an exemption for the religious sacrifice of dolphins simply because it does not ban the boiling of lobsters? That would appear to be the logical consequence of Merced's argument, but it is not a consequence that was brought to the attention of the court by Euless's attorneys.[160] Going forward, the discussion of the selective-exemption rule in animal-law cases will continue to implicate the issue of the government's relative interests in protecting different types of animals. If courts are going to be confronting that difficult issue, they would no doubt benefit from the in-

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157 *See generally* Amicus Curiae Br. of the Wash. Humane Socy. in Support of Respt., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 1992 WL 12008580 at *25 (U.S. July 17, 1992) ("[I]n the case of euthanasia of strays by humane societies, countervailing public health and animal welfare concerns justify the killing and the procedure is carefully regulated to ensure that no cruelty is involved.").

158 *Merced Brief*, *supra* n. 31, at *32.

159 Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1362(13), 1371 (2006).

160 Professor Henry Holzer has previously written about the consequences of a broad reading of *Lukumi* that treats all animal killing as fungible. *See* Henry Mark Holzer, *Contradictions Will Out: Animal Rights vs. Animal Sacrifice in the Supreme Court*, 1 Animal L. 79, 98–100 (1995) ("Perhaps the day will come when Santerians will be prohibited from sacrificing animals, but it is not likely to arrive until lobsters are no longer boiled alive and eaten in Hialeah.").

volvement of the animal-welfare community[161]—an involvement that was unfortunately missing in *Merced*.

D. The Impact of Hot-Button Social Issues on the Selective-Exemption Debate: Stormans, Inc. v. Selecky

Unlike animal-welfare organizations, reproductive-rights groups have not been missing from the debate over the selective-exemption rule. They have been actively involved in defending federal and state laws mandating the coverage or dispensing of emergency contraception, and one of those cases—*Stormans, Inc. v. Selecky*—is now before the Ninth Circuit for a second time.[162]

One of the more intriguing dynamics in *Stormans*—a dynamic that has become increasingly common in the overall debate about religious liberty—is the simultaneous reliance of conservative advocates on Justice Brennan's pro-exemptions opinion for the Court in *Sherbert v. Verner*[163] and liberal advocates on Justice Scalia's anti-exemptions

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[161] For just one of the many examples of the important work being done on the criteria that should (or should not) be used in valuing different animals in the law, see Lesley J. Rogers & Gisela Kaplan, *Think or Be Damned: The Problematic Case of Higher Cognition in Animals and Legislation for Animal Welfare*, 12 Animal L. 151, 153 (2006) (arguing that "it is important for policy makers and lawmakers to take into consideration the new scientific findings" about "perception and higher cognition" in animals; warning that relying exclusively on these findings to include "some species, but not others, into new legislative frameworks for protection . . . promise[s] to make life even worse for those species not included"; and proposing additional considerations for "species appropriate legislation" (emphasis omitted)).

[162] 586 F.3d 1109 (9th Cir. 2009), *on remand*, 844 F.Supp.2d 1172 (W.D. Wash. 2012), *appeal filed*, Nos. 12-35221, 12-35223 (9th Cir. 2012).

[163] 374 U.S. at 399–410; *see* Br. for Appellees, *Stormans, Inc. v. Selecky*, 2012 WL 5915339 at *4 (9th Cir. 2012) (Nos. 12-35221, 12-35223) [hereinafter *Stormans Brief*] (citing *Sherbert* for the proposition that a showing of discriminatory intent is not necessary to establish a free exercise violation).

Stormans's brief was co-authored by Professor Michael McConnell, a renowned conservative scholar and former federal judge who was appointed to the Tenth Circuit by President George W. Bush, and attorneys from the Becket Fund for Religious Liberty, the same group that represented José Merced. *Supra* nn. 34–35 and accompanying text. Although the Becket Fund frequently represents adherents of non-traditional religions in free exercise cases, it is generally viewed as part of the "socially conservative" legal movement. Charlotte Allen, *Justice For All*, The Weekly Standard (Sept. 29, 2008). This perception will no doubt be reinforced by the Fund's prominent role in challenging what it describes as the "abortion-pill mandate" imposed by "Obamacare." Press Release, Becket Fund for Religious Liberty, *Hobby Lobby Seeks Emergency Relief from Abortion-Pill Mandate* (Nov. 21, 2012) (available at http://www.becketfund.org/hobby-lobby-seeks-emergency-relief-from-abortion-pill-mandate/ (accessed Apr. 13, 2013)); Press Release, Becket Fund for Religious Liberty, *HHS Mandate Lawsuits Charge Forward as Only Remaining Challenge to "Obamacare"* (June 28, 2012) (available at http://www.becketfund.org/what-happens-to-hhs-mandate-challenges-after-supreme-courts-ruling-on-thursday/ (accessed Apr. 13, 2013)).

Among the numerous organizations signing on to amicus briefs in support of Stormans were the Liberty Institute, the American Center for Law and Justice, the Family Policy Institute of Washington, the Washington State Catholic Conference, and the National Association of Evangelicals. Amicus Curiae Br. in Support of Pls.-Appel-

opinion for the Court in *Employment Division v. Smith*.[164] This ironic division did not always exist; as recently as the mid-1990s, conservatives and liberals were largely united in their support of *Sherbert* over *Smith*. One notable exception to that earlier consensus was Professor Lino Graglia, who excoriated his fellow conservatives at the time for supporting federal legislation to restore the pro-exemption philosophy of *Sherbert*:

> Heedless of the fact that it was their implacable enemies who were now their allies, even conservative religious groups were willing to join an assault on self-government and federalism in pursuit of a promise of preferential treatment. These groups must have thought that a federally imposed exemption from the operation of ordinary law could not help but come in handy at some point. . . . Only a shortsighted and greedy focus on an imagined narrow self-interest, however, can explain the failure of religious conservatives to understand that a doctrine invented by Justice Brennan and enthusiastically supported by the ACLU and Americans United for the Separation of Church and State was not likely to be in the long-range interest of religion.[165]

It is beyond the scope of this Article to fully explore the extraordinarily provocative and strikingly prophetic nature of this passage,[166] but two quick observations are in order. First, the American Civil Liberties Union (ACLU) and Americans United for Separation of Church and State have since changed their positions from pro-exemption

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lees, *Stormans, Inc. v. Selecky*, 2012 WL 6018942 (9th Cir. 2012) (Nos. 12-35221, 12035223); Amici Curiae Br. of Wash. State Catholic Conf. et al. in Support of Pls.-Appellees, *Stormans, Inc. v. Selecky*, 2012 WL 6018940 (9th Cir. 2012) (Nos. 12-35221, 12035223).

164 494 U.S. at 874–90; *see* Reply Br. of Intervenors-Appellants Judith Billings et al., *Stormans, Inc. v. Selecky*, 2012 WL 6801697 at *19 (9th Cir. 2012) (Nos. 12-35221, 12-35223) (arguing that *Smith* rejected the broad reading of *Sherbert* relied upon by Stormans and established that free exercise claims require proof that laws were "motivated by discriminatory animus" or "applied in a discriminatory fashion"). The Intervenors' brief was co-authored by an attorney from Planned Parenthood.

Among the numerous organizations signing on to amicus briefs in support of the State and the Intervenors were Lambda Legal, Americans United for the Separation of Church and State, the Center for Reproductive Rights, and the National Women's Law Center. Amici Curiae Br. of AIDS United et al. in Support of Defs.-Appellants & Intervenors-Appellants, *Stormans, Inc. v. Selecky*, 2012 WL 3911751 (9th Cir. 2012) (Nos. 12-35221, 12-35223); Amicus Curiae Br. of Ams. United for Separation of Church & State in Support of Defs.-Appellants, *Stormans, Inc. v. Selecky*, 2012 WL 3911747 (9th Cir. 2012) (Nos. 12-35221, 12-35223) [hereinafter *Americans United*]; Amici Curiae Br. of Ctr. for Reproductive Rights & Natl. Women's L. Ctr. in Support of Appellants & Reversal, *Stormans, Inc. v. Selecky*, 2012 WL 3911750 (9th Cir. 2012) (Nos. 12-35221, 12-35223) [hereinafter *Center for Reproductive Rights & National Women's Law Center*].

165 Graglia, *supra* n. 3, at 61.

166 On the prophetic side, the "federally imposed exemption" regime Graglia scolded religious conservatives for supporting in the 1990s has indeed "come in handy" for conservatives, as it is now one of the principal legal theories for challenging the contraceptive-coverage mandate in the federal ACA. *Supra* n. 107.

(Brennan) to anti-exemption (Scalia).[167] Second, religious conservatives have only intensified their support for the pro-exemption (Brennan) position.[168]

What, pray tell, is going on?

The answer lies in the ascendance of hot-button social issues in the debate over religious exemptions. The debate used to be about accommodating the rest days of Sabbatarians,[169] the family farming and child-rearing practices of the Amish,[170] and the sacramental use of peyote by Native Americans[171]—practices that did not tend to polarize along political lines. By contrast, the debate today largely revolves around the question whether exemptions should be made from regulations requiring access to emergency contraception[172] and laws prohibiting discrimination against gay people.[173] With the debate shifted to this terrain, few conservatives have been willing to join Professor Graglia in his embrace of Justice Scalia's anti-exemption position, and few liberals have been willing to hold on to their embrace of Justice Brennan's pro-exemption position, with Professor Laycock a notable exception.[174]

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[167] *See* Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties"*, 84 Neb. L. Rev. 795, 828 n. 140 (2006) (recounting the ACLU's change in positions); *Americans United*, *supra* n. 164, at *6 (relying on the anti-exemptions position of *Smith*).

