THE PARTIALITY OF NEUTRALITY

The doctrines of neutrality in Establishment Clause and Free Exercise Clause jurisprudence are manipulable standards used more for rhetoric than rigorous legal analysis. The Supreme Court has interpreted the Establishment Clause to require government neutrality "between religion and religion, and between religion and nonreligion."[1] Yet the Court's rulings are not neutral towards religion. They instead embrace the secular. The Free Exercise Clause jurisprudence that has developed after *Employment Division v. Smith*[2] also eschews neutrality. Though the test in *Smith* purports to require courts to apply strict scrutiny to any law that is not neutral, courts often implicitly assume the neutrality of the challenged laws. In fact, those laws make inherent moral judgments, instantiate particular philosophies, and often verge on imposing secularism. The uncritical assumption of neutrality in Free Exercise Clause jurisprudence combined with the Court's embrace of secularism as neutral in Establishment Clause jurisprudence has created confusion in the approach to and definition of neutrality.

This Note will assess the concept of neutrality in contemporary Establishment Clause and Free Exercise Clause jurisprudence, argue that the supposed neutrality requirements (as applied) do not achieve neutrality, and then suggest drawing on other areas of law to form a more coherent doctrine of neutrality for the religion clauses. Part I will explain how contemporary Establishment Clause jurisprudence has led courts to embrace the secular in the name of neutrality, how that embrace is not neutral, and how some current applications of the neutrality analysis are at odds with other current Supreme Court precedent. Part II will begin by explaining the *Smith* standard, its effect on Free Exercise Clause jurisprudence, and the role of neutrality within that jurisprudence. Next, it will discuss the tension *Smith* created within Free Exercise Clause jurisprudence,[3] both generally and specifically in regards to the poorly

---

1. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

2. 494 U.S. 872 (1990).

3. *Smith* did not overturn, and in fact relied on much of, the existing free exercise precedent. *See* John P. Forren, *Revisiting Four Popular Myths About the Peyote Case*, 8 U. PA. J. CONST. L. 209, 211 (2006).

defined neutrality analysis. Part II concludes by describing the two ways that contemporary courts fallaciously assume neutrality. Part III explores the ways that discrimination jurisprudence and Free Speech Clause jurisprudence assess neutrality and suggests that Free Exercise Clause jurisprudence incorporate some of those more developed tests into its neutrality analysis.

I. NEUTRALITY AND THE ESTABLISHMENT CLAUSE

At the center of the Court's Establishment Clause jurisprudence is the call for government neutrality. Although "neutrality" in the Establishment Clause context is "not self-defining,"[4] "recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others."[5] The nominal basis of Establishment Clause jurisprudence emerged in *Lemon v. Kurtzman*.[6] That case announced a three-prong test for determining whether a statute lacked neutrality and thus violated the Establishment Clause: "First, the Statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[7]

The *Lemon* test[8] is still held out as the primary Establishment Clause test that "embodies the supposed principle of neutrality between religion and irreligion,"[9] yet it is "a boundless, and boundlessly manipulable, test."[10] Its application is neither consistent nor compulsory,[11] and by 1994 five justices had repudi-

4. Welsh v. United States, 398 U.S. 333, 372 (1970) (White, J., dissenting).

5. Lee v. Weisman, 505 U.S. 577, 627 (1992) (Souter, J., concurring).

6. 403 U.S. 602 (1971).

7. *Id.* at 612–13 (citations and internal quotation marks omitted).

8. *See id.*

9. McCreary Cty. v. ACLU, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting).

10. *Weisman*, 505 U.S. at 632 (Scalia, J., dissenting).

11. *See McCreary*, 545 U.S. at 891–94 (Scalia, J., dissenting) (cataloguing the Court's inconsistent uses of the *Lemon* test); Mitchell v. Helms, 530 U.S. 793, 807–08 (2000) (recognizing that the *Lemon* test has been "recast" and "modified . . . for purposes of evaluating aid to schools"); Bd. of Educ. v. Grumet, 512 U.S. 687, 718–21 (1994) (O'Connor, J., concurring in part and concurring in judgment) (explaining how the *Lemon* test has been ignored and is "so vague as to be useless"); Wallace v. Jaffree, 472 U.S. 38, 68–69 (1985) (O'Connor, J., concurring in judgment) ("Despite its initial promise, the *Lemon* test has proved problematic. The required

ated it.[12] Justice Scalia described the *Lemon* test as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[13] He continued:

> Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so. The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[14]

Though the *Lemon* test is of dubious strength in the Court's contemporary jurisprudence, the "endorsement test" has emerged from it and "has become the foundation of Establishment Clause jurisprudence."[15]

The Court officially adopted the endorsement test, which was first proposed by Justice O'Connor in her *Lynch v. Donnelly*[16] concurrence, in *County of Allegheny v. ACLU*.[17] In *Allegheny*—an Establishment Clause challenge to a government-sponsored holiday display that included religious symbols—the Court extensively discussed Justice O'Connor's *Lynch* con-

---

inquiry into 'entanglement' has been modified and questioned, and in one case we have upheld state action against an Establishment Clause challenge without applying the *Lemon* test at all. The author of *Lemon* himself apparently questions the test's general applicability," and the *Lemon* test has been simply "followed or ignored a particular case as our predilections may dictate." (citations omitted)).

12. *See McCreary*, 545 U.S. at 890 (Scalia, J., dissenting).

13. Lamb's Chapel v. Ctr. Moriches Union Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment).

14. *Id.* at 398–99 (citations omitted).

15. *Weisman*, 505 U.S. at 627.

16. 465 U.S. 668, 690–94 (1984) (O'Connor, J., concurring).

17. 492 U.S. 573, 592–94 (1989).

currence and adopted that reasoning. The Court explained that the four *Lynch* dissenters agreed with Justice O'Connor's analysis and only disagreed on how that endorsement test applied to the facts of the instant case.[18] The endorsement test draws on principles from both the first and second prongs of the *Lemon* test. Under *Allegheny* the question is no longer only whether the government's actual purpose is endorsement of religion, but also whether a reasonable observer could interpret it as an endorsement of religion.[19] Thus "for purposes of the Establishment Clause, the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season."[20] Under the newly accepted endorsement test, the government must do more than just refrain from any actions that can be perceived as endorsing religion; it must also actively convey secular messages—all in the name of neutrality.

Adhering to only the secular, however, does not equal neutrality. Secular and secularism have many different meanings,[21] none of which can be equated with neutrality. Professor Rex Ahdar[22] defines the terms by breaking the political philosophy of secularism into two distinct strains: benevolent secularism and hostile secularism.[23] Benevolent secularism is "a philosophy obliging the state to refrain from adopting and imposing

18. *See Allegheny*, 492 U.S. at 596–97.

19. *See id.* at 620–21.

20. *Id.* at 620.

21. For example, *Black's Law Dictionary* defines secular as "[w]orldly, as distinguished from spiritual," *Secular*, BLACK'S LAW DICTIONARY (10th ed. 2014), and *Merriam-Webster* defines secular as "of or relating to the worldly or temporal," *Secular*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/secular [https://perma.cc/7BR9-CW6E] (last visited Jan. 18, 2018), and secularism as "indifference to or rejection or exclusion of religion and religious considerations," *Secularism*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/secularism [https://perma.cc/XT29-EG67] (last visited Jan. 18, 2018). Several academics have written about the definition of secular and secularism, and those terms will be used and defined throughout this Note.

22. Rex Ahdar was a barrister and solicitor to the High Court in New Zealand and a Fulbright Senior Research Scholar at UC Berkeley. He is currently a law professor teaching, among other things, law and religion. His academic interests include church-state relations and religious liberty, and he has published extensively in those areas. *See Our People in the Faculty of Law: Professor Rex Ahdar*, UNIV. OF OTAGO FACULTY OF LAW, http://www.otago.ac.nz/law/staff/rex_ahdar.html [https://perma.cc/8SXE-D5F9] (last visited March 4, 2018).

23. *See* Rex Ahdar, *Is Secularism Neutral?*, 26 RATIO JURIS 404, 408–12 (2013).

any established beliefs," and it does not disparage religious beliefs or strive to keep them out of political discourse.[24] Benevolent secularism is also known as "negative" secularism because it is "a freedom 'from' establishmentarian imposition."[25] Hostile secularism, on the other hand, is a belief that a "state should actively pursue a policy of established unbelief."[26] Although the American government has never explicitly endorsed a policy of established unbelief, many opinionated leaders do espouse tenets of hostile secularism. Such tenets include beliefs like "religious reasons and arguments must be excluded from shaping public policy; . . . religious symbols and practices are relics of a bygone era that continue to exert coercive power and must be vanquished;" and "funding of faith-based entities is divisive," and should thus not be allowed.[27] Secularism, whether hostile or benevolent, is thus a philosophy with its own set of truth claims.[28] And although "[a] secular baseline is commonly admired by many liberals as a neutral, impartial one . . . that depends entirely upon one's viewpoint."[29] Advocates of secularism argue that the "secular" is neutral because it

---

24. *Id.* at 409–10.

25. Wilfred M. McClay, *Two Concepts of Secularism*, 13 J. POL'Y HIST. 47, 60 (2001).

26. Ahdar, *supra* note 23, at 411; *see also* McCreary Cty. v. ACLU, 545 U.S. 844, 885–86 (2005) (Scalia, J., dissenting) (describing hostile secularism as the type of secularism spread across Europe by Napoleon and codified in the French constitution).

