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Smith, Stormans, and the Future of Free Exercise: Applying the Free Exercise Clause to Targeted Laws of General Applicability

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*By Mark L. Rienzi**

Suppose that a new Christian church in town announced that it will have a special focus on the biblical story of Jesus turning water into wine. Accordingly, rather than the single sip of wine commonly consumed at other Christian services, worshippers at the new church drink several glasses of wine as part of the service, in imitation of the wedding guests at Cana.

Unfortunately, after church, the drunken worshipers spill into the streets and are generally a loud and raucous group. Neighbors complain about being woken up early by their noise. Drunk driving arrests, previously unheard of on Sunday mornings, begin to rise.

In an effort to eliminate the noise, traffic, and other problems caused by the churchgoers, the town outlaws the consumption of alcohol on Sunday mornings. The law is neutral and generally applicable—it outlaws all consumption, and applies to all drinkers, religious or not. The law is not passed out of any animus toward the new church, but rather as a good faith attempt to protect the rest of the population from the impact of the drunken faithful.

This hypothetical highlights an important blind spot in the way most courts approach Free Exercise cases. Does the Free Exercise Clause extend to situations where the legislature deliberately targets a religious practice, but does so for neutral reasons and is willing to extend the ban to people who happen to engage in the same practice for non-religious reasons? While one can imagine reasonable arguments on both sides about the constitutionality of the Sunday morning alcohol ban, it seems absurd to say that the Free Exercise Clause is not part of the equation. Yet under the First Amendment analysis presently employed by many courts, that result is entirely likely.

I. Two Types of Free Exercise Cases

Since the Supreme Court's 1990 decision in *Employment Division v. Smith*,[1] virtually all free exercise cases have been grouped into one of two categories. On one hand is the rare case where a law treats religious conduct more harshly than if the same conduct were engaged in for non-religious purposes. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court invalidated a law that outlawed ritual animal sacrifices because "certain religions" may propose to engage in such practices.[2] The law also included a series of exemptions making clear that the only animal killings addressed would be the ritual sacrifices conducted as part of the Santeria religion.[3] The Court found that such religious discrimination in the text or operation of a statute is subjected to strict scrutiny and therefore only permitted when narrowly tailored to a compelling state interest.[4] Accordingly, such outright discrimination against religion is virtually never permissible; as Justice Souter observed at the time, it is also exceedingly rare.[5]

On the other hand are laws that do not make express religious distinctions in their terms or operation.[6] For example, the ban on use of peyote at issue in *Smith* outlawed all peyote use, whether engaged in for religious reasons or not. Such "neutral and generally applicable" laws are not subject to free exercise analysis at all, and instead are permissible unless they violate some other constitutional principle.[7]

When viewed through the *Smith/Lukumi* dichotomy, the Free Exercise Clause appears to retain relevance only in the rare cases where the law treats religious conduct *worse* than the same conduct engaged in for secular reasons. Accordingly, except for rare cases of clear religious discrimination or animus, virtually all laws challenged on federal free exercise grounds are found to be "neutral and generally applicable," and therefore exempt from free exercise analysis under *Smith*.[8]

II. Targeted Laws of General Applicability

A third possibility exists. A legislature seeking to outlaw a particular religious conduct—perhaps for perfectly neutral reasons—may enact a law that is designed to target that religious conduct, but is nevertheless facially neutral and generally applicable.

In some cases, this targeting of religious conduct may be the result of animus—the lawmakers want to eliminate the religious conduct *because* it is religious. Courts generally appear able to address this type of targeting under *Lukumi*, particularly where the lawmakers are open about their anti-religion motivation.[9]

In many other cases, however, the targeting will occur without any particular animus toward religion at all. That is, the targeting of the religious conduct will occur not *because of* the religious nature of the conduct, but for some other reason (such as public safety). These laws still clearly target religious conduct—indeed, their very goal is to eliminate that conduct—but will usually apply whether the conduct is engaged in for religious reasons or any other reason.