[168] *See e.g.* Mary Ann Glendon, *First of Freedoms?*, Am. Mag. ¶ 6 (Mar. 5, 2012) (available at http://americamagazine.org/issue/5131/article/first-freedoms (accessed Apr. 13, 2013)) (describing religious liberty as "a distinctive freedom that merits special exemptions and accommodations"); Jay Alan Sekulow, Heritage Found., *Religious Liberty and Expression under Attack: Restoring America's First Freedoms* 4 (Oct. 1, 2012) (available at http://thf_media.s3.amazonaws.com/2012/pdf/LM88.pdf) (accessed Apr. 13, 2013)) (describing the failure to exempt certain religious employers from the federal contraception-coverage mandate as "[o]ne of the greatest assaults on religious liberty . . . in the history of the United States").

[169] *Sherbert*, 374 U.S. at 409.

[170] *Yoder*, 406 U.S. at 210.

[171] *Smith*, 494 U.S. at 874.

[172] In addition to the *Stormans* case challenging Washington's law, more than fifty lawsuits have been brought challenging the contraceptive-coverage mandate in the federal ACA. *See* Press Release, Becket Fund for Religious Liberty, *Tenth Circuit Grants Hobby Lobby Full Court Hearing* (Mar. 29, 2013) (available at http://www.becketfund.org/press-release-hl-enbanc/ (accessed Apr. 13, 2013)) ("There are now 52 separate lawsuits challenging the HHS mandate, which is a regulation under the Affordable Care Act (aka 'Obamacare').").

[173] *See e.g. Elane Photo., LLC v. Willock*, 284 P.3d 428, 440–45 (N.M. App. 2012) (rejecting exemption claim made by a photography company that was fined under state antidiscrimination law for refusing to provide services at a same-sex commitment ceremony), *cert. granted*, (N.M. Aug. 16, 2012).

[174] *See* Tony Mauro, Leg. Times, *On the Trail of the Latest High Court Contender*, http://www.nlada.org/DMS/Documents/1118064729.2/article.jsp%3Fid%3D1117789517125 ¶ 20 (June 6, 2005) (accessed Apr. 13, 2013) (quoting Laycock describing himself as a "moderate-to-liberal Democrat"). Laycock, who has been a prominent supporter of religious-exemption legislation like RFRA, has written about how the bipartisan "wall-to-wall coalition" that supported RFRA in the early 1990s "broke apart in the late 1990s" over disagreements about the impact of religious exemptions on "civil rights in general, and gay rights in particular." Douglas Laycock, *The Religious Exemption Debate*, 11

Just as he supported José Merced's claim for a religious exemption from Euless's animal laws,[175] Professor Laycock is supporting Stormans's claim for a religious exemption from Washington's pharmacy delivery rule.[176] That rule, which was adopted in 2007, requires pharmacies to "deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the U.S. Food and Drug Administration for restricted distribution by pharmacies . . . in a timely manner."[177] The rule exempts pharmacies from the general duty to dispense drugs under the following circumstances:

> [W]hen the prescription cannot be filled due to lack of payment, because it may be fraudulent or erroneous, or because of declared emergencies, lack of specialized equipment or expertise, or unavailability of a drug despite good faith compliance with [a preexisting "stocking rule" requiring that] "[t]he pharmacy must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients."[178]

Rutgers J. L. & Religion 139, 148–49 (2009); *see also* Richard Schragger, *The Politics of Free Exercise After* Employment Division v. Smith: *Same-Sex Marriage, the "War on Terror," and Religious Freedom*, 32 Cardozo L. Rev. 2009, 2022 (2011) (describing how the concerns of "liberal groups" about "mandatory religious exemptions to anti-discrimination laws . . . led to the unraveling of the left-right coalition that supported RFRA originally").

[175] *Supra* nn. 34–35 and accompanying text.

[176] *Laycock Brief–Stormans*, *supra* n. 36. Twenty-three other constitutional law professors signed on to the Laycock amicus brief in *Stormans*. *Id.* at app. A.

[177] *Stormans*, 586 F.3d at 1116 (quoting Wash. Admin. Code § 246-869-010).

[178] *Id.* at 1116 n. 5.

As a result of the manner in which the "delivery rule" was drafted, there has been some confusion about whether it imposes any greater obligation on pharmacies to carry drugs than already existed under the preexisting "stocking rule." The Ninth Circuit has answered this question in the affirmative. *See id.* at 1121 ("Because the new rules require the pharmacy to deliver medications, such as Plan B, in a timely manner, Stormans will not be able to avoid stocking Plan B on the basis of its religious objections."); *see also* Appellants' Opening Br., *Stormans, Inc. v. Selecky*, 2012 WL 3835166 at *44 (9th Cir. 2012) (No. 12-35221) (describing a survey the State did about the delivery rule indicating that "[t]wenty-eight pharmacies may have to change their stocking practices for Plan B"); *but see* St. Appellants' Reply Br., *Stormans, Inc. v. Selecky*, 2012 WL 6801853 at *3 (9th Cir. 2012) (Nos. 12-35221, 12-35223) ("The *sole* operational effect of the new Delivery Rule is that when a medication is on the shelf the pharmacy must deliver it to the patient." (emphasis in original)). The Ninth Circuit's understanding of the delivery rule as imposing additional obligations on pharmacies to obtain drugs for their patients is consistent with the rule's language, which is not limited to drugs that happen to be on a pharmacy's shelf, but extends to all lawfully prescribed or FDA-approved drugs. *See Stormans*, 586 F.3d at 1116 (quoting the delivery rule). While one of the *exemptions* to the delivery mandate is for "good faith" compliance with the stocking rule, unless a refusal to stock a drug represents good-faith compliance, the language of the delivery rule appears to obligate a pharmacy to obtain the drug and sell it to the customer. And this was the central purpose of the delivery rule in the first place, as noted by the Defendant-Intervenor-Appellants in their 2008 brief to the Ninth Circuit. Opening Br. of Def.-Intervenor-Appellants, *Stormans, Inc. v. Selecky*, 2008 WL 1723143 at *37 (Nos. 07-36039, 07-36040, 586 F.3d 1109 (2009)) ("The evidence establishes that several pharmacies in Washington have refused to sell Plan B based on personal grounds, and therefore regulations increasing distribution were needed to serve the interest in patient safety and public health.").

Stormans, Inc., which operates a pharmacy in Olympia, Washington, is owned by individuals who have a religious objection to dispensing Plan B in their pharmacy.[179] Because the exemptions to the delivery rule do not excuse religious refusals to dispense drugs by pharmacies,[180] Stormans brought a lawsuit challenging the rules as a violation of the Free Exercise Clause. In its original decision in the case, the Ninth Circuit reversed the district court's grant of a preliminary injunction in Stormans's favor.[181] Following a trial, the district court ruled in favor of Stormans on the merits, and the case is now on appeal to the Ninth Circuit.[182]

In his amicus brief supporting Stormans, Professor Laycock makes the same case for a broad interpretation of the selective-exemption rule that he made with the Becket Fund in *Merced*.[183] Citing *Newark Lodge*, Laycock writes: "A singular secular exception triggers strict scrutiny if it undermines the state interest allegedly served by applying the rule to religious conduct."[184] Thus, Laycock argues, since Washington has exceptions for pharmacies that fail to deliver drugs for "business reasons,"[185] and since those exceptions undermine the State's interest in ensuring patients are able to obtain drugs in a timely fashion, the State must allow Stormans to refuse to dispense drugs for religious reasons that similarly undermine the State's interest.[186]

This is so, Laycock contends, even if Washington did not adopt its secular exceptions with a discriminatory intent.[187] As for the language in *Newark Lodge* that would appear in tension with this claim, Laycock confronts some, but not all, of it. He writes:

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179 *Stormans*, 586 F.3d at 1116–17.

180 The rules do accommodate refusals by individual pharmacists, who can refer customers to another pharmacist on site, but the rules do not allow pharmacies as entities to refuse delivery of drugs. *Id.* at 1115–16.

181 *Id.* at 1113.

182 *Stormans*, 844 F. Supp. 2d at 1201, *appeal filed*, Nos. 12-35221, 12-35223 (9th Cir. 2012).

183 *Laycock Brief–Stormans*, *supra* n. 36, at **1–3; *Merced Brief supra* n. 31, at **23–25. *See also supra* nn. 140–154 and accompanying text (discussing the argument Laycock made in *Merced* for a broad interpretation of the selective-exemption rule).

184 *Laycock Brief–Stormans*, *supra* n. 36, at *19.

185 *Id.* at **4, 16, 22, 26. Laycock appears to be using this phrase to describe the lack-of-payment, lack-of-specialized equipment, and out-of-stock components of the existing exemptions to the pharmacy delivery rule. *See also Stormans Brief*, *supra* n. 163, at *67 (focusing on the exemptions "for specialized equipment, customary payment, and out-of-stock drugs").

186 *Laycock Brief–Stormans*, *supra* n. 36, at *16; *see also Stormans Brief*, *supra* n. 163, at *67 (arguing that the business exemptions trigger the selective-exemption rule because they "permit a wide variety of referrals that undermine the government's alleged interest in timely access to medication far more than Plaintiffs' religious conduct").