27. Ahdar, *supra* note 23, at 418. A few examples of such comments include Hillary Clinton advocating for abortion by stating "deep seated cultural codes, religious beliefs and structural biases have to be changed," Hillary Clinton, Former Secretary of State, Keynote Address at Women in the World Summit (Apr. 23, 2015), Dianne Feinstein questioning Amy Barrett's ability to be a federal court of appeals judge because of now-Judge Barrett's devout Catholicism, *see Confirmation Hearing on the Nomination of Amy Barrett to be United States Circuit Judge for the Seventh Circuit: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Dianne Feinstein, Member, S. Comm. on the Judiciary), and Chicago Mayor Rahm Emanuel attempting to block Chick-fil-A's opening of a new restaurant in Chicago because Emanuel felt the CEO's biblical worldview did not match contemporary beliefs and thus should not be part of the Chicago community, Michael Patrick Leahy, *Boston Globe and Chicago Sun-Times Take Chick-Fil-A Bashing Mayors to Woodshed*, BREITBART (July 28, 2012), http://www.breitbart.com/big-journalism/2012/07/28/boston-globe-and-chicago-sun-times-ask-which-part-of-the-first-amendment-do-our-chick-fil-a-bashing-mayors-not-understand/ [https://perma.cc/6UE7-V5NV]. *See also* Zelman v. Simmons-Harris, 536 U.S. 639, 719 (2002) (Breyer, J., dissenting) (asserting that faith-based funding is divisive and should not be allowed).

28. Ahdar, *supra* note 23, at 407–08.

29. *Id.* at 415.

is what remains once one takes away religion.[30] Yet two points counter that argument.

First, the determination that the absence of religion is neutral is itself a normatively laden, and thus not neutral, judgment. *Black's Law Dictionary* defines "neutral" in the context of "policy, interpretation, language, etc." as "not inherently favoring any particular faction or point of view; couched so as *not to express a predisposition or preference*."[31] But embracing the secular and rejecting the religious does "express a predisposition or preference."[32] As Paul Horowitz explains in his book *The Agnostic Age*, "Prevailing approaches to law and religion that purport to be neutral, or to hold religious and non-religious beliefs alike in equal regard, routinely fail to do anything of the sort. The perspective they ultimately offer tilts clearly, if (sometimes) unconsciously, in favor of the secular."[33] The legal "insistence upon neutrality . . . border[s] upon religious hostility,"[34] which is unsurprising given "how elusive is the line which enforces the Amendment's injunction of strict neutrality, while manifesting no official hostility toward religion."[35] By tilting towards the secular and removing religion, legal actors favor one worldview and set of truth claims over another. They

30. *See id.* at 407; *cf.* Cty. of Allegheny v. ACLU, 492 U.S. 573, 610 (1989) ("The government does not discriminate against any citizen on the basis of the citizen's religious faith if the government is secular in its functions and operations. On the contrary, the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths.").

31. *Neutral*, BLACK'S LAW DICTIONARY, *supra* note 21 (emphasis added).

32. *Id.*

33. PAUL HOROWITZ, THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION, at xxiv (2011); *see also* William P. Marshall, *What is the Matter with Equality: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 195 (2000) (citing examples of legal subordination of the religious to the secular: "The Establishment Clause's prohibition of state funding of institutions or organizations is unique to religion. There is no comparable limitation on government funding of nonreligious groups and activities," and "the Establishment Clause's nonendorsement principle recognized in the nativity scene cases is also a religion-only limitation. The state may endorse non-religious institutions or ideologies if it so chooses.").

34. Sch. Dist. v. Schempp, 374 U.S. 203, 246 (1963) (Brennan, J., concurring).

35. *Id.* at 245.

are thus not acting neutrally.[36] Instead, they are creeping closer to imposing hostile secularism.

The courts have also begun embracing a more hostile form of secularism. In his dissent in *Locke v. Davey*,[37] Justice Scalia commented:

> One need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction. In an era when the Court is so quick to come to the aid of other disfavored groups, its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional.[38]

He then warned that the Court's reasoning could lead to far-reaching consequences, stating, "France has proposed banning religious attire from schools, invoking interests in secularism no less benign than those the Court embraces today."[39] France is not alone. Much of Europe has recently increasingly moved away from benevolent secularism and embraced hostile secularism.[40] That mixing of hostile and benevolent secularism is to be expected in the United States because accepting benevolent secularism makes rejecting the more oppressive tenets of hos-

---

36. *See* JONATHAN CHAPLIN, TALKING GOD: THE LEGITIMACY OF RELIGIOUS PUBLIC REASONING 23 (2008) ("The religious 'neutrality' or 'evenhandedness' of a procedurally secular state will always be a neutrality 'from the standpoint of' some particular, contested political vision.").

37. 540 U.S. 712 (2004).

38. *Id.* at 733 (Scalia, J., dissenting) (citations omitted).

39. *Id.* at 734. For other examples of how France's secularism and supposed neutrality is hostile and oppressive towards religion, see Angelique Chrisafis, *France's headscarf war: 'It's an attack on freedom,'* GUARDIAN (Jul. 22, 2013), https://www.theguardian.com/world/2013/jul/22/frances-headscarf-war-attack-on-freedom [https://perma.cc/K9M5-2NMW] (showing how in France adherence to secularism and reliance on supposed neutrality has led to banning all religious attire and religious symbols in areas of the public and private sectors and banning mothers from wearing head scarves on school trips with their children); Elizabeth Winkler, *Is It Time for France to Abandon Laïcité?*, NEW REPUBLIC (Jan. 7, 2016), https://newrepublic.com/article/127179/time-france-abandon-laicite [https://perma.cc/W42X-HCBH] (explaining that secularism is "the first religion of the Republic," is taught as its own ideology in schools, and is aimed at removing all religious influences).

40. *See* Tariq Modood, *Moderate Secularism, Religion as Identity and Respect for Religion*, 81 POL. Q. 4, 12 (2010) ("Since the 1960s European cultural, intellectual and political life—the public sphere in the fullest sense of the word—is increasingly becoming dominated by secularism, with secularist networks and organisations controlling most of the levers of power. The accommodative character of secularism itself is being dismissed as archaic, especially on the centre-left.").

tile secularism difficult.[41] Whether that slippage in the United States is good or bad depends on one's perspective. It is, however, decidedly not neutral.

Labeling laws neutral when they are premised on distinct worldviews and assumptions about morality exacerbates polarization. A major strand of contemporary jurisprudential theory advocates neutrality through government restraint in advancing any moral code.[42] And secularists assert that neutrality towards religion includes neutrality regarding morality.[43] Such an approach to law is impossible. Excepting laws designed to solve coordination problems, such as those laws designating on which side of the road people should drive, almost all laws must be premised on basic assumptions, worldviews, and often morality.[44] Even laws to which people generally agree, such as laws against premeditated murder, are premised on moral assumptions because nearly all laws try to order society in a way the legislators or voters think is "better." The idea of "better" is a value laden judgment and is thus not morally neutral. Even the decision *not* to regulate morally controversial conduct is a morally laden judgment.[45] And principles, such as the "harm

---

41. *See* JULIAN RIVERS, THE LAW OF ORGANIZED RELIGIONS: BETWEEN ESTABLISHMENT AND SECULARISM 332, 346–47 (2010); *see also* CHAPLIN, *supra* note 36, at 23 ("Thus, where society is pervasively secularized—where public life and institutions are principally governed as if transcendent religious authority is irrelevant—it will in practice almost inevitably lean towards programmatic secularism.").

42. *See* H.L.A. HART, LAW, LIBERTY, AND MORALITY 14–15 (1963). The argument is often espoused in obscenity cases, *see* Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 385–90 (1959) (arguing that the state cannot ban films promoting adultery based on desire to promote good morals), as well as in the Court's move away from allowing an interest in morality to justify state legislation in other free speech contexts, *compare* Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 574 (1942) (upholding arrest for cursing and insulting an officer on the street that was justified by an "interest in order and morality"), *with* United States v. Playboy Entm't Grp., 529 U.S. 803, 818, 827 (2000) (striking down a law regulating indecency on non-broadcast medium because no compelling interest in morality).

43. *See* Carl H. Esbeck, *Religion and a Neutral State: Imperative or Impossibility?*, 15 CUMB. L. REV. 67, 78 (1984).

44. Even coordination rules such as traffic laws can be understood as codifying a moral view. Although the choice of which side of the road to drive on is arbitrary, choosing a side and punishing drivers who endanger others by driving on the wrong side evinces moral concern for human life, health, and safety. *See* Robert P. George, *Kelsen and Aquinas on the Natural-Law Doctrine*, 75 NOTRE DAME L. REV. 1625, 1637–38 (2000).

45. *See* Esbeck, *supra* note 43, at 68 ("[T]he state cannot retreat from the regulation of certain conduct which is arguably immoral and still claim its neutrality concerning the rightness of the conduct. The very decision by the state to with-

principle,"[46] that try to avoid the problem of *a priori* moral assumptions still must incorporate basic moral ideas.[47] Take the harm principle, for example. The underlying assumption that harming another person is "bad" and therefore justifies state intervention, and the definition of "harm" itself, both require moral determinations. The implicit moral underpinnings of most laws do not establish that a community's traditional understanding of morality is enough to uphold a law.[48] Those unavoidable predispositions do prove, however, that such laws are not neutral according to the *Black's Law Dictionary* definition.[49]

Controversial anti-discrimination laws premised on equality poignantly illustrate that lack of neutrality concerning morality.[50] Professor Chai R. Feldblum, an openly homosexual LGBT activist and legal scholar, argues that "moral beliefs necessarily underlie the assessment of whether such equality is *justifiably* granted or denied,"[51] and "it is disingenuous to say that voting for a law [about homosexuality] conveys no message about morality at all."[52] She goes on to say that for people who believe homosexuality is not morally neutral, "[s]uch a[n] [anti-discrimination law] rests on a moral assessment of homosexuality and bisexuality that [may be] radically different from their

---

draw its regulation, leaving the morality of the conduct up to each individual, is a value-ladened choice.").

46. *See* JOHN STUART MILL, ON LIBERTY 22 (Longman, Roberts & Green 1864) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). For a detailed analysis of the harm principle, see JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984).