187 *See Laycock Brief–Stormans*, *supra* n. 36, at *2 ("Religion need not be singled out, and the state need not act with bad motive. Laws that burden religion and apply to some but not all analogous secular conduct are not generally applicable.").

> In *Newark*, Justice Alito reasoned that the medical exception "indicate[d] that the Department has *made a value judgment* that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." This point about value judgments also appears in *Lukumi*, which said that the ordinances' individualized evaluation of particular justifications for killing animals "*devalues religious reasons* for killing by judging them to be of lesser import than nonreligious reasons." The point deserves further elaboration. *It does not require that the state have made an explicit value judgment, or that state officials consciously compare religious and secular conduct and deem the secular conduct more worthy.*[188]

The conclusion at the end of this paragraph is difficult to square with either the plain meaning of the phrase, "made a value judgment," or the following additional language from *Newark Lodge*:

> [W]e conclude that the Department's *decision to provide medical exemptions while refusing religious exemptions* is sufficiently suggestive of *discriminatory intent* to trigger heightened scrutiny under *Smith* and *Lukumi*.[189]

As discussed above, while *Newark Lodge* did extend the "individualized exemption" theory to a situation involving a categorical exemption, it was a situation in which the categorical exemption was adopted *after* the request for the religious exemption had been made to the same decision-maker.[190] The more typical "categorical-exemption" situation—exemplified by the situation in *Merced*—involves a categorical exemption that is adopted in a law separate from any consideration of a request for a religious exemption.[191] In that more typical situation, unlike in the *Newark Lodge* situation, there is no reason to draw an inference of discriminatory intent solely from the adoption of the categorical exemption.

Interestingly, notwithstanding Laycock's advocacy in *Stormans* for the broad version of the selective-exemption rule that would extend to categorical exemptions adopted with no inherent risk of discriminatory intent, Stormans itself probably does not need that interpretation to succeed in its lawsuit. Stormans needs only the middle-ground version of the selective-exemption rule that extends to categorical exemptions adopted in circumstances that *do* involve the risk present in *Newark Lodge*.[192] That is so because the categorical exemptions

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[188] *Id.* at *24 (citing *Newark Lodge*, 170 F.3d at 366, and *Lukumi*, 508 U.S. at 537 (emphasis in *Lukumi* added by Laycock, emphasis in *Newark Lodge* and final sentence of passage added by Author)).

[189] 170 F.3d at 365 (emphasis added); *see also Roy*, 476 U.S. at 708 (plurality) (explaining that where a State has "created a mechanism for individualized exemptions," its "refusal to extend an exemption to an instance of religious hardship *suggests a discriminatory intent*" (emphasis added)).

[190] *Supra* n. 80 and accompanying text.

[191] *Supra* nn. 144–146 and accompanying text.

[192] The narrowest version of the selective-exemption rule would be one that applied only to discretionary individualized exemptions, which raise the greatest risk of intentional discrimination. *See* Ira C. Lupu, *The Case Against Legislative Codification of Re-*

adopted to Washington's pharmacy rules, like the medical exemption in *Newark Lodge*, were adopted *after* religious objections to the rule were raised, and the categorical exemptions were considered alongside those religious objections.[193]

Although Stormans would not seem to need the broad version of the selective-exemption rule, and although that version does not follow from the original "suggestion of discriminatory intent" rationale for the rule, Laycock does offer an alternative rationale for the rule that is worth considering, given its potential impact on future cases. Laycock calls this the "vicarious political protection" rationale, and it proceeds as follows:

> A small religious minority will not have the political clout to defeat a burdensome regulation, but if that regulation also burdens other, more powerful interests, there will be stronger opposition and the regulation is less likely to be enacted. Burdened secular interests provide vicarious political protection for small religious minorities. But this vicarious political protection breaks down very rapidly if the legislature is free to exempt any group that might have enough power to prevent enactment, leaving a law applicable only to small religions with unusual practices and other groups too weak to prevent enactment. If secular interests burdened by the regulation can be exempted, they have no reason to oppose the regulation, and religious minorities are left standing alone. . . . This concern with vicarious po-

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ligious Liberty, 21 Cardozo L. Rev. 565, 573, 573 n. 42 (1999) (explaining that "regimes of more open-ended discretion are typically most vulnerable to the charge that they are being administered in ways hostile to religion"; such regimes warrant "a hard judicial look" under the "individual assessment principle," which addresses "[i]dentical concerns" to those that have long informed the Court's close scrutiny of discretionary "licensing authority over expressive activity"); *see also Axson-Flynn*, 356 F.3d at 1299 (discussing the "general principle that greater discretion in the hands of governmental actors makes the action taken pursuant thereto more, not less, constitutionally suspect" (citing *Cantwell*, 310 U.S. at 305)).

[193] *See Stormans*, 586 F.3d at 1114 (noting that during the rulemaking process "[m]ost of the comments . . .focused on whether pharmacists should be allowed to refuse to dispense a lawful prescription for Plan B based on their personal, moral, *or religious beliefs*" (emphasis added)); Amicus Curiae Br. of Church of the Lukumi Babalu Aye, Inc. et al. in Support of Appellees & Affirmance, *Stormans, Inc. v. Selecky*, 2012 WL 6018943 at *9 (9th Cir. 2012) (Nos. 12-35221, 12-35223) [hereinafter *Church of the Lukumi Babalu Aye Amicus Brief*] (relying on the State Pharmacy Board's simultaneous consideration of business and religious exemptions during the rulemaking process to argue that "the Board specifically prioritized the commercial interests of all pharmacists over the religious conscience of a minority of pharmacists").

As for the other hot-button issue currently implicating the selective-exemption rule—the issue of the contraceptive-coverage mandate being implemented by HHS under the federal ACA, see *supra* nn. 106–110 and accompanying text—the granted secular exemptions (for small businesses with fewer than fifty employees and for grandfathered plans) were adopted by Congress in the ACA *prior* to HHS's regulatory consideration of religious exemptions for commercial businesses. *Compare* Pub. L. No. 111-148, §§ 1251, 1513(a), 124 Stat. 119, 161–62, 253–54 (2010) (exempting grandfathered plans and small businesses) *with* Coverage of Certain Preventive Services under the Affordable Care Act, 78 Fed. Reg. 8456, 8462 (exempting religious non-profits but declining to exempt "for-profit" employers who oppose contraception on religious grounds).

> litical protection is the deepest rationale for the rule that even a single secular exception (if it undermines the asserted reasons for the law) makes a law less than generally applicable.[194]

This argument brings us back to Question 1 from the beginning of this Article (concerning the fundamental purpose of the selective-exemption rule),[195] as Laycock's rationale is essentially an argument for adopting the "unintentional neglect or indifference" view of the selective-exemption rule.[196] The argument goes: because the interests of small religious minorities will often be neglected in the legislative process, they are uniquely dependent on the vicarious political protection of powerful secular interests, and a broad selective-exemption rule shields them if that vicarious political protection is removed. Though intuitively appealing, this argument does not withstand closer scrutiny.

First, the practices of small religious minorities often are *not* shared by others, so in many situations, there will be no vicarious political protection of their interests because no secular entity will have an interest in defending the practice.[197] As a result, "statutes burdening small religious minorities are disproportionately likely to be uniform ones, immune to challenge under the *Smith* rule,"[198] even if courts adopted Laycock's broad version of the selective-exemption rule. On a related note, but more fundamentally, an argument for protecting religious minorities against neglect and indifference is an argument for providing exemptions to *all* laws, not just laws that happen to contain secular exemptions. As Professor Christopher Lund has explained, the broad selective-exemption rule is basically a theory of constitutional luck—you will be protected against unintentional neglect if you happen to live in a jurisdiction where a powerful secular interest has obtained an exemption, but you will not be protected from the very

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194 *Laycock Brief–Stormans*, *supra* n. 36, at **26–27 (quoting Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law 25, 36 (2000)) (internal citation and quotation marks omitted). In making this argument, Laycock draws upon Justice Jackson's observation in the equal protection context that "there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Id.* at *25 (quoting *Ry. Express Agency v. City of N.Y.*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)).

195 *See supra* n. 26 and accompanying text (laying out five major unresolved questions about the selective-exemption rule).

196 *See also* Duncan, *supra* n. 25, at 881–82 (embracing a broad version of the selective-exemption rule because it addresses "indifference to the plight of religious minorities" (quoting Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 169 (1992))).

197 As Professor Christopher Lund has explained: "Small religious minorities often want idiosyncratic things—they demand rights that no one else wants. As a result of their nonmainstream beliefs, they are often burdened by laws that burden no one else. Because no significantly sized group is burdened, no exceptions to the law ever develop." Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 Tenn. L. Rev. 351, 359 (2010).

198 *Id.*

same neglect if you live in a jurisdiction where no powerful secular interest has sought an exemption.[199] As Lund has noted, that "is really an unprincipled and bizarre manner of distributing constitutional exemptions."[200]

While the broad selective-exemption rule would be an intolerably random method of protecting against *unintentional neglect* of religious minorities, a more narrowly tailored selective-exemption rule aimed at protecting against *intentional discrimination* is not random. Rather, it is properly invoked only in situations that inherently raise the risk of such discrimination, like the decision-making situations in *Lukumi* and *Newark Lodge*. Limiting application of the selective-exemption rule to situations "suggestive of discriminatory intent"[201] would also avoid a conflict with the Supreme Court's post-*Lukumi* decisions in *City of Boerne v. Flores*[202] and *Locke v. Davey*[203]—a conflict that is unavoidable if Laycock's broad version of the selective-exemption rule is adopted.