47. *Cf.* J. Kelly Strader, Lawrence's *Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 43 (2011).

48. *Cf.* Lawrence v. Texas, 539 U.S. 558, 577 (2003). Whether or not morality *should* be an allowable justification for legislation is an interesting topic that falls outside the scope of this Note. Here I assert only that some form of morality must be assumed *a priori* for almost all laws. I take no stance on the role morality should play in the law's justification once that moral worldview has been assumed and accepted.

49. *See* BLACK'S LAW DICTIONARY, *supra* note 31.

50. Equality itself is a problematic concept. Although most people agree to treating like things alike, disagreement is prevalent about which things are like and what treating them alike means. For a discussion on the problems with the idea of equality, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (concluding that the term is so enduring in law because it has no fixed meaning).

51. Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 86–87 (2006).

52. *Id.* at 85.

own."[53] Yet in courts and in politics these laws and views are repeatedly labeled as neutral.[54] In actuality, they often reflect the values and moral judgments of the elite few and leave many Americans wondering why their values are being ignored.[55]

A second counter to the argument that the "secular" is neutral, even assuming arguendo that absence of religion is neutral,[56] is that an increasingly popular form of secularism in the United States is openly hostile to religion and thus not neutral in any sense.[57] For example, Sam Harris's book *The End of Faith*[58] was described as a "rallying cry for a more ruthless secularisation of society."[59] That hostility to religion is unsurprising because "the secular liberal tradition developed in opposition to the classical [religious] synthesis and the

53. *Id.* at 87.

54. *See, e.g.*, King v. Governor of N.J., 767 F.3d 216, 221, 241–42 (3d Cir. 2014) (deeming as neutral a law outlawing any effort to help minors engage in sexual orientation change except when the minor is seeking to transition from one gender to another); Catholic League for Religious & Civil Rights v. City & Cty. of S.F., 567 F.3d 595, 597, 604 (9th Cir. 2009) (holding as neutral and "well within the Board's secular purview" a decision to promote adoptions by same-sex couples by passing a resolution condemning the Vatican's "discriminatory and defamatory directive" that Catholic charities should not place children in homosexual households); Okwedy v. Molinari, 150 F. Supp. 2d 508, 511–12, 519 (E.D.N.Y. 2001) (affirming a government action requiring a billboard company to take down billboards quoting Leviticus 18:22, which condemns homosexuality, and stating that the action "furthers the government's *neutral* policy of opposing discrimination based on sexual orientation." (emphasis added)) *aff'd in part, vacated in part*, 69 Fed. Appx. 482 (2d Cir. 2003); *cf.* McCullen v. Coakley, 134 S. Ct. 2518, 2526–28, 2534 (2014) (labeling as neutral a law that allows speech in favor of abortion and makes criminal speech criticizing abortion); Christian Legal Soc'y Chapter v. Martinez, 561 U.S. 661, 669 (2010) (holding as "viewpoint neutral" a law school policy requiring a religious group to abolish its requirement that its members adhere to certain religious principles).

55. *See* Ahdar, *supra* note 23, at 416.

56. Such an assumption is both contestable and contested. *See, e.g.*, Esbeck, *supra* note 43, at 75–78 (describing how the different groups hold different beliefs about the possibility of a state being neutral and about on which topics a state should be neutral).

57. *See e.g.*, FAMILY RESEARCH COUNCIL, HOSTILITY TO RELIGION: THE GROWING THREAT TO RELIGIOUS LIBERTY IN THE UNITED STATES (2017); BRIAN LEITER, WHY TOLERATE RELIGION (2013) (arguing that government should not tolerate religion by granting religious exemptions).

58. SAM HARRIS, THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON (2005).

59. Stephanie Merritt, *Faith no more*, OBSERVER (Feb. 5, 2005), https://www.theguardian.com/theobserver/2005/feb/06/society [https://perma.cc/H6YS-XWLS]; *see also* RICHARD DAWKINS, THE GOD DELUSION (2006), CHRISTOPHER HITCHENS, GOD IS NOT GREAT (2007).

anthropological assumptions that sustain it,"[60] and even benevolent secularism eventually morphs into hostile secularism.[61] Secularism never has been and cannot be neutral towards religion.[62]

Striving for neutrality as the absence of religion has thus led to the contradictory result of embracing the non-neutral secular. That result has fulfilled Justice Goldberg's prediction that "untutored devotion to the concept of neutrality can lead to . . . a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."[63] But the embrace of the non-neutral secular also shows disregard of his warning: "Such results are not only not compelled by the Constitution, but . . . are prohibited by it."[64] Justice Kennedy also admitted in *Lee v. Weisman*,[65] even as he found a prayer at graduation to violate the Establishment Clause, that excluding religion completely and embracing only the secular could be unconstitutional,[66] particularly if the "affected citizens [were] mature adults."[67] That is because secularism is not neutral or impartial.

The Court has held that the exclusion of religion and the idea that the government need not "respect[] the religious nature of [the] people and accommodate[] the public service to [the people's] spiritual needs" impermissibly "prefer[s] those who believe in no religion over those who do believe."[68] Indeed, the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility

---

60. GEORGE PELL, GOD & CAESAR: SELECTED ESSAYS ON RELIGION, POLITICS, & SOCIETY 168 (M. A. Casey ed., 2007).

61. *See* RIVERS, *supra* note 41, at 332, 346–47; *see also* CHAPLIN, *supra* note 36, at 23.

62 . *Cf.* Adrian Vermeule, *Liturgy of Liberalism*, FIRST THINGS (Jan. 2017), https://www.firstthings.com/article/2017/01/liturgy-of-liberalism [https://perma.cc/46VC-KXC2] (arguing that historically and contemporarily secularist ideologies manifest themselves in religious ways and giving examples such as France's Festival of Reason, where, during the French Revolution, French proponents of secularism placed a goddess of Reason on the holy altar of the Church of Our Lady in Paris to "worship" rationality).

63. Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

64. *Id.*

65. 505 U.S. 577 (1992).

66. *See id.* at 598 ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.").

67. *See id*. at 593.

68. *See* Zorach v. Clauson, 343 U.S. 306, 314 (1952).

toward any. Anything less would require the 'callous indifference,'" which the Court has held is not allowed by the Establishment Clause.[69] Justice Stewart has recognized in dissent that adhering solely to secularism places religion "at an artificial and state-created disadvantage" and that religious exercises must be permitted for the state "truly to be neutral in the matter of religion."[70] Justice Stewart's dissent explained that rejecting religious concerns is not "the realization of state neutrality, but rather . . . the establishment of *a religion of secularism*."[71] And the majority agreed that "of course . . . the State may not establish a 'religion of secularism.'"[72] Yet, secularism and the secularist definition of neutrality advocate just that hostility and callous indifference. And the Supreme Court and lower courts have begun to employ that definition with the application of the endorsement test and manipulation of the *Lemon* test. The idea that neutrality in Establishment Clause jurisprudence means the promotion of secularism is anything but neutral and should not be allowed under current Supreme Court precedent.[73]

II. NEUTRALITY AND THE FREE EXERCISE CLAUSE

A. The Smith *Standard and Its Progeny*

In *Smith*, the Court held that an individual's right to free exercise does not allow him to disregard criminal, "neutral law[s] of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or pro-

69. *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (citations omitted).

70. Sch. Dist. v. Schempp, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting).

71. *Id.* (emphasis added).

72. *Id.* at 225 (majority opinion).

73. Several courts of appeals have also held that promoting the absence of religion over religion is unconstitutional. *See, e.g.*, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 165 (3d Cir. 2002) ("[T]he Free Exercise Clause's mandate of neutrality toward religion prohibits government from 'deciding that secular motivations are more important than religious motivations.'" (quoting Fraternal Order of Police v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999))); Ehlers-Rienzi v. Connelly Sch. of the Holy Child, 224 F.3d 283, 287 (4th Cir. 2000) ("[A]ccommodation of religion is a necessary aspect of the Establishment Clause jurisprudence because, without it, government would find itself effectively and unconstitutionally promoting the absence of religion over its practice.").

scribes)."[74] Rational basis review of such claims[75] replaced the strict scrutiny standard the Court had been applying when a generally applicable law burdened the free exercise rights of an individual.[76] Justice Scalia reasoned that the Oregon law at issue was seeking to regulate conduct, not belief,[77] and suggested that the United States might devolve into anarchy if the strict scrutiny test continued to apply to free exercise claims.[78] In subsequent cases, *Smith*'s holding was boiled down into the rule that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest"[79] and was expanded to apply outside the criminal context.[80]

Smith repeatedly asserts that a law must be *both* neutral *and* generally applicable for the *Smith* standard to apply. Given Justice Scalia's penchant for precision, those two phrases must denote two different requirements.[81] But *Smith* fails to clearly delineate what each entails. Since *Smith*, the definition of generally applicable has crystalized, yet the concept of neutrali-

---

74. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

75. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 289 (Colo. Ct. App. 2015) ("The Court held that neutral laws of general applicability need only be rationally related to a legitimate governmental interest in order to survive a constitutional challenge." (citing *Smith*, 494 U.S. at 879)), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

76. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

77. *See Smith*, 494 U.S. at 882. Interestingly, earlier in the opinion Justice Scalia asserted that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts." *Id.* at 877; *see also id.* at 893 (O'Connor, J., concurring in judgment) ("Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like belief itself, must be at least presumptively protected by the Free Exercise Clause."); Wisconsin v. Yoder 406 U.S. 205, 219–20 (1972) ("[B]elief and action cannot be neatly confined in logic-tight compartments," and "our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause.").

78. *See Smith*, 494 U.S. at 888–89.