In *Flores*, the Court held that the Religious Freedom Restoration Act (RFRA)[204] exceeded Congress's power to enforce constitutional rights against the States[205] because the Act attempted to "alter[ ] the meaning of the Free Exercise Clause" and effect "a substantive change in constitutional protections."[206] In reaching that conclusion, the Court identified the baseline for what constitutes a free exercise violation as "legislation enacted or enforced due to animus or hostility to the burdened religious practices."[207] The Court found that RFRA was not designed to confront such unconstitutional laws, because "Congress' concern was with the *incidental burdens* imposed [by state legislation], not *the object or purpose* of the legislation."[208] And while Congress did compile evidence indicating that religious minorities had

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199 Lund, *supra* n. 75, at 644–65.

200 *Id.* at 664.

201 *Newark Lodge*, 170 F.3d at 365.

202 521 U.S. 507 (1997).

203 540 U.S. 712 (2004).

204 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

205 U.S. Const. amend. XIV, § 5.

206 521 U.S. at 519, 532.

207 *Id.* at 531; *see id.* at 529 (describing "the free exercise of religion as defined by *Smith*" as freedom from "laws which are enacted with the unconstitutional object of targeting religious beliefs and practices"); *id.* at 530 (finding the legislative record in support of RFRA inadequate because it did not contain examples of modern state laws "passed because of religious bigotry" or "persecution"); *id*. at 535 (explaining that RFRA was not remedial because "the state laws to which [it] applies are not ones which will have been motivated by religious bigotry" or that burden people "because of their religious beliefs"); *see also* Berg, *supra* n. 23, at 1197 ("The Court in *Boerne*, in finding RFRA disproportionate to Free Exercise Clause violations, compared the statute to a relatively narrow constitutional prohibition against laws reflecting 'bigotry,' 'animus,' or 'hostility' toward the burdened faith.") (quoting *Flores*, 521 U.S. at 530, 531, 536).

208 521 U.S. at 531 (emphasis added).

been burdened as the result of government neglect and indifference,[209] that was not sufficient. The problem with RFRA was clear: "Laws valid under *Smith* would fall under RFRA without regard to whether they had *the object of stifling or punishing free exercise*."[210] Having struck down a religious-exemption law enacted by Congress because it was not properly aimed at intentional discrimination, it would be odd indeed for the Court to approve a judicial religious-exemption rule that is not aimed at intentional discrimination.

Further casting doubt on the viability of the broad Laycock version of the selective-exemption rule is the Court's decision in *Locke*, where it upheld a state program against a free exercise challenge for the very reason that nothing in the program's operation "suggest[ed] animus toward religion."[211] Although there is certainly room for debate over the Court's *finding* of no animus in *Locke*,[212] the Court's *requirement* of animus is crystal clear. And it is a requirement that harkens back to *Bowen v. Roy*,[213] where the selective-exemption rule was first articulated by a plurality of the Court.[214] The *Roy* plurality declined to find the rule implicated by requirements in a federal statute governing the food-stamp program when there was "nothing whatever suggesting antagonism by Congress towards religion generally or towards any particular religious beliefs."[215]

In short, a broad selective-exemption rule that goes beyond situations suggesting discriminatory intent cannot be reconciled with the Supreme Court's current understanding of the Free Exercise Clause.

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[209] *Id.* at 530–31 (citing testimony from seven witnesses and two committee reports concerning "autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs"); *see* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 225–26 (1993) (contrasting "deliberate persecution" with situations where the "secular bureaucracy is indifferent to [the] needs" of religious minorities and giving as an example of the latter "one of the saddest cases since *Smith*" involving an "unnecessary autopsy performed on a young Hmong man" that was done "without the slightest regard for the family's religious beliefs"). In *Flores*, the Court cited Professor Laycock's congressional testimony about unnecessary autopsies, but the Court found that such conduct did not violate the Free Exercise Clause. 521 U.S. at 530–31.

[210] *Flores*, 521 U.S. at 534 (emphasis added); *see id.* ("We make these observations . . . to illustrate the substantive alteration of [*Smith*'s] holding attempted by RFRA").

[211] 540 U.S. at 725; *see id.* at 721 (finding no "evidence of hostility"); *id.* at 724 (finding that the state program did not "[evince] the hostility toward religion which was manifest in *Lukumi*").

[212] *Id.* at 733 (Scalia, J., dissenting) ("Let there be no doubt: This case is about discrimination against a religious minority.").

[213] 476 U.S. 693 (plurality), *approved*, *Smith*, 494 U.S. at 884, *and Lukumi*, 508 U.S. at 537–38.

[214] 476 U.S. at 708 (plurality); *see supra* n. 40 and accompanying text (discussing the selective-exemption rule's role in preventing intentional discrimination).

[215] 476 U.S. at 708; *see id.* at 707–08 ("Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.").

As noted above, however, the situation in *Stormans* may well be one that implicates the more narrowly tailored selective-exemption rule. If that is the case, and Stormans can get past the hurdles of Question 1 (concerning the purpose of the rule) and Question 2 (concerning the rule's applicability to categorical exemptions), the critical issue in the case will revolve around Question 3 (concerning the comparability of the granted and denied exemptions).[216] The Ninth Circuit will have to determine whether the secular exemptions Washington has made from its pharmacy delivery rule are sufficiently analogous to the requested religious exemption to trigger the selective-exemption rule. Reframing the question in the terms used in *Newark Lodge*, the court will have to ask whether the exempted secular activities and non-exempted religious activities equally undermine the government's interest in its underlying rule.[217]

Interestingly, the Ninth Circuit already answered this question at the preliminary-injunction stage when it held that the exemptions "are a reasonable part of the regulation of pharmacy practice, and their inclusion in the statute does not undermine the general applicability of the new rules."[218] The court reasoned that the existing exemptions "actually increase access to medications by making it possible for pharmacies to comply with the rules, further patient safety, and maintain their business."[219] Thus, the court held, the pharmacy rules "are generally applicable because they are not substantially underinclusive."[220]

The issue is now back before the Ninth Circuit because the district court held, based on further fact-finding at trial, that some of the existing exemptions do actually "endanger the government's interest in a similar or greater degree than Plaintiffs['] religiously motivated" conduct.[221] The tension between this finding and the original Ninth Circuit decision does not appear to be the result of the additional fact-finding alone. Rather, the "ships passing in the night" quality of the original Ninth Circuit decision and the district court decision seems to be a consequence of the two courts using different government interests as their respective baselines for conducting the underinclusion analysis.

The district court's baseline was the State's broad interest in "ensuring timely access to medication," an interest that the court found to

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216 *See supra* n. 26 and accompanying text (laying out five major unresolved questions about the selective-exemption rule).

217 *See supra* nn. 82–84 and accompanying text (discussing the fact that the undercover-officer exemption to the police department's no-beard policy did not implicate the selective-exemption rule because it did not undermine the purpose of the policy, while the medical exemption did undermine the purpose of the policy).

218 *Stormans*, 586 F.3d at 1135.

219 *Id.*

220 *Id.* at 1134.

221 *Stormans v. Selecky, Inc.*, 854 F. Supp. 2d 925, 970 (W.D. Wash. 2012) ("Findings of Fact and Conclusions of Law") (quoting *Lukumi*, 508 U.S. at 543 (internal quotation marks and brackets omitted)) (accompanying opinion at 844 F. Supp. 2d 1172).

be undermined by many of the "business reasons" for which the failure to stock a drug can be excused under the existing exemptions.[222] The Ninth Circuit, by contrast, appeared to be looking to a narrower interest that the state board of pharmacy sought to advance:

> [T]he Board was motivated by concerns about the potential deleterious effect on public health that would *result from allowing pharmacists to refuse to dispense* lawfully prescribed medications *based on personal, moral objections (of which religious objections are a subset).*[223]

With that more narrow interest in mind, the Ninth Circuit focused its analysis on "how many people are able to get medication that they might previously have been denied based on religious or general moral opposition by a pharmacist or pharmacy to the given medication."[224] The court found that, "[w]hatever that number . . . it cannot be shrugged off as insignificant."[225] Thus, the rule advanced the State's interest in protecting patient access against refusals to serve,[226] and the existing exemptions did not undermine those interests because the existing exemptions did not concern *refusals* to serve for moral reasons, but *failures* to serve for business reasons.[227] The different base-

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[222] *Id.* at 972, 975. Of particular note, the district court found that the "lack of payment" or "customary payment" exemption is not limited to cases of non-payment, but also covers cases where pharmacies choose to limit the *method* of full payment they will accept. *Id.* at 972–73. The court found that these method-of-payment restrictions on delivering drugs "can impose a far more serious barrier to access [to drugs in general] than [Stormans's] religiously motivated" refusals to sell Plan B. *Id.* at 973. The importance of these factual findings about the method-of-payment exemption will vary greatly depending on the breadth with which the Ninth Circuit ultimately defines the State's interest in its rule.

[223] *Stormans*, 586 F.3d at 1133 (emphasis added). The Ninth Circuit, unlike the district court, concluded that targeting personal and moral objections did not amount to an unconstitutional effort to "impose burdens only on conduct motivated by religious belief." *Id.* (quoting *Lukumi*, 508 U.S. at 543). Nonetheless, on remand, the district court again found that Washington had violated the constitution by targeting "conscientious objectors," and Stormans is again pressing that argument before the Ninth Circuit. 844 F. Supp. 2d at 1178, 1200; *see Stormans Brief*, *supra* n. 163, at **103–04 ("[I]t is just as constitutionally problematic to target 'moral' objections as it is to target religious objections.").

[224] *Stormans*, 586 F.3d at 1135.

[225] *Id.*

[226] *Id.*

[227] Though implicit in the Ninth Circuit's decision, the distinction between refusals to serve and failures to serve was not made explicit by the court. Nor has the State made the distinction explicit in its briefs. Indeed, the closest any defender of the law has come to drawing out this critical distinction is the argument made in an amicus brief that the rule "serves the important goals of protecting women's reproductive rights and preventing discrimination against women." *Center for Reproductive Rights & National Women's Law Center, supra* n. 164, at *3 n. 2; *see also Stormans*, 586 F.3d at 1115 (quoting a letter from the executive director of the Washington State Human Rights Commission urging adoption of the rule because it "is illegal and bad policy to permit pharmacists to deny services to women based on the individual pharmacists' religious or moral beliefs"). This argument goes to the heart of the case. It is *refusals* to serve for personal and moral reasons, not *failures* to serve for business reasons, that threaten the State's interest in "preventing discrimination against women" and animated the rule's adoption

lines used by the district court and the Ninth Circuit go to a fundamental difficulty with implementing the selective-exemption rule—determining how broadly or narrowly to define the State's interest when comparing existing exemptions with requested religious exemptions.[228] An example from the nondiscrimination context helps explain why the Ninth Circuit's approach of narrowly defining the state interest is the better one.

Assume a State has a broad public accommodations law that requires businesses to make all their services available to all people who have the ability to pay for those services. The law contains exemptions, however, excusing failures to serve based on a business's decision to accept only certain forms of payment (e.g., an inn's decision to accept only certain types of credit cards)[229] or a business's decision not to offer a particular service to anyone during a particular period (e.g., an inn's decision not to rent out its wedding space in the off season when demand is too low to warrant keeping sufficient staff on hand).[230] Now imagine an inn that refuses to rent out its wedding space for weddings involving divorced people because the owner of the inn has a sincere religious belief that hosting such marriages facilitates adultery in direct contravention of the Bible.[231] The owner seeks an exemption from his obligation under the state public accommodations law, arguing that the law's inclusion of exemptions permitting *failures to serve* for business reasons requires an exemption permitting his *refusal to serve* divorced people for religious reasons.

If the State's interest in its public accommodation law is broadly defined as ensuring customer access to commercial services, the exemptions written into the law would in fact undermine the State's interest at least as much as, and probably more than, the requested

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in the first place. The State would have done better to focus on this more narrow interest in its briefs rather than relying on a broader interest in "timely and efficient access by patients to lawfully-prescribed medicines," Appellants' Opening Br., *Stormans v. Selecky*, 2012 WL 3835166 at *30 (9th Cir. 2012) (Nos. 12-35221, 12-35223), which may well be undermined by failures to serve for business reasons.

In addition to preventing sex discrimination, another reason a regulator might be more concerned about moral reasons for *refusing* to dispense drugs than business reasons for *failing* to dispense drugs is that market forces cannot be relied upon to remedy barriers to access caused by the former practice. While any large unmet need will likely encourage a pharmacy motivated by business concerns to find a way to respond, moral objections are more insensitive to demand. I am indebted to Steve Kanter for bringing this dynamic to my attention.

[228] For general discussions of these types of logistical difficulties, see generally Brownstein, *supra* n. 25, at 199–202; Volokh, *supra* n. 23, at 1541–42.

[229] *Cf. supra* n. 222 (discussing the district court's finding in *Stormans* that the "customary payment" exemption excuses failures to deliver drugs based on a pharmacy's decision to accept only certain methods of payment).

[230] *Cf. Stormans Brief*, *supra* n. 163, at *71 (relying on the district court's finding that the existing exemptions to Washington's pharmacy rules allow pharmacies not to stock a drug "when [it] is in low demand").

[231] *Matthew* 19:9 ("I tell you that anyone who divorces his wife, except for sexual immorality, and marries another woman commits adultery.").

religious exemption. For there are thousands of businesses that limit payment to certain types or selectively limit their services based on demand. But if the State's interest in its public accommodations law is more narrowly defined as preventing businesses from refusing services based on judgments about customers, the business exemptions written into the law—like the business exemptions written into the Washington pharmacy rule—would not undermine the State's interest, while allowing personal religious refusals would.

The potential consequences of too broadly defining a State's interest in its laws, which could result in mandatory religious exemptions from all sorts of antidiscrimination laws governing commercial businesses, militates in favor of carefully ascertaining the State's interest before applying the selective-exemption rule.

III. AN APPROPRIATELY SCALED SELECTIVE-EXEMPTION RULE AND WHAT IT WOULD MEAN FOR ANIMAL-WELFARE LAWS

The foregoing discussion suggests the following answers to the key questions identified at the beginning of this Article about the selective-exemption rule.[232]

A. The Purpose of the Rule

The selective-exemption rule is properly viewed as a tool to guard against the type of intentional discrimination prohibited by the Free Exercise Clause under *Smith*, not a shield against the type of unintentional neglect or indifference that was actionable under the Court's post-*Sherbert*/pre-*Smith* jurisprudence. Although strong arguments have been offered for reconsidering *Smith*[233] and its "equal protection"

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[232] *Supra* text accompanying n. 26.

[233] *See e.g. Lukumi*, 508 U.S. at 559–62, 576 n. 8 (Souter, J., concurring in part and concurring in the judgment) (raising doubts about *Smith*'s "formal neutrality" rule, discussing how "substantive neutrality" would "generally require government to accommodate religious differences by exempting religious practices from formally neutral laws," and arguing that the Framers may have hoped to prevent burdens on religion "flowing from the indifference or ignorance of the majority" (citing generally Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990))); *see also* Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 Nw. U. L. Rev. 1189, 1191 (2008):

> Judge Michael McConnell and Douglas Laycock . . . have excoriated *Smith* as inconsistent with the text and original understanding of the Free Exercise Clause, a sharp break with established precedent, and, ultimately, a naked betrayal of basic human rights values. They argue that the decision renders the Free Exercise Clause meaningless and, accordingly, that the Supreme Court should abandon it.

A number of commentators have urged the Court to consider a middle-ground position between *Sherbert* (strict scrutiny of incidental burdens on religion) and *Smith* (no scrutiny of incidental burdens on religion) by using intermediate scrutiny to protect religious-liberty interests from incidental burdens. *See e.g.* Rodney A. Smolla, *The Free*

interpretation of the Free Exercise Clause,[234] those arguments should not be advanced through the backdoor of the selective-exemption rule.[235] The selective-exemption rule was adopted as part of the *Smith* paradigm, and it only makes sense to interpret it in accord with that paradigm.[236]

Exercise of Religion after the Fall: The Case for Intermediate Scrutiny, 39 Wm. & Mary L. Rev. 925, 937–43 (1998) (arguing that the Court should bring "free exercise cases into a parity with speech cases" by applying the "flexible standard of intermediate judicial scrutiny" to generally applicable laws that incidentally burden religious practice); Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 Vand. L. Rev. 1335, 1343 n. 31 (1995) ("[T]he Court has made considerable progress in developing a workable jurisprudential approach to inadvertence in the free speech context. Unfortunately, the Supreme Court appears unaware that this is precisely the same systemic jurisprudential question that is presented when similar regulations inadvertently affect the interests protected by the religion clauses."). To adopt such an approach, however, the Court would have to back away from its opinion in *City of Boerne v. Flores*. *See* 521 U.S. at 534 (explaining that even if RFRA were interpreted "to mandate some lesser test, say, one equivalent to intermediate scrutiny," it would still not properly enforce the Free Exercise Clause).

234 *See Arlington Heights*, 429 U.S. at 253 ("Proof of . . . discriminatory intent or purpose is required to show a violation of the Equal Protection Clause . . . ."); *Flores*, 521 U.S. at 531, 534–35 (finding RFRA inconsistent with the Free Exercise Clause because it was not responsive to state laws with a discriminatory "object or purpose," and instead covered state laws "without regard to whether they had the object of stifling or punishing free exercise" or had "been motivated by religious bigotry"). The Court recently confirmed the equivalence of its free exercise and equal protection tests, with a reminder that the ultimate inquiry in both contexts concerns animus: "Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (citing *Lukumi*, 508 U.S. at 540–41 for the First Amendment and *Washington v. Davis*, 426 U.S. 229, 240 (1976) for the Fifth Amendment). "Under extant precedent purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences' . . . It instead involves a decisionmaker's undertaking a course of action '"because of," not merely "in spite of," [the action's] *adverse effects upon an identifiable group*.'" *Ashcroft*, 556 U.S. at 676–77 (quoting *Personnel Adminstr. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added and internal citations omitted)).

235 *Cf.* Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 Loy. U. Chi. L.J. 71, 71 n. 4 (2001) ("My sense is that those who offer these alternative case readings do so because they disagree with the cases' natural reading and believe that the Free Exercise Clause ought to give religious liberty more protection than the Supreme Court appears to believe it should.").