79. City of Boerne v. Flores, 521 U.S. 507, 514 (1997).

80. *See id.*

81. *See, e.g.*, Transcript of Oral Argument at 27–28, National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) (No. 11-398) (showing Justice Scalia arguing that the terms "necessary" and "proper" have distinct meanings that both must be met for an action to be constitutional); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174–179 (2012).

ty remains unclear. Justice Scalia exacerbated the problem of distinguishing neutrality and general applicability in a later concurrence. He acknowledged that general applicability and neutrality are not the same,[82] then proceeded to say that although he "agree[d] with most of the invalidating factors" set out in the majority opinion, "it seem[ed] to [him] a matter of no consequence under which rubric ('neutrality,' Part II-A, or 'general applicability,' Part II-B) each invalidating factor [was] discussed."[83] Justice Scalia thus contributed to the confusion about whether neutrality and general applicability are interchangeable while concurrently acknowledging that they are two distinct requirements.

Of those two distinct requirements, the general applicability analysis is much more defined. A law is generally applicable if it does not single out a particular group against which to apply the law.[84] If a law applies equally to all groups, allowing for reasonable and carefully tailored exemptions, then it is considered generally applicable.[85] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[86] a case challenging a law against animal slaughter targeted at a particular religious group that practiced animal sacrifice, Justice Kennedy explained that though general applicability and neutrality are distinct, they are also "interrelated."[87] He later clarified, and Justice Souter further elucidated, that any law that is not generally applicable will likely also lack neutrality.[88] But a law that *is* generally applicable could also lack neutrality.[89]

What determines neutrality independently of the general applicability analysis remains unclear. In *Lukumi*, three years after *Smith*, Justice Kennedy provided a list of characteristics

82. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 557–58 (1993) (Scalia, J., concurring in part and concurring in judgment).

83. *Id.* at 558.

84. *See id.* at 543–45 (majority opinion).

85. *Cf.* Marshall, *supra* note 33, at 195 n.10 (citing *Sherbert*, 374 U.S. at 404) (explaining that strict scrutiny still applies after *Smith* "in cases in which the state has in place a system of individualized exemptions but refuses to extend that system to cases of religious hardship").

86. 508 U.S. 520 (1993).

87. *See id.* at 531.

88. *See id.*; *id.* at 561 (Souter, J., concurring in part and concurring in judgment).

89. *See id.* at 565–66 (Souter, J., concurring in part and concurring in judgment).

that would reveal a law's lack of neutrality.[90] One of those characteristics Justice Kennedy described by writing, "[I]f the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."[91] Yet what *is* to be considered neutral after *Smith* has never been explained. That dearth of explanation has led courts that find a law generally applicable to simply assume neutrality without independent analysis.[92] In practice, that assumption allows any generally applicable law to stand, both facially and as-applied.[93] The assumption that such laws are neutral thus shapes the law, and the lack of any principled (or non-principled) analysis of neutrality leads to confusion.

B. Tension Created by the Smith *Standard*

Ever since its inception, the *Smith* standard has created tension beyond its lack of defined neutrality analysis. In *Smith*, four justices believed the majority opinion "dramatically depart[ed] from well-settled First Amendment jurisprudence . . . and [was] incompatible with our Nation's fundamental commitment to individual liberty."[94] Three justices dissented because the decision disregarded "the years [that] painstakingly ha[d] developed a consistent and exacting standard to test the constitutionality of a state statute that burden[ed] the free exercise of religion," which required laws burdening religious exercise be "justified by a compelling interest that [could not] be served by less restrictive means."[95] And at

90. *See id.* at 542 (majority opinion).

91. *Id.* at 533.

92. *See, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391–92 (1990) (finding a law generally applicable then going on to hold it did not violate the Free Exercise Clause without even mentioning neutrality), Peyote Way Church of God v. Thornburgh, 922 F.2d 1210, 1213 (5th Cir. 1991) (asserting law was generally applicable and then holding it did not violate the Free Exercise Clause without conducting two separate analyses or even explicitly mentioning neutrality).

93. In fact, in *Craig v. Masterpiece Cakeshop*, the Colorado Court of Appeals skipped any rational basis analysis and simply held, "We conclude that CADA is a neutral law of general applicability and, therefore, offends neither the First Amendment nor article II, section 4." Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 288 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017)

94. Emp't Div. v. Smith, 494 U.S. 872, 891 (1990) (O'Connor, J., concurring in judgment).

95. *Id.* at 907 (Blackmun, J., dissenting).

least three times since *Smith* was decided justices have called for it to be reversed or reconsidered.[96] Some of the tension is caused by the friction between *Smith* and previous precedent that remains good law, and some of the tension flows from the lack of clarity in the opinion and its application in future cases.[97]

That lack of clarity is exemplified in Justice Souter's concurrence in the judgment in *Lukumi*. *Lukumi* is one of the first cases after *Smith* to discuss the concept of neutrality in depth and apart from the concept of general applicability. Justice Souter began discussing the confusion surrounding neutrality in the context of the Free Exercise Clause by stating, "While general applicability is, for the most part, self-explanatory, free-exercise neutrality is not self-revealing."[98] He then delineated three different types of neutrality: facial neutrality, formal neutrality, and substantive neutrality.[99] As a free exercise requirement, both facial and formal neutrality "would only bar laws with an object to discriminate against religion."[100] The distinction here is that for facial neutrality only the text and operation of the law would be considered in determining its object, whereas formal neutrality would also consider the intentions of the legislators.[101] Substantive neutrality, in contrast, would demand both a neutral object *and* neutral application—a goal that might be achieved through reasonable religious accommodations.[102]

Justice Souter used the example of Prohibition to explain the difference between substantive and formal neutrality. Without any religious exemptions, Prohibition would fail the substan-

96. *See* City of Boerne v. Flores, 521 U.S. 507, 544–65 (1997) (O'Connor, J., dissenting) (calling for *Smith* to be reassessed in light of the historical underpinnings of the inception of the Free Exercise Clause); *Lukumi*, 508 U.S. at 569–77 (Souter, J., dissenting) (calling for *Smith* to be reexamined because its conception of neutrality did not "comfortabl[y] fit with settled law"); *id.* at 577–80 (Blackmun, J., concurring in judgment) (refusing to apply *Smith* because it "was wrongly decided" and arriving at the same conclusion as the majority via a different route).

97. *See Lukumi*, 508 U.S. at 573 (Souter, J., concurring in part and concurring in judgment) ("*Smith* presents not the usual question of whether or not to follow a constitutional rule, but the question of which constitutional rule to follow, for *Smith* refrained from overruling prior free-exercise cases that contain a free-exercise rule fundamentally at odds with the rule *Smith* declared.").

98. *Id.* at 561.

99. *See id.* at 561–62.

100. *Id.*

101. *See id.* at 562 n.3.

102. *See id.* at 562.

tive neutrality test because it would disproportionately burden some religious adherents by disallowing them from partaking in religious practices involving alcohol, such as Jewish Passover Seder and Catholic Eucharist. Yet such a prohibition would pass the formal neutrality test because its object was not to discriminate against those religions but to reduce alcohol consumption. Concluding the descriptive part of his argument, Justice Souter stated, "If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause's neutrality command; if the Free Exercise Clause, rather, safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality."[103]

Much of the confusion around neutrality in Free Exercise Clause jurisprudence arises because it is unclear what type of neutrality the Free Exercise Clause demands. Though in *Smith* Justice Scalia failed to define neutrality, he tended toward formal neutrality in application by distinguishing between laws that have religious prohibition as their object and laws that prohibit religion only through incidental effects.[104] In a later case, when concurring in judgment, Justice Scalia clarified that neutrality applies to "those laws that *by their terms* impose disabilities on the basis of religion."[105] In other words, though Justice Scalia did not so hold in *Smith*, he believed that the Free Exercise Clause only requires laws to be formally, even quasi-facially, neutral.[106] The body of law, however, disagrees.[107] And Justice O'Connor vehemently so:

> Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice . . . . If

103. *Id.*

104. *See Smith*, 494 U.S. at 877–78.

105. *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring in part and concurring in judgment).

106. *Id.* at 562 (Souter, J., concurring in part and concurring in judgment) ("Though [Scalia] used the term 'neutrality' without a modifier, [he] plainly assumes that free-exercise neutrality is of a formal sort.").

107. *See id.* at 534 (majority opinion) ("Facial neutrality is not determinative."); *see also* State v. Arlene's Flowers, Inc., 389 P.3d 543, 561 (Wash. 2017) ("'[T]he Free Exercise Clause forbids any regulation of beliefs as such,' and that . . . unconstitutional regulation may sometimes be accomplished through a law that *appears* facially neutral." (citing Blackhawk v. Pennsylvania, 381 F.3d 202, 208–09 (3d Cir. 2004))), *petition for cert. filed*, No. 17-108, 2017 WL 3126218 (U.S. July 14, 2017).

> the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. As we have noted in a slightly different context, "[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides."[108]

Thus Justice Scalia's interpretation would remove any independent protection for religion provided by the Free Exercise Clause because everything his interpretation protects against would already be protected under the Fourteenth Amendment's promise of equal protection and statutory anti-discrimination.

Such a conception of neutrality in free exercise cases not only makes the Free Exercise Clause superfluous after the Fourteenth Amendment,[109] it also leaves "a free-exercise jurisprudence in tension with itself."[110] *Smith* "refrain[s] from overruling prior free-exercise cases that contain a free-exercise rule fundamentally at odds with the rule *Smith* declared."[111] The prior cases make clear "that the Free Exercise Clause embraces more than *mere formal* neutrality, and that formal neutrality and general applicability are not sufficient conditions for free-exercise constitutionality."[112] Prior to *Smith*, "[T]he Court repeatedly . . . stated that the [Free Exercise] Clause set[] strict limits on the government's power to burden religious exercise, whether it is a law's object to do so or its unanticipated effect."[113] *Smith*'s blurry depiction of the neutrality demanded by

---

108. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring) (quoting Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141–42 (1987)).

109. If all the Free Exercise Clause offers is that which is already guaranteed by the Equal Protection Clause, there would have been no need to incorporate the Free Exercise Clause against the states. That the Court did specifically incorporate the Free Exercise Clause against the states through the Fourteenth Amendment, *see* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), demonstrates that the Court did not think that the Free Exercise Clause was superfluous after the Fourteenth Amendment.

110. *Lukumi*, 508 U.S. at 564 (Souter, J., concurring in part and concurring in judgment).

111. *Id.* at 573.

112. *Id.* at 565 (emphasis added).

113. *Id.* at 569–70; *see, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 717 (1981) ("In a variety of ways we have said that '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the exercise of religion.'" (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

the Free Exercise Clause and its refusal to overrule contradictory conceptions of the required neutrality have confused the jurisprudence around what constitutes a neutral law. That confusion is evidenced in part by the arbitrary application of precedent concerning standards of neutrality and the assumption of neutrality absent any standard or critical analysis.

C. Arbitrary or Absent Standards of Neutrality Applied Today

In most contemporary free exercise cases, courts assume neutrality in one of two ways. First, courts may state that the law does not fall into one of the categories that would explicitly reveal that the law lacked neutrality and then illogically leap to the conclusion that it is, therefore, neutral.[114] Second, courts may conflate neutrality and general applicability, either by completely ignoring neutrality[115] or performing the same analysis to find a law both neutral and generally applicable.[116]

1. The False Assumption of Neutrality

First, courts assume neutrality by arbitrarily picking one of many characteristics that reveal when a law lacks neutrality, showing that the law under review does not have that feature, and then assuming neutrality.[117] Nearly all cases concerning

---

114. *See, e.g.*, Stormans v. Selecky, 586 F.3d 1109, 1130 (9th Cir. 2009) (asserting that "'if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is *not neutral*,'" and then holding the law *was neutral* because there was no evidence that the object of the law was to infringe (quoting *Lukumi*, 508 U.S. at 533 (emphasis added))). *But see* Midrash Sephardi v. Town of Surfside, 366 F.3d 1214, 1234 n.16 (11th Cir. 2004) (rejecting the argument that law is neutral just because there is no evidence that the law directly targeted religion).

115. *See* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391–92 (1990) (finding a law generally applicable then going on to hold it did not violate the Free Exercise Clause without even mentioning neutrality).

116. *See, e.g.*, San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1031 (9th Cir. 2004) (conducting only one analysis for both neutrality and general applicability); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 167 (3d Cir. 2002) (analyzing only whether a law was "uniformly applied" to determine that the law was both neutral and generally applicable).

117. *See, e.g.*, Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 844 (9th Cir. 2016) (citing *Lukumi* for the proposition that a law *is not neutral* if it references religion then concluding that because the act did not reference religion the law *was neutral*), *cert. granted sub nom.* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 464 (2017); Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548, 556 (4th Cir. 2013) (explaining a law is not neutral if it targets religion and then agreeing with the lower court that under First Amend-

freedom of religion only define neutrality negatively,[118] and most choose the negative definition that asserts a law is not neutral if "the object of [the] law is to infringe upon or restrict practices because of their religious motivation."[119] In one of the rare cases where neutrality was defined in a positive sense, the Ninth Circuit Court of Appeals defined a neutral law as one that "references no religious practice."[120] But the Court has expressly rejected that positive definition of neutrality.[121] Although a law that "references no religious practice" would be considered facially neutral, "[f]acial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality' and 'covert suppression of particular religious beliefs.' Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."[122]

Though a law *is not* neutral if it purposefully infringes on religion, that definition gives no guidance about what a neutral law *is*; it only determines one characteristic a law cannot have if it is to be neutral. Such a definition does not illuminate what other criteria a law must meet to be neutral. It leaves open the door for infinite other criteria. *Lukumi* makes that distinction clear. The Court stated, "[T]he *minimum requirement* of neutrali-

---

ment principles the law is neutral unless petitioner demonstrates that the County targeted petitioner).

118. *See, e.g.*, *Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is *not* neutral . . . must undergo the most rigorous of scrutiny." (emphasis added)); *id.* at 533 ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.") (citing Emp't Div. v. Smith, 494 U.S. 872, 878–79 (1990)); Stormans v. Wiesman, 794 F.3d 1064, 1076 (9th Cir. 2015) (citing *Lukumi*, 508 U.S. at 533); Priests for Life v. U.S. Dept. of Health & Human Servs., 772 F.3d 229, 267 (D.C. Cir. 2014) ("A law is not neutral if it facially 'refers to a religious practice without a secular meaning discernable from the language or context,' or if 'the object of a law is to infringe upon or restrict practices because of their religious motivation.'" (quoting *Lukumi*, 508 U.S. at 533)), *vacated and remanded*, Zubik v. Burwell, 136 S. Ct. 1557 (2016); McTernan v. City of York, 564 F.3d 636, 647 (3d Cir. 2009) ("Government action is not neutral . . . if it burdens religious conduct because of its religious motivation, or if it burdens religiously motivated conduct but exempts substantial comparable conduct that is not religiously motivated."); Hartmann v. Stone, 68 F.3d 973, 978 (6th Cir. 1995) ("A rule that uniformly bans all religious practice is not neutral.").

119. *Lukumi*, 508 U.S. at 533.

120. *Nat'l Inst. of Family & Life Advocates*, 839 F.3d at 844.

121. *Lukumi*, 508 U.S. at 534.

122. *Id.*

ty is that a law not discriminate on its face."[123] Likewise, in *Locke v. Davey* Justice Scalia quoted Justice Souter's concurrence from *Lukumi* where Justice Souter "endorsed the 'noncontroversial principle' that 'formal neutrality' is a '*necessary* conditio[n] for free-exercise constitutionality,'" implying that formal neutrality alone is insufficient.[124] Although it is therefore clear that a law that purposefully infringes on religion or has religious discrimination as its object is *not* neutral, that fact gives little guidance as to what laws *are* neutral.

Several other conditions reveal a law's lack of neutrality, though the absence of those conditions does not establish a law as neutral.[125] *Lukumi* lists some of those conditions, holding that a law is not neutral if it discriminates on its face,[126] if there is even "slight suspicion" that it is a product of government hostility towards religion,[127] if "the burden of the [law], in practical terms, falls on [religious observers] but almost no others,"[128] or if a law "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends."[129] Even with these other negative definitions, courts often cite only the first—a law is *not* neutral if its object is to impinge upon religious practices—and then fallaciously conclude that because the law does not base its application upon religious motivation, it *is* neutral.[130] That type of reasoning is unacceptable, as the Court explained in *Locke*.

In *Locke*, the respondent based his argument on the premise that if a statute was not facially neutral then it was unconstitutional. He tried to infer that premise from the holding in *Luku-*

---

123. *Id.* at 533 (emphasis added).

124. Locke v. Davey, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting) (emphasis added).

125. *See Lukumi*, 508 U.S. at 542.

126. *See id.* at 533.

127. *See id.* at 534, 547.

128. *Id.* at 536.

129. *Id.* at 538.

130. *See* State v. Arlene's Flowers, Inc., 389 P.3d 543, 561 (Wash. 2017) (citing the definition of when a law is not neutral and concluding that because the WLAD does not explicitly target religion, it *is* neutral), *petition for cert. filed*, No. 17-108, 2017 WL 3126218 (U.S. July 14, 2017); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 291 (Colo. Ct. App. 2015) (citing above definition and from it concluding a law *is* neutral because it does not seem to "discriminate[] against conduct *because of* its religious character" (emphasis added)), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

mi based on when a statute *was* facially neutral.[131] The *Locke* Court rejected the respondent's premise, explaining that to make such an inference would extend *Lukumi* "well beyond not only [its] facts but [also its] reasoning"[132] because the Court's statement about what is true when a statute is facially neutral tells other courts nothing about what is true when the statute is *not* facially neutral. The same logic applied by the respondent in *Locke* has been underlying the assumption of neutrality in the *Smith* progeny. Courts move from a holding establishing that if a law purposefully targets religion, it is not neutral to assuming that if a law does not purposefully target religion, then it is neutral. But the Court has never even implied that possibility. To describe the fallacy another way, lower courts take the Court's holding about a condition sufficient to prove a law lacks neutrality and apply it as a condition necessary for non-neutrality, which is another way of saying that courts apply the absence of that condition as sufficient for neutrality.

In *Grace United Methodist Church v. City of Cheyenne*,[133] for example, the Tenth Circuit Court of Appeals cited *Lukumi*'s rule that a "law *lacks* facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context,"[134] and then derived a rule that "[a] law *is neutral* so long as its object is something other than the infringement or restriction of religious practice."[135] In *Olsen v. Mukasey*,[136] the Eighth Circuit Court of Appeals also concluded that something was neutral from a rule only describing what was not neutral. That court explained, "[a] law is *not neutral* if its object is 'to infringe upon or restrict practices because of their religious motivation'" and inferred that a law *is neutral* absent that prohibited object.[137] To reach that conclusion courts must commit the same logical fallacy the Court rejected in *Locke*: they must draw a conclusion about a law that *does not* purposefully target religion based on a holding about a law that *does* purposefully target religion.

---

131. *See Lukumi*, 508 U.S. at 534.
132. Locke v. Davey, 540 U.S. 712, 720 (2004).
133. 451 F.3d 643 (10th Cir. 2006).
134. *Id.* at 650 (quoting *Lukumi*, 508 U.S. at 533 (emphasis added)).
135. *Id.* at 649–50 (emphasis added).
136. 541 F.3d 827 (8th Cir. 2008).
137. *Id.* at 832 (emphasis added) (citing *Lukumi*, 508 U.S. at 533).