236 Notwithstanding my doctrinal conclusions about the proper role of the selective-exemption rule under *Smith* and its progeny, I find considerable normative force in arguments that the *Smith* doctrine is insufficiently narrow insofar as it does not account for the adverse impact of unintentional neglect on minority religions. *See e.g.* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1298 (1994) (discussing the "substantial risk that governmental actors, even while bearing no animus toward minority religious believers, will ignore, undervalue, or implicitly denigrate their deep, religiously motivated concerns"). However, as discussed above, the appropriate doctrinal response to this normative concern is the development of a test for reviewing *all* incidental burdens on religious minorities, not just those incidental burdens that *happen to coincide* with the existence of unexceptional categorical exemptions. *Supra* text accompanying nn. 195–200. Professors Eisgruber and Sager have

B. Individualized v. Categorical Exemptions

Consistent with its role in guarding against the danger of intentional discrimination, the selective-exemption rule should apply in situations where the government either makes available discretionary exemptions to a legal requirement based on "individualized governmental assessment of the reasons for the relevant conduct," as in *Lukumi*,[237] or adopts categorical exemptions to a legal requirement for non-religiously motivated conduct while simultaneously denying an exemption for analogous religiously motivated conduct ("simultaneous-consideration situations"), as was the case in *Newark Lodge*.[238] The selective-exemption rule should *not* apply where a government rulemaker writes categorical exemptions into a law separate from any consideration of religion and where requests for religious exemptions only arise later, outside the rulemaking context ("non-simultaneous-consideration situations"), as in *Merced*.[239]

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proposed one methodology for reviewing all incidental burdens to protect against the danger of neglect—a methodology they call "equal liberty" or "equal regard." Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 89 (Harvard U. Press 2007). But implementation of their proposed methodology faces considerable logistical difficulties. *See* Lund, *supra* n. 197, at 360–68 (concluding that Eisgruber and Sager's proposed counterfactual test is "unworkable"); Andrew Koppelman, *Justice Stevens, Religious Enthusiast*, 106 Nw. U. L. Rev. 567, 579 (2012) (concluding that Eisgruber and Sager's test is "incoherent"). A more promising, albeit more modest, approach to vindicating equality interests against neglect is the burden-shifting "rationality with bite" approach proposed by Professor Krotoszynski. Krotoszynski, *supra* n. 233, at 1262–72.

[237] 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884). The precise scope of the "individualized assessment" strain of the selective-exemption rule is a subject of dispute among commentators. *Compare e.g.* Brian A. Freeman, *Expiating the Sins of* Yoder *and* Smith*: Toward A Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 Mo. L. Rev. 9, 50–51 (2001) (arguing that the denial of a requested exemption under an individualized-exemption system is not by itself sufficient to trigger strict scrutiny because the rule only applies when the system refuses to consider any religious hardship claims) *with e.g.* Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith*,* Sherbert*, Hogwarts, and Religious Liberty*, 83 Neb. L. Rev. 1178, 1202 (2005) (arguing that the denial of a requested exemption under an individualized-exemption system is sufficient to trigger strict scrutiny and that a blanket refusal to consider religious exemptions is not a necessary predicate).

It is also important to note that individualized-exemption systems come in different forms with varying degrees of discretion granted to the officials who administer them. *See* Lupu, *supra* n. 192, at 572–73 ("Regimes of individualized judgment always reside on a continuum ranging from placement in a few categories marked by bright-line rules (e.g., ages of eligibility to purchase alcohol or operate a motor vehicle) to highly discretionary decisions based on a multiplicity of circumstances (e.g., no job dismissal without 'just cause')."). The Court has not yet had the opportunity in the free exercise context to distinguish between individualized-exemption systems based on the degree of discretion they grant individual decision-makers, but one logical approach would be to apply closer scrutiny to those systems that fail to provide "determinate criteria" for the exercise of discretion. *Id.* at 573.

[238] 170 F.3d at 365.

[239] *See supra* nn. 140–147 and accompanying text (comparing the non-simultaneous-consideration situation in *Merced* with the simultaneous-consideration-situation in

C. Comparing Categorical Exemptions in "Simultaneous-Consideration" Situations

The generally accepted test for comparing categorical exemptions, rooted in the language of *Lukumi* and applied in *Newark Lodge*, is whether the granted exemptions undermine the government's interests as much as, or more than, would the requested religious exemption.[240] In applying this test, which will not always be easy, courts should avoid the risk of too easily inferring discriminatory intent on the part of government rule-makers whose very job is to draw lines between different categories of conduct. Accordingly, courts should be careful to narrowly identify the government's precise interest in its rule and ask whether the granted exemptions concern identical or nearly identical conduct. To use the animal laws in the *Merced* case as an example, a city could very well have an interest in preventing the type of cruelty to large mammals that might result from allowing unregulated slaughter of such mammals in households across the city. That specific interest should not be frustrated by more broadly defining the city's interest as "preventing all animal cruelty" and then finding that interest undermined by exceptions for fowl and rodents. Not only might the city have determined that it is inherently more concerned about large mammals than chickens, it might also have determined that the greater difficulty of killing such mammals in a household setting makes cruelty in that circumstance more likely than in cases of home slaughter of chickens. Likewise, a city rule allowing veterinarians to put down animals in a controlled setting is not identical or nearly identical to a rule allowing all residents of the city to kill animals in their homes, and the two activities can only be deemed "comparable" if courts adopt an inappropriately broad definition of the conduct at issue.

On a related note, the Court hinted in *Smith* that the selective-exemption rule might be limited to situations where government has

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Newark Lodge, and explaining why the former does not involve an inherent risk of discriminatory intent).

There is an additional problem with adopting the broad non-simultaneous version of the selective-exemption rule and routinely applying strict scrutiny to laws containing categorical exemptions. The Court has long held that, under traditional rational basis review, the government can tackle problems "one step at a time." *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955). But according to the broad version of the selective-exemption rule, that one-step-at-a-time rulemaking process is precisely what makes a law vulnerable to strict scrutiny. *See* Duncan, *supra* n. 25, at 880–81 ("[A]n across-the-board prohibition of some class of behavior may be enforced against religiously motivated conduct, but when the government pursues underinclusive restrictions against religious practices, the Free Exercise Clause is triggered and the selective regulatory scheme will be reviewed under a compelling interest test that is strict in theory and usually fatal in fact."); *see also Laycock Brief–Stormans*, *supra* n. 36, at *17 (contending that "*partially* applicable laws—laws that burden religion and *some* analogous secular conduct, but *not all* analogous secular conduct . . . are subject to strict scrutiny" (emphasis in original)).

[240] *Supra* nn. 82–86 and accompanying text.

favored "some 'personal reasons'" for engaging in conduct over "religious reasons" for engaging in the same conduct.[241] Giving force to that limitation would help cabin the rule. The limitation would not apply to the business reasons Washington State recognizes as valid excuses for pharmacies failing to stock drugs, while still allowing the rule to apply in cases where there is a danger that government has discriminated in favor of non-religious personal motivations over religious motivations—for example, if Washington allowed pharmacy owners to refuse to dispense drugs from pharmaceutical companies they deemed morally irresponsible for engaging in unnecessary animal testing, but did not also allow pharmacy owners to refuse to dispense drugs they deemed immoral for religious reasons.

D. The Requisite Number of Categorical Exemptions

Where the circumstances are such that a government decisionmaker has denied a religious exemption while *simultaneously* granting a *closely analogous* secular exemption, a single categorical exemption can be enough to suggest discriminatory intent. However, there can be little doubt that situations involving just one or two categorical exemptions are a far cry from the gerrymandering and clear targeting that characterized *Lukumi*, which raises the question whether both situations should trigger the same level of "'surpassingly strict scrutiny.'"[242] That leads to the discussion of the final question that must be answered about the selective-exemption rule.

E. The Appropriate Level of Scrutiny in Categorical-Exemption Cases

To best ascertain the appropriate level of scrutiny in cases involving simultaneously considered categorical exemptions, it is helpful to first review the overall doctrinal structure the Court has adopted to confront intentional discrimination. In the free exercise context, as in the equal protection context, discriminatory "animus" now represents the ultimate constitutional harm.[243] As the Court has explained with regard to racial classifications, while "[p]ressing public necessity may sometimes justify the existence of" such classifications, "racial antagonism never can."[244] Likewise, although religious classifications may be permissible in some circumstances,[245] "[l]egislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."[246]

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[241] *Smith*, 494 U.S. at 884 (quoting *Sherbert*, 374 U.S. at 401 n. 4).

[242] *See Laycock Brief–Stormans*, *supra* n. 36, at *14 (quoting Duncan, *supra* n. 25, at 883) (urging such scrutiny in categorical-exemption cases).

[243] *Locke*, 540 U.S. at 725; *Flores*, 521 U.S. at 531; *Romer v. Evans*, 517 U.S. 620, 632, 634–35 (1996); Koppelman, *supra* n. 154, at 95–111.

[244] *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944).

[245] *Locke*, 540 U.S. at 725.

[246] *Lukumi*, 508 U.S. at 547.