The *Locke* Court, however, implicitly made the same logical error that it condemned. As Justice Scalia observed in dissent, "[t]he Court makes no serious attempt to defend the program's neutrality."[138] It only found "that the scholarship program was not motivated by animus toward religion."[139] Justice Scalia dismissed that finding's relevance, stating, "The Court does not explain why the legislature's motive matters, and I fail to see why it should."[140] The Court ruled that the law is constitutional because there "is not evidence of hostility toward religion"[141] nor "anything that suggests animus towards religion."[142] Evidence of animus or hostility may be a factor in determining neutrality, but lack of evidence of animus cannot be determinative of neutrality,[143] especially given the other explicit factors relevant to neutrality that Justice Kennedy announced in *Lukumi*.[144]

More striking is that the Court in *Locke* concluded the law was constitutional under *Smith*'s rational basis standard without even *once* mentioning neutrality. Even though evidence of animus will show that a law is not neutral,[145] as discussed above, that does not mean that lack of evidence of animus proves the law is neutral. Some courts still assume a lack of animus is sufficient for a law to be neutral instead of correctly reasoning that lack of animus is necessary but not sufficient for a law to be neutral.[146] But many courts are now going beyond

---

138. Locke v. Davey, 540 U.S. 712, 731 (2004) (Scalia, J. dissenting).

139. *Id.* at 732.

140. *Id.*

141. *Id.* at 721 (majority opinion).

142. *Id.* at 725.

143. *See id.* at 732–33 (Scalia, J., dissenting); Midrash Sephardi v. Town of Surfside, 366 F.3d 1214, 1234 n.16 (11th Cir. 2004) (refusing to find a law neutral when only support for that claim was lack of evidence of hostility or animus toward religion).

144. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 536–38 (1993) (holding a law is not neutral if "the burden of the [law], in practical terms, falls on [religious observers] but almost no others" or if a law "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends").

145. *See* Shrum v. City of Coweta, 449 F.3d 1132, 1145 (10th Cir. 2006) ("Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral.").

146. *See* Ill. Bible Coll. v. Anderson, 870 F.3d 631, 639 (7th Cir. 2017) (finding law neutral because "no allegation of underlying religious animus"); Abdus-Shahid v. Mayor of Balt., 674 Fed. App'x 267, 272 (4th Cir. 2017) (concluding a law was neutral because no evidence that the policy had been implemented with an improper motivation had been presented).

that logical flaw: courts remove the middle steps concerning neutrality and completely replace the neutrality analysis with an inquiry into whether the law was enacted with animus or hostility towards religion.[147] Several post-*Locke* cases illustrate that point.

For example, in *Wirzburger v. Galvin*[148] the First Circuit cited both *Smith* and *Lukumi* yet still assessed only whether the law was generally applicable and whether its passage was "motivated by animus towards religion" in its free exercise analysis.[149] The court never mentioned neutrality.[150] More starkly, the court acknowledged that the challenged amendment's sponsor stated that his motivation was to "protect the initiative and referendum against the religious fanatics and against the professional religionists."[151] Yet the court still found "no evidence that animus against religion was a motivating factor behind the [amendment's] passage," and without mentioning neutrality, thus upheld the law.[152]

Similarly, in *Bronx Household of Faith v. Board of Education of New York*,[153] a case challenging a New York City Department of Education regulation prohibiting the use of otherwise-accessible school facilities by groups "holding religious worship services," the Second Circuit discussed *Lukumi* at length without once mentioning neutrality.[154] Instead the court framed the *Lukumi* test as one barring only regulations that were either not generally applicable or were motivated by animus towards

147. *See* Bronx Household of Faith v. Bd. of Educ., 750 F.3d 184, 196 (2d Cir. 2014) (asserting that "the clear implication" of *Lukumi* is that if a law is generally applicable and not motivated by animus the law should be upheld, and reasoning on that basis that "the Free Exercise Clause would not prohibit the Board['s] [restriction] . . . so long as the Board's restriction [was generally applicable] and was not motivated by discriminatory disapproval of any particular religion's practices," finding no evidence of animus and thus upholding the regulation); Prater v. City of Burnside, 289 F.3d 417, 428–30 (6th Cir. 2002) (conducting an extensive analysis of whether the city's decision was based on animus, finding insufficient evidence of animus, and holding that the decision did not violate the Free Exercise Clause without any analysis of the decision's neutrality).

148. 412 F.3d 271 (1st Cir. 2005).

149. *See id.* at 281–82.

150. *See id.*

151. *Id.* at 281.

152. *See id.* at 282.

153. 750 F.3d 184 (2d Cir. 2014).

154. *See id.* at 187–205.

religion.[155] The court stated, "[T]he clear implication of the [*Lukumi*] opinion [was] that, if the prohibition had [been generally applicable] and had not been motivated by hostility to Santeria's religious practice, the prohibition would have been upheld."[156] Based on that interpretation of *Lukumi*, which completely disregards any neutrality analysis, the court stated that "the Free Exercise Clause would not prohibit the Board['s] [restriction] . . . so long as the Board's restriction [was generally applicable] and was not motivated by discriminatory disapproval of any particular religion's practices."[157] Next, the court found that there was "not a scintilla of evidence that the Board disapprove[d] of religion,"[158] and thus rejected the free exercise challenge.[159] In dissent, Judge John Walker, Jr. pointed out that under *Lukumi*'s neutrality requirement, ignored by the majority, the challenged regulation was not neutral for two reasons. First, it lacked facial neutrality, and second, it fell into one of the explicit categories that reveal non-neutrality outlined by the *Lukumi* majority.[160] Some courts have gone as far as admitting a law is not neutral and then explicitly rejecting the neutrality analysis in favor of an animosity inquiry.[161] However, that explicit rejection of neutrality and replacement with animosity is contrary to binding Supreme Court precedent.[162]

---

155. In *Lukumi*, no part of the majority opinion discusses the motivation of the lawmakers as a factor of the neutrality test. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993). Five justices who signed onto most of the majority opinion specifically chose to reject the only part of Justice Kennedy's opinion that discussed the lawmakers' motivation as relevant to neutrality. *See id.*

156. *Bronx Household*, 750 F.39 at 196.

157. *Id.*

158. *Id.* at 192.

159. *See id.* at 200.

160. *See id.* at 207 (Walker, J., dissenting) ("[I]ts object 'is to infringe upon or restrict practices because of their religious motivation.'" (quoting *Lukumi,* 508 U.S. at 533)).

161. *See e.g.*, Eulitt v. Me. Dep't of Educ., 386 F.3d 344, 355–56 (1st Cir. 2004) (acknowledging the law "lacks religious neutrality on its face" then relying on *Locke* to extensively analyze potential animus before concluding no free exercise violation); KDM v. Reedsport Sch. Dist., 196 F.3d 1046, 1050–51 (9th Cir. 1999) (admitting the regulation was "not 'neutral'" and still holding that it did not "impose an impermissible burden on their free exercise of religion" because there was not "substantial animus").

162. *See supra* note 155; *see also* Hassan v. City of N.Y., 804 F.3d 277, 309 (3d Cir. 2015); Shrum v. City of Coweta, 449 F.3d 1132, 1145 (10th Cir. 2006) ("[T]he Free Exercise Clause is not confined to actions based on animus." (citations omitted));

2. The Failure to Analyze Neutrality

The second way courts implicitly assume neutrality is by conflating neutrality and general applicability. Most often courts conflate the two requirements either by demonstrating general applicability and then moving on without even mentioning neutrality or by performing only one analysis and then holding the law is both neutral and generally applicable.[163] One example of the former reasoning occurred just months after *Smith* was decided. In *State v. Hershberger*,[164] the Minnesota Supreme Court asserted that *Smith* had "significantly changed first amendment free exercise analysis."[165] The court held, contrary to an earlier opinion on the same issue,[166] that a law requiring an Amish man to put an orange, plastic triangle on his cart was constitutional even though using plastic violated the Amish man's religious beliefs and other materials could have easily been used to achieve the same purpose.[167] Throughout the entire "significantly changed first amendment analysis," the court did not once mention neutrality; it went straight and only to general applicability. The court reasoned, "The *Smith II* court held a law of general application, which does not intend

---

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5–16, at 956 (3d ed. 2000) ("[A] law that is not neutral or that is not generally applicable can violate the Free Exercise Clause without regard to the motives of those who enacted the measure.").

163. *See, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., No. 5-12-CV-06744, 2013 WL 1277419, at *2 (3d Cir. 2013) (applying only one analysis to determine law is both neutral and generally applicable); Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 242 (3d Cir. 2008) (claiming Act is "a neutral law of general applicability" and proceeding to perform only one analysis).

164. 462 N.W.2d 393 (Minn. 1990).

165. *Id.* at 396.

166. *See* State v. Hershberger, 444 N.W.2d 282, 289 (Minn. 1989) ("[W]e hold that these appellants have established that each has a sincerely-held religious belief that forbids him from displaying the SMV emblems required by Minn. Stat. § 169.522; that state enforcement of Minn. Stat. § 169.522 which subjects these appellants to criminal prosecution, with resultant potential fines or jail incarceration, burdens the appellants' rights under the Free Exercise Clause; that the state has a compelling public safety interest which Minn. Stat. § 169.522 seeks to serve; but that the state's compelling public safety interest can be served by a less restrictive alternative; and that, therefore, Minn. Stat. § 169.522 as applied against these appellants violates the Free Exercise Clause of the First Amendment to the United States Constitution."), *vacated*, 462 N.W.2d 393 (Minn. 1990).