Although the Court's equal protection and free exercise doctrines both treat invidious intent as the ultimate touchstone of a constitutional violation, the doctrines pursue that intent indirectly through a series of objective indicators and resulting presumptions.[247] If a statute facially classifies people on the basis of race or religion, or if an intent to target people on one of those bases is clear from the operation of statute (e.g., the gerrymandering in *Lukumi*),[248] there is a strong presumption of invidious intent that the government can only overcome by meeting strict scrutiny.[249] The presumption of animus is not as strong, however, when the government classifies on the basis of gender, and the government can overcome the presumption by meeting intermediate scrutiny.[250] The Court also has appeared to apply a slightly elevated level of scrutiny—so-called "hard-look rational basis" or "rational basis with bite"—to guard against the elevated risk of animus in cases involving classifications on the basis of sexual orientation and disability.[251] In cases involving classifications that raise no special danger of animus, the Court applies deferential rational basis review.[252]

Given that the tiers of scrutiny represent various degrees of presumption based on the inherent risk of invidious intent in a given circumstance (highest risk for racial classifications, lowest risk for

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[247] Koppelman, *supra* n. 154, at 103–09 & nn. 104–105.

[248] *See also Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886))).

[249] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995) (explaining that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool" and "that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype" (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality))); *Lukumi*, 508 U.S. at 531 ("A law failing to satisfy [the neutrality and general applicability] requirements must be justified by a compelling state interest and must be narrowly tailored to advance that interest.").

[250] See *U.S. v. Va.*, 518 U.S. 515, 533 (1996):

> The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives . . . . The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring . . . .

(internal citations, quotation marks, and brackets omitted).

[251] *See Romer*, 517 U.S. at 620, 632 (sexual orientation); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 433 (1985) (disability).

[252] *See F.C.C. v. Beach Commun., Inc.*, 508 U.S. 307, 313 (1993) (explaining that "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification").

routine economic classifications), one obvious question is whether a lower level of scrutiny should apply to simultaneous categorical-exemption cases than applies in cases involving facial discrimination or religious gerrymandering. The inherent risk of invidious discrimination would seem to be lower with categorical exemptions, as exemptions are routinely made to laws for reasons having nothing to do with the suppression of religion. Even where religious exemptions have been requested during the legislative or rulemaking process, there is a different level of danger when the rule-maker calls out religion specifically in a law (or in a targeted gerrymander) than when a requested religious exemption gets left on the shelf with various other requests that do not make it into a final bill or rule.[253] *Newark Lodge* illustrates that an intermediate level of scrutiny can still provide meaningful protection for religious adherents in simultaneous categorical-exemption cases,[254] and the flexibility of intermediate scrutiny (i.e., not fatal in fact) can help ensure that state decision-makers retain the ability to craft step-by-step solutions to important problems when doing so would be substantially more advantageous than taking an across-the-board approach.[255] As for non-simultaneous categorical-exemption sit-

[253] In other words, while the simultaneous adoption of a secular categorical exemption and denial of a religious exemption is *evidence of* possible discriminatory intent, it is not *sufficient to establish* discriminatory intent (as would be a facial religious classification). When the circumstances in a case are sufficient to establish discriminatory intent, strict scrutiny's strong presumption of unconstitutional animus is appropriate. By contrast, when the circumstances are merely suggestive of discriminatory intent, but not conclusive about that intent, intermediate scrutiny's more-easily-rebutted presumption of animus is appropriate. One remaining question, however, is whether courts in simultaneous categorical-exemption cases should require additional evidence of discriminatory intent beyond suspicious timing before applying even intermediate scrutiny. In light of the Court's "objective" approach to ferreting out animus, *see supra* n. 247 and accompanying text, the answer would appear to be "no." *See* Koppelman, *supra* n. 154, at 109 ("The pursuit of illicit motivation has produced a procedure that, for sound institutional reasons, drives evidence of actual motive to the margins of judicial inquiry."); *id*. at 111 ("Once suspicion is aroused, the presumptions that are put into play may appropriately—indeed, must—do the rest of the work."). *Cf. Newark Lodge*, 170 F.3d at 365 ("[T]he Department's decision to provide medical exemptions while refusing religious exemptions is *sufficiently suggestive* of discriminatory intent *to trigger heightened scrutiny*" (emphasis added)).

[254] As noted above, *supra* text accompanying n. 87, *Newark Lodge* applied intermediate scrutiny because the case arose in the public-employment context.

[255] It is important to note that the intermediate scrutiny test contemplated here would be drawn from the equal protection context, not the free speech context. The equal protection version of the test only requires courts to judge the government, asking if its challenged conduct is "substantially related" to achieving an "important" objective. *U.S. v. Va.*, 518 U.S. at 533. By contrast, the free speech version of intermediate scrutiny requires courts to judge both the government's interest and the private speaker's interest. *See* McCoy, *supra* n. 233, at 1358–64 (explaining the balancing of interests required by *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)). Translating the free speech balancing test to the free exercise context would require courts to ascertain "the importance to the individual of the restriction on his or her religiously motivated conduct." *Id.* at 1369. That, however, is precisely the type of inquiry that the Supreme Court has said the judiciary is not competent to perform. *See Smith*, 494 U.S.

uations, they do not trigger any level of heightened scrutiny because they do not involve an inherent risk of invidious discrimination.[256] As a result, so long as *Smith* is good law, courts should apply deferential rational basis review in non-simultaneous categorical-exemption cases.[257]

To summarize, the doctrinal approach that best fits the Court's focus on animus in free exercise cases would result in the following tiered system of review:

> *Strict Scrutiny:* Cases involving facial classifications, clear targeting, or discretionary individualized-exemption schemes.
>
> *Intermediate Scrutiny:* Cases involving categorical exemptions made while simultaneously denying an analogous religious exemption (simultaneous-consideration situations).
>
> *Rational Basis Review:* Cases involving categorical exemptions written into law separate from any consideration of religious exemptions (non-simultaneous-consideration situations).

Applying this free exercise framework to cases involving animal-welfare laws would lead to substantially different results than would be obtained under Professor Laycock's approach.

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at 885–87 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."). Accordingly, to be consistent with *Smith*, any heightened scrutiny test adopted in the free exercise context must be aimed at flushing out discrimination by closely scrutinizing the government's conduct; the test cannot attempt to advance religious autonomy by weighing the interests of religious adherents against the interests of the government. *See* Krotoszynski, *supra* n. 233, at 1198 ("The focus of the [free exercise] inquiry should not be on whether religious autonomy values have been unreasonably squelched, but rather on whether covert discrimination animated (or even seriously influenced) the government's action.").

256 *See supra* nn. 140–147 and 190–191 and accompanying text (comparing the non-simultaneous-consideration situation in *Merced* with the simultaneous-consideration situation in *Newark Lodge*, and explaining why only the latter involved an inherent risk of discriminatory intent).

257 Applying either intermediate scrutiny or strict scrutiny to non-simultaneous categorical-exemption cases would be in considerable tension with the Supreme Court's decision in *Flores* to strike down RFRA. *See supra* text accompanying nn. 204–210 (discussing the Court's decision in *Flores*); *supra* n. 233 (explaining that the Court would have to back away from its decision in *Flores* if it were to use intermediate scrutiny to protect religious-liberty interests from incidental burdens). Some commentators, however, have raised the prospect of applying elevated rational basis review to such claims. *See* Robert W. Tuttle, *How Firm A Foundation? Protecting Religious Land Uses After* Boerne, 68 Geo. Wash. L. Rev. 861, 888–90 (2000) (proposing "hard-look rational basis review" of underinclusive laws that incidentally burden religion); Krotoszynski, *supra* n. 233, at 1197–99 (proposing "rationality with bite" review of all laws that incidentally burden religion). The *Blackhawk* case discussed earlier, *supra* text accompanying nn. 88–100, is an example of a case involving a non-simultaneously adopted categorical-exemption that might fail such elevated rational basis scrutiny. Requiring Mr. Blackhawk to pay a permit fee while exempting zoos and circuses from permit fees might be "so attenuated" from the state's purported interest in raising money from fees "as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446.

First and foremost, laws including categorical exemptions adopted in non-simultaneous-consideration situations—like the city ordinances in *Merced*—would be presumptively constitutional as applied both to secular killings and religious killings. By contrast, if the broad Laycock approach to the selective-exemption rule were adopted, laws containing non-simultaneously considered exemptions would be presumptively unconstitutional as applied to religious killings and subject to strict scrutiny.[258]

The framework above might also lead to different results than the Laycock approach in animal-law cases involving categorical exemptions adopted in simultaneous-consideration situations. Imagine, for example, a large university town that has endured a rash of negative press as a result of the inhumane slaughter of a pig at a fraternity house in connection with its annual pig roast. When the town council takes up a proposal to ban the killing of large mammals, exemptions are proposed for federally inspected slaughterhouses and for homeowners who engage in religious animal sacrifice. The council ultimately adopts the ordinance with the slaughterhouse exemption, but without any exemption for residential homeowners. The council reasons that it does not have the resources to ensure humane methods of killings by homeowners.[259] Under the framework above, the town's choice between exemptions would be subject to intermediate scrutiny to ensure it was made for important secular reasons (ensuring humane slaughter regardless of the religious motivations behind that slaughter) and not discriminatory reasons (disfavoring one class of people engaged in slaughter because of their religion).[260] But under the Laycock

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[258] Given the sheer volume of categorical exemptions in animal-cruelty laws, the consequences of non-simultaneously adopted categorical exemptions triggering strict scrutiny would be considerable. *See* Frasch et al., *supra* n. 38, at 75 ("Most anti-cruelty laws include one or more exemptions . . . excluding whole classes of animals, such as wildlife or farm animals."); Craig A. Wenner, Note, *Judicial Review and the Humane Treatment of Animals*, 86 N.Y.U. L. Rev. 1630, 1656 (2011) ("[S]tates have uniformly removed hunting from the scrutiny of anti-cruelty laws . . . ."); *see generally* William A. Reppy, Jr., *Broad Exemptions in Animal-Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law*, 70 L. & Contemp. Probs. 255, 298–324 (2007) (collecting exemption provisions from forty-two states).