167. *See Hershberger*, 462 N.W.2d at 396.

to regulate religious belief or conduct, is not invalid because the law incidentally infringes on religious practices."[168]

That disregard of the neutrality and exclusive reliance on general applicability is exemplified by Justice O'Connor's dissent in *City of Boerne*. Justice O'Connor suggested that through *Smith,* courts have "interpreted the Free Exercise Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as the prohibition is *generally applicable*."[169] Later she once again omitted mention of neutrality from her discussion of free exercise and spoke only of general applicability: "[T]he Free Exercise Clause is properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer's conduct is in tension with a law of *general application*."[170] Finally, Justice O'Connor condemned the idea that the Constitution condones "a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law."[171] Though some other courts have completely ignored neutrality,[172] most courts commit the second type of flawed reasoning: at least mentioning neutrality but performing no analysis beyond that for general applicability, asking only whether the law applies equally.[173]

When courts misapply a negative definition of neutrality or conflate neutrality with general applicability, they will draw a logically flawed conclusion about whether a given law is neutral. Currently, many courts address general-applicability de-

---

168. *Id.*

169. City of Boerne v. Flores, 521 U.S. 507, 546 (1997) (O'Connor, J., dissenting) (emphasis added).

170. *Id.* at 564 (emphasis added).

171. *Id.*

172. *See, e.g.,* NLRB v. Hanna Boys Ctr., 940 F.2d 1295, 1305 (9th Cir. 1991) (failing to mention neutrality as a factor in the *Smith* analysis when describing its interpretation of the *Smith* test and ultimately applying the *Sherbert* test instead).

173. *See, e.g.,* Am. Life League v. Reno, 47 F.3d 642, 654 (4th Cir. 1995) ("Under the Act . . . [t]he same conduct is outlawed for all. Therefore, the Act is a generally applicable law, neutral toward religion. It does not offend the First Amendment's Free Exercise Clause."); First Assembly of God v. Collier Cty., 20 F.3d 419, 423 (11th Cir. 1994) (finding an ordinance neutral and generally applicable based only on reasoning that regulation applied to all homeless shelters).

fenses without mentioning neutrality at all.[174] Yet, if a law burdening religious practice is not neutral, it is subject to strict scrutiny.[175] Determining whether or not a law is neutral is thus of critical importance. Yet, as seen, Free Exercise Clause jurisprudence has largely neglected the concept of neutrality. This raises the question: what should a proper neutrality analysis look like?

III. A PATH FORWARD: NEUTRALITY IN DISCRIMINATION AND FREE SPEECH JURISPRUDENCE

The way the Court interprets neutrality in other contexts should inform how neutrality is interpreted in free exercise cases because the law should be as coherent and consistent as possible.[176] Neutrality is a pervasive and more developed concept in both discrimination and Free Speech Clause jurisprudence, which are both closely related to free exercise law.[177] Because of that kinship, the importance of interpreting like terms consistently is even more crucial. The desire for consistency in the application of neutrality between the Court's Free Speech Clause and Free Exercise Clause jurisprudence is especially important because both of those freedoms are protected by the First Amendment.[178]

---

174. *See, e.g.*, Okwedy v. Molinari, 69 Fed. App'x 482, 484 (2d Cir. 2003) (rejecting a Free Exercise Clause claim supposedly under the reasoning in *Smith* and *Lukumi* without ever mentioning neutrality).

175. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

176. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 516 (1996).

177. *See* Lee v. Weisman, 505 U.S. 577, 591 (1992) (explaining that although the Establishment Clause analysis differs from the speech provisions of the First Amendment, the Free Exercise Clause "has close parallels in the speech provisions of the First Amendment"); *cf.* Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 734–35 (2008) (explaining the similarities between Free Exercise Clause analysis and Equal Protection Clause analysis).

178. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

A. Neutrality in Discrimination Jurisprudence

Justice O'Connor has the view that "the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause,"[179] and "the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity."[180] Yet, Equal Protection Clause jurisprudence has a more developed view of neutrality, which results in the Court applying heightened scrutiny much more often when assessing discrimination.[181] Unlike how neutrality has often been employed in free exercise cases, discrimination jurisprudence does not require a court to implicitly (or explicitly) find animus or hostility on the part of the lawmaker for the law to be "nonneutral."[182] A court may look to the effects of the law when assessing whether discrimination legislation is neutral.[183] Under an equal protection analysis, one does have to show a discriminatory purpose.[184] That purpose determination, however, is different than proof of animus or hostility.[185] Moreover, in the same case in which the Court asserted that a law's disproportionate impact *alone* will not make that law un-

---

179. Emp't Div. v. Smith, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring in judgment).

180. *Id.* at 901–02.

181. *See id.* at 886 n.3 (majority opinion); *cf.* Locke v. Davey, 540 U.S. 712, 730 n.2 (2004) (Scalia, J., dissenting) ("If [a rational basis] is all the Court requires, its holding is contrary not only to precedent, but to common sense. If religious discrimination required only a rational basis, the Free Exercise Clause would impose no constraints other than those the Constitution already imposes on all government action.").

182. *See* Hassan v. City of N.Y., 804 F.3d 277, 298 (3d Cir. 2015); Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1260 (10th Cir. 2008) ("Even in the context of race, where the nondiscrimination norm is most vigilantly enforced, the Court has never required proof of discriminatory animus, hatred, or bigotry." (citations omitted)).

183. *See* Rogers v. Lodge, 458 U.S. 613, 618 (1982) (holding if the effects of a facially race-neutral law "'bear[] more heavily on one race than another'" it may violate equal protection (quoting Washington v. Davis, 426 U.S. 229, 242 (1976))).

184. *See Davis*, 426 U.S. at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."); *see also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that discriminatory purpose requires that the classification must have been adopted because of, not despite, the disparate impact).

185. *See* Shrum v. City of Coweta, 449 F.3d 1132, 1144–45 (10th Cir. 2006) (distinguishing between purposeful discrimination with an unrelated and unprejudiced aim, such as saving money, and purposeful discrimination based on animus or hostility).

constitutional, the Court clarified that a law's discriminatory impact *is* relevant "in cases involving Constitution-based claims of racial discrimination" because the effects of a formally neutral law may show that the law actually lacks neutrality.[186] Though Equal Protection Clause jurisprudence does ask whether discrimination was a purpose of the law, animus is not necessary for a law to lack neutrality, and the operation of the law is relevant to the law's neutrality.

The Court has developed an even stricter jurisprudence concerning neutrality around Congress's anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964, and other statutes with anti-discrimination components, such as the Voting Rights Act. Under that jurisprudence, if a law that is facially neutral can be shown to disproportionately burden a distinct group, then it is no longer considered neutral, regardless of whether the legislators had a discriminatory purpose.[187] In fact, "[t]o establish a prima facie case of discrimination a plaintiff must show [only] that the facially neutral employment practice had a significantly discriminatory *impact*"[188] because a discriminatory impact can negate the supposed neutrality.

In coming to that decision, the Court relied on *Griggs v. Duke Power Co.*,[189] which held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if [their effect is] to 'freeze' the status quo of prior discriminatory employment practices."[190] *Connecticut v. Teal*[191] also reaffirmed that the effects of a formally neutral law can reveal its discriminatory nature.[192] Although the employment practices in that case were neutral in the sense that the "requirements applied equally to white and black employees and applicants"[193] and "there was no[] showing that the employer had a racial purpose or invidious intent in adopting the[] requirements,"[194] they were "invalid because they had a

186. *See Davis*, 426 U.S. at 241.
187. Connecticut v. Teal, 457 U.S. 440, 448 (1982).
188. *Id.* at 446 (emphasis added).
189. 401 U.S. 424 (1971).
190. *Id.* at 430.
191. 457 U.S. 440 (1982).
192. *See Teal*, 457 U.S. at 451.
193. *Id.* at 446.
194. *Id.*

disparate impact."[195] The Court has also struck down formally neutral voting practices, such as literacy tests, because they had a discriminatory impact, often disproportionately denying certain races the right to vote.[196] Both the form and operation of the law matter when assessing neutrality in statutory discrimination jurisprudence.[197]

Yet, in *Smith*, Justice Scalia, writing for the Court, held that "requirements applied equally," lacking "invidious intent,"[198] and only "hav[ing] the effect of burdening a particular religious practice[,] need not be justified by a compelling governmental interest."[199] That assertion implies that such a law fits into the Court's definition of neutral. Later, Justice Scalia, the author of *Smith*, walked back this position,[200] and fervently criticized the Court's contemporary treatment of burdens to religion:

> The Court has not approached other forms of discrimination this way. When we declared racial segregation unconstitutional, we did not ask whether the State had originally adopted the regime, not out of "animus" against blacks, but because of a well-meaning but misguided belief that the races would be better off apart. *It was sufficient to note the current effect of segregation on racial minorities.*[201]

In the years since *Smith*, the Court has also reaffirmed the notion that the effects of a facially race-neutral law could render that law not race-neutral. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[202] the

---

195. *Id.*

196. *See e.g.*, Gaston Cty. v. United States, 395 U.S. 285, 293 (1969).

197. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

198. *See Teal*, 457 U.S. at 446 (citing *Griggs*, 401 U.S. at 431).

199. Emp't Div. v. Smith, 494 U.S. 872, 886 n.3 (1990). Scalia in that footnote also argues that "laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause." *Id.* (citing Washington v. Davis, 426 U.S. 229 (1976).

200. *See* Locke v. Davey, 540 U.S. 712, 732 (2004) (Scalia, J., dissenting) ("We do not pause to investigate whether [a law] was actually trying to accomplish the evil the Constitution prohibits. It is sufficient that the citizen's rights have been infringed. '[It does not] matter that a legislature consists entirely of the purehearted, if the law it enacts *in fact* singles out a religious practice for special burdens.'" (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Scalia, J., concurring in part and concurring in judgment))).

201. *Id.* (emphasis added).

202. 135 S. Ct. 2507 (2015).

Court held that to assess the neutrality of an employer's actions under the Fair Housing Act, it must look to the effects of those actions because "the text of [the] provisions 'focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer' and therefore compels recognition of disparate-impact."[203] Similarly, the text of the First Amendment concerns the *effects* that any law passed by Congress has on people's free exercise of religion.[204] Because the "text refers to the consequences of actions and not just to the mindset of actors," neutrality "must be construed to encompass disparate-impact."[205]

To maintain consistency between bodies of law, courts should look to the effects of a statute when determining whether or not it is neutral in the free exercise context. In the free exercise cases, the burden often falls disproportionately on those who have religious beliefs and act on those religious beliefs. Indeed, how can one feel a burden to his or her religious practice if one does not practice religion? For example, the only ordinance that the Court has found not to be neutral involved a prohibition on sacrificing animals.[206] The Court reasoned that though the ordinance facially prohibited everyone from sacrificing animals, in application it only affected practitioners of the Santeria religion.[207] In other words, "the burden of the ordinance, *in practical terms*, [fell] on the Santeria adherents and almost no others."[208] Yet, in other cases a court has explicitly said, "The Free Exercise Clause is not violated, [thus the law must be considered neutral], even though a group motivated by religious reasons may be more likely to engage in the proscribed conduct."[209] The meaning ascribed to the word "neutral" in free exercise cases is inconsistent among free exercise decisions and inconsistent with discrimination jurisprudence. Like courts determining neutrality in discrimination cases,

---

203. *Id.* at 2518 (quoting Smith v. City of Jackson, 544 U.S. 228, 236 (2005)).

204. *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in judgment) ("The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted."); *see also* U.S. CONST. amend. I.

205. *Inclusive Communities Project*, 135 S. Ct. at 2518.

206. *See Lukumi*, 508 U.S. at 536.

207. *See id.*

208. *Id.* (emphasis added).

209. Stormans v. Selecky, 586 F.3d 1109, 1131 (9th Cir. 2009).

courts handling free exercise cases should not require proof of animosity to show a law lacks neutrality, and should consistently look to the effects of a law to determine its neutrality. That does not mean that any disparate impact will prove that a law lacks neutrality and trigger strict scrutiny. "Even completely neutral practice will inevitably have *some* disproportionate impact on one group or another."[210] But it does mean that impact should be a factor in assessing the neutrality of a law in the free exercise context as it is in the equal protection context.

B. Neutrality in Free Speech Clause Jurisprudence

Free Speech Clause jurisprudence shares many characteristics with Free Exercise Clause jurisprudence.[211] Both bodies of law are rooted in the First Amendment; both doctrines purport that a law burdening its respective right is subject to strict scrutiny unless the law is both neutral and generally applicable. Likewise, neutrality and general applicability are two distinct concepts in both doctrines, though, as described above, Free Exercise Clause jurisprudence often conflates the two. Both doctrines start their neutrality analysis by determining if a law is facially neutral, and if the law fails that test, then, under both doctrines, it is reviewed under strict scrutiny. However, that is where the similarities between the two doctrines' neutrality analyses end. The neutrality analysis in Free Speech Clause jurisprudence is quite developed,[212] but in Free Exercise Clause jurisprudence, it is still immature.

The traditional content-neutrality inquiry in Free Speech Clause jurisprudence requires neutrality in each of three respects: "the law's application, the asserted government justification, and the governmental motive."[213] To be neutral in application, the law cannot "by terms of its application, ha[ve] an

---

210. *Inclusive Communities Project*, 135 S. Ct. at 2545 (Alito, J., dissenting) (quoting City of L.A. v. Manhart, 435 U.S. 702, 711 n.20 (1978)).

211. *See* Lee v. Weisman, 505 U.S. 577, 591 (1992) ("The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment.").

212. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983) ("[The content-neutrality inquiry is] the most pervasively employed doctrine in the jurisprudence of free expression.").

213. Mark Rienzi & Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 FORDHAM L. REV. 1189, 1191 (2013).

'unconstitutional *effect*' on First Amendment freedoms"[214] and cannot be applied in a discriminatory way.[215] To be a neutral government justification, the law must be "justified without reference to the content of the regulated speech."[216] In other words, the law is not neutral in its justification if the "interest is served only by restricting speech of a particular content."[217] Finally, to be neutral under the governmental motive inquiry, "the legislature must not have acted with the *motive* of favoring or disfavoring a particular viewpoint or content"[218] or "designed [the law] to target [specific] speakers and their messages for disfavored treatment."[219]

Although a law must be neutral in all three respects to escape strict scrutiny, the first two parts are more objective and, thus, less subject to manipulation.[220] Though necessary as part of a larger test, "inquiries into congressional motives . . . are a hazardous matter,"[221] and "direct inquiry into motives . . . very rarely will prove productive."[222] One reason is that few legislatures would admit to or design a law that explicitly revealed animus or discriminatory intent.[223] Because of that susceptibil-

---

214. Kagan, *supra* note 176, at 413 (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)); *see* McCullen v. Coakley, 134 S. Ct. 2518, 2549 (2014) (Alito, J., concurring in judgment) ("While such a law would be content neutral on its face, there are circumstances in which a law forbidding all speech at a particular location would not be content neutral in fact.").

215. *See* Hoye v. City of Oakland, 653 F.3d 835, 850–51 (9th Cir. 2011) (holding that though the statute applied neutrally on its face, it was not neutral because it was enforced in a discriminatory way); Kagan, *supra* note 176, at 463–64 (explaining that laws turning on communicative intent seem content neutral on their face but are actually not content neutral because they allow content based actions in application).

216. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

217. Rienzi & Buck, *supra* note 213, at 1207.

218. *Id.* at 1194; *see also* Turner Broad. Sys. v. FCC, 512 U.S. 622, 645–46 (1994) (facially neutral law enacted for the purpose of suppressing speech about a particular topic is not neutral).

219. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2663–64 (2011).

220. *See* Rienzi & Buck, *supra* note 213, at 1200.

221. United States v. O'Brien, 391 U.S. 367, 383 (1968).

222. Kagan, *supra* note 176, at 440; *see also id.* at 490 ("The error . . . lies in the decision to evaluate reasons by asking questions about them.").

223. *See* Rienzi & Buck, *supra* note 213, at 1195, 1199; *see also* Kagan, *supra* note 176, at 437 ("Officials will not admit (often, will not themselves know) that a regulation of speech stems from hostility or self-interest. They will invoke in each case a plausible interest, divorced from ideological disapproval.").

ity to manipulation, relying only on the motive test to determine neutrality is particularly dangerous, yet that is essentially the only test that courts employ to decide neutrality in free exercise cases.[224] When courts focus only on the motive prong, as in free exercise neutrality analysis, or call it the "principal inquiry"[225] as in free speech, they "confuse[] means with ends"[226] and employ "a content-neutrality inquiry that focuses on such direct inquiries into motive [that it is] avoided too easily to do any real work."[227] Indeed, the Court has repeatedly "rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature *intends* to suppress certain ideas,'"[228] and has instead embraced the idea that ostensibly "[i]nnocent motives do not eliminate the danger of censorship."[229] Like the free speech neutrality analysis, Free Exercise Clause jurisprudence should require neutrality in a law's application and the government's asserted justification. Free Exercise Clause jurisprudence should also take heed of the warnings from Free Speech Clause jurisprudence about the motive inquiry when assessing neutrality.

Free Exercise Clause jurisprudence should assess neutrality in a more consistent and robust way. To do so, it should look to the traditional free speech neutrality doctrine as well as the disparate impact assessment used when considering neutrality in discrimination jurisprudence.

---

224. The use of only the third test is also becoming an issue in determining neutrality in Free Speech Clause jurisprudence through the secondary effects doctrine. *See* Rienzi & Buck, *supra* note 213, at 1204 ("The secondary effects doctrine, a fertile ground for abuse, insidiously eviscerates free expression by allowing government officials to characterize content-based regulations as content-neutral. In practice, government officials use the doctrine to silence expression they dislike."); *cf.* Kagan, *supra* note 176, at 484 ("[T]he secondary effects doctrine fits uneasily with the rest of First Amendment jurisprudence.").

225. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

226. Rienzi & Buck, *supra* note 213, at 1234.

227. *Id.*

228. Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993) (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991)).

229. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2229 (2015).

IV. CONCLUSION

First Amendment Free Exercise Clause and Establishment Clause jurisprudence both incorporate neutrality into their analyses, and in both the neutrality doctrine is inconsistent rhetorically and legally, though in distinct ways. In Establishment Clause jurisprudence, the purported test for neutrality, the *Lemon* test, is often ignored and is inconsistently applied. Though the *Lemon* test has not been formally replaced, it has morphed into the endorsement test. Under that modified test, if a reasonable observer could perceive a government action as an endorsement of anything religious, as opposed to an endorsement of the secular, that government action is unconstitutional. The idea that the absence of the religious and the endorsement of the secular is neutral conflicts with Supreme Court precedents[230] as well as with contemporary philosophical thought[231] and common sense.

Free Exercise Clause jurisprudence also looks to neutrality in its analysis. Under *Smith*, neutrality and general applicability are necessary conditions for a law to escape strict scrutiny. Although general applicability is more readily understood, Free Exercise Clause jurisprudence never defines neutrality in the positive, only occasionally providing negative definitions that show what characteristics reveal that a law lacks neutrality. That absence of definition has led lower courts to erroneously assume neutrality either by concluding a law is neutral from a rule about when a law is *not* neutral or by analyzing general applicability and neutrality in the same way. Some lower courts have gone so far as to require a showing of lawmaker

230. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 598 (1992) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."); Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." (citations omitted)); Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("To hold that [the state may not accommodate the public service to the needs of the religious] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion.").

231. *See, e.g.*, Ahdar, *supra* note 23, at 407–08; Horowitz, *supra* note 33, at xxiv.

animus to find that a law is not neutral. Given the confusion around what neutrality requires, courts should look to Free Speech Clause and Equal Protection Clause jurisprudence to determine what constitutes a neutral law.

Our current Establishment Clause and Free Exercise Clause law concerning neutrality displays a worrisome trend of embracing the secular and excluding the religious. Its own proclamations notwithstanding, that trend is not neutral. And because neutrality is at the core of the meaning of the First Amendment, it is not constitutional either.

Kelsey Curtis