[259] *Cf.* John Fernandez, *Santeria Sacrifice Goes Public*, Palm Beach Post 1A (June 27, 1993) (describing a residential ceremony performed for the media by Santeria priest Rigoberto Zamora: "Zamora ran into some problems. The first goat sacrificed was still alive after its neck was cut. Zamora had been handed a dull steak knife from the kitchen and a sharper one had to be fetched as the animal bobbed its head."); O'Brien, *supra* n. 120, at 154 ("Zamora then killed one of the guinea hens by slamming it against the floor, before cutting off its head. Later, he ripped the head off of a pigeon with his hands.").

[260] Given the facts posited in the text, the town should be able to meet its burden under intermediate scrutiny of showing that its choice was substantially related to its important interest in ensuring humane slaughter. However, if the facts are changed to posit a scenario in which the town grants an exemption for *uninspected* local farms that engage in slaughter, the town will have a much more difficult time defending its simultaneous rejection of an exemption for uninspected residential religious slaughter. *Cf. Lukumi*, 508 U.S. at 545 (discussing a small-farm exemption to the City of Hialeah's no-

approach, strict scrutiny and its nearly insurmountable presumptions would apply, and the town's choice would be invalidated unless it could be shown to "advance interests of the highest order."[261]

Finally, with regard to animal laws that are subject to discretionary individualized exemptions, the framework here—like the Laycock approach—calls for strict scrutiny when religious exemptions are denied. This reflects both traditional concerns about discretionary decision-making that adversely impacts religious minorities[262] and the fact that the Supreme Court has repeatedly used the "compelling interest" language of strict scrutiny when discussing such situations.[263] That said, were the Court writing on a clean slate, a strong argument could be made that individualized-exemption situations, like simultaneous categorical-exemption situations, should be subject to intermediate scrutiny. For while there is some risk of animus when a religious exemption is denied under a discretionary system, there may also be many potential innocent reasons for such denials, and it is far from clear that the Court should apply the same strong presumption of animus that it applies when the government has already facially discriminated on the basis of religion or engaged in religious gerrymandering. Indeed, in the free speech context, the Court has recently cast doubt on the wisdom of strictly scrutinizing waiver systems before a pattern of discrimination has emerged.[264] Moreover, as noted above, there is still

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slaughter ordinance and noting that Hialeah "has not explained why commercial operations that slaughter 'small numbers' of hogs and cattle do not implicate its professed desire to prevent cruelty to animals" as much as the religious killings prohibited by Hialeah).

261 *Lukumi*, 508 U.S. at 546; *see* Duncan, *supra* n. 25, at 881 (describing the *Lukumi* version of the compelling-interest test as "strict in theory and usually fatal in fact"). The choice invalidated by the selective-exemption rule would be the choice not to make an exemption for religious homeowners, not the choice to enact the general ban on killing mammals. Thus, the remedy would be a court-mandated religious exemption, not the wholesale invalidation of the town's ban (absent evidence that the ban itself was the product of discrimination, as was the case with the ordinances in *Lukumi*).

262 *Supra* n. 192.

263 *See Lukumi*, 508 U.S. at 537 ("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.'" (quoting *Smith*, 494 U.S. at 884 (quoting *Roy*, 476 U.S. at 708 (plurality)))).

264 *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002):

> Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements. . . . The prophylaxis achieved by insisting upon a rigid, no-waiver application of the ordinance requirements would be far outweighed, we think, by the accompanying senseless prohibition of speech (and of other activity in the park) by organizations that fail to meet the technical requirements of the ordinance but for one reason or another pose no risk of the evils that those requirements are designed to avoid. On balance, we think the permissive nature of the ordinance furthers, rather than constricts, free speech.

a good deal of uncertainty as to when exactly the individualized-exemption rule is triggered in the first place.[265] All of which is to say, animal-welfare advocates would do well to stay engaged in the dialogue over the contours of the individualized-exemption rule, especially since that rule could have a dramatic impact on animal law. As Professor Henry Holzer observed in the inaugural volume of *Animal Law*, which was published just two years after *Lukumi* was decided, the animal-cruelty statutes of more than thirty states contain subjective standards akin to Hialeah's "unnecessarily . . . kills" standard,[266] which triggered the individualized-exemption rule in *Lukumi* because it required "an evaluation of the particular justification for the killing."[267]

Are the animal-cruelty laws of more than thirty states inapplicable to religious killings under the individualized-exemption component of the selective-exemption rule? Are *Merced*-type city ordinances prohibiting most animal killing vulnerable to challenge under the selective-exemption rule whenever they include categorical exemptions for chickens? If the federal Humane Methods of Livestock Slaughter Act (HMLSA)[268] was amended to remove the current exemption from its handling requirements for handling of animals in connection with religious slaughter,[269] would the selective-exemption rule nonetheless require religious exemptions from the handling requirements because the HMSLA excludes from its coverage animals killed in scientific experiments?[270]

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265 *Supra* n. 237.

266 *See* Holzer, *supra* n. 160, at 107 (listing thirty-three states and the District of Columbia); *see e.g.* Colo. Rev. Stat. §§ 18-9-202(1.5)(a), 18-9-202(1.5)(b) (2012) ("needlessly kills"); Del. Code Ann. tit. 11 § 1325(b)(4) (1974) ("unnecessarily kills"); N.C. Gen. Stat. Ann. § 14-360 (a), (c) (West 2010) ("kill . . . without justifiable excuse"); Nev. Rev. Stat. § 574.100(1)(b) (2011) ("unjustifiably . . . kill"); N.Y. Agric. & Mkts. Law §353 (McKinney 2005) ("unjustifiably . . . kills"); Ohio Rev. Code Ann. § 959.13(A)(1) (1976) ("unnecessarily . . . kill"); Va. Code Ann. § 3.2-6570(A)(i) (1950) ("unnecessarily . . . kills"); S.C. Code. Ann. § 47-1-40 (1976) ("needlessly . . . kills"). All fifty states have enacted animal-cruelty statutes. M. Varn Chandola, *Dissecting American Animal Protection Law: Healing the Wounds with Animal Rights and Eastern Enlightenment*, 8 Wis. Envtl. L.J. 3, 4 (2002).

267 *Lukumi*, 508 U.S. at 537.

268 7 U.S.C. §§ 1901–1907 (2006).

269 *See* Melissa Lewis, *The Regulation of Kosher Slaughter in the United States: How to Supplement Religious Law So as to Ensure the Humane Treatment of Animals*, 16 Animal L. 259, 275, 280 (2009) (proposing such an amendment); Jeff Welty, *Humane Slaughter Laws*, 70 L. & Contemp. Probs. 175, 205 (2007) (same). These proposals would only eliminate the HMLSA's exemption for *handling* in connection with religious slaughter and would retain the law's exemption for certain *methods of religious slaughter*, such as Kosher slaughter, or *shechita*. For a detailed discussion of alleged handling abuses in connection with religious slaughter in the U.S., see Lewis, *supra* at 265–67, and Michelle Hodkin, *When Ritual Slaughter Isn't Kosher: An Examination of Shechita and the Humane Methods of Slaughter Act*, 1 J. Animal L. 129 (2005).

270 *See* Welty, *supra* n. 269, at 182–83 ("[The HMSLA] is a law of limited scope: it covers only 'livestock,' which excludes, for example, animals killed for their fur and animals killed in scientific experiments.").

These are the types of animal-law questions whose answers could be dictated by the ongoing and ever-increasing litigation over *Lukumi*'s unsettled selective-exemption rule. It is litigation that would no doubt benefit from the active participation of the animal-welfare community—a community that is more familiar than most with the dynamics of exemption-riddled laws and the interests they (imperfectly) advance.

IV. CONCLUSION

In November 2012, twenty years to the month after its namesake case was argued in the Supreme Court, the Church of the Lukumi Babalu Aye filed an amicus brief in *Stormans v. Selecky*.[271] The Church is not involved in the case because the Santeria religion has particular teachings about Plan B. Instead, the Church is involved in the case because it raises fundamental questions about the Free Exercise Clause—questions that have remained unanswered for two decades since the Court decided *Lukumi*.

At the heart of those questions is an inquiry into the proper scope of *Lukumi*'s selective-exemption rule, a rule that has remained shrouded in mystery since 1993. This Article has attempted to unravel some of that mystery, using both the *Stormans* case and the *Merced* case as vehicles for working through the unsettled doctrinal issues. The end result is a proposed selective-exemption rule that serves a clear purpose (guarding against intentional discrimination), has a defined scope (applicable only when a decision-maker has actually made a choice between secular exemptions and religious exemptions), and is appropriately tailored (triggers intermediate scrutiny when implicated).

Under the interpretation of the selective-exemption rule offered in this Article, customary and nondiscriminatory animal-protection laws like those involved in *Merced* should fare fine. But under the much broader interpretation of the rule being offered in courts throughout the country by some of the nation's leading religious-liberty experts, many animal-protection laws could become nearly impossible to apply to religiously motivated conduct. In light of those stakes, the question for animal-welfare advocates is whether they should engage the debate before it is resolved by the Supreme Court.

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271 *Church of the Lukumi Babalu Aye Amicus Brief*, *supra* n. 193.