The Sunday morning alcohol ban described above is this type of targeted law of general applicability. The law plainly targets religious conduct—its very purpose is to rein in the drunken faithful from the new church—but it is nevertheless neutral (i.e., the legislature was not restricting the drinking *because* it was religious, but because it caused other problems) and generally applicable (i.e., it applied to other drinkers as well, not just those from the new church).

To further illustrate this type of targeting, suppose a town has an influx of Orthodox Jewish and Seventh Day Adventist business owners who, for religious reasons, keep their shops closed on Saturdays. Many shoppers stop coming downtown on Saturdays, because so many businesses are closed. Citing the harm to the entire downtown business community from the Saturday closings, the town council enacts a law requiring all

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businesses to remain open on Saturdays. The law is passed for economic reasons, and not out of animus toward religion. The law is also generally applicable—although it was designed to address the Saturday closings caused by religious conduct, it also would prohibit Saturday closings for non-religious reasons.

The Saturday opening law is a targeted law of general applicability. It is *targeted*, because religious conduct was causing a particular problem (harm to the downtown economy) and the object of the law was to address that harm by stopping the religious conduct. Yet the law is also *neutral* (i.e., there is no evidence of animus and the closings are not targeted *because* of religion but for other reasons) and *generally applicable*, in that it would apply to the same problematic conduct if it happened to be engaged in for reasons other than religion (for example, if the owner is on vacation).

The Saturday opening law can be contrasted with the law at issue in *Smith*. In *Smith*, the challenged law was a general ban on drug use.[10] While the law had an incidental effect on religious users of peyote, the primary purpose of the drug ban was not to eliminate the religious use of peyote, but, presumably, to promote public safety. *Smith* would have involved targeting if the legislature had passed the drug law because of problems it had with religious uses of peyote. In contrast, while the Saturday opening law was not the result of religious animus and would apply generally, it was enacted in response to religious conduct, and its main goal is to eliminate that conduct.

This type of targeting of religious conduct is, of course, as burdensome on the religious actors as if the legislature had said "we want to get rid of the religious store owners, so let's make them keep their stores open on Saturdays." In either case, the lawmaker has identified religious conduct as problematic and set out to prohibit that conduct in a way that will force the store owners to either violate their beliefs or lose their stores. Yet, if the legislature betrays no animus, and if the legislature is willing to ban the same conduct in the rare situation where it occurs without religious motivation, courts generally excuse this type of targeting of religious conduct from free exercise analysis entirely.

If recent cases are any guide, the Saturday opening law would be analyzed by most courts as follows. First, the court would determine that, unlike the law at issue in *Lukumi*, the Saturday opening law is neutral. The court would analyze whether the text contains any indicators that it is designed to restrict only religiously motivated conduct, or to restrict that conduct because of the religious motivation. Courts would also look at the operation of the statute to make sure that, in operation, the law does not treat religious conduct differently from the same conduct engaged in for non-religious purposes.[11]

In determining neutrality, some courts would stop with the text and operation of the law, perhaps mindful of Justice Scalia's argument in his *Lukumi* concurrence that "it is virtually impossible to determine the singular 'motive' of a collective legislative body."[12] These courts would deem the law neutral and, if also generally applicable to non-religious closings, exempt from Free Exercise analysis under *Smith.*[13]

Most courts, however, would look into the law's history for any evidence of bad intent, namely that the law targeted the Saturday closings *because of* their religious motivation.[14] Finding a neutral reason for the law—namely protection of the downtown economy—the courts would likely deem the law "neutral and generally applicable," and therefore constitutional under *Smith*.[15] Most courts would not consider the fact that the law is targeted, in that the entire point of the law was to address a problem caused by religious conduct by prohibiting that conduct.

III. Example: The Ninth Circuit's Plan B Decision

The Ninth Circuit's recent decision in *Stormans, Inc. v. Selecky* provides a clear example of lawmakers targeting religious conduct through the use of generally applicable laws, and a court failing to even apply the Free Exercise Clause to analyze the challenged law.[16]

Stormans concerned a Washington Board of Pharmacy regulation adopted in response to certain pharmacists refusing to dispense a drug known as Plan B.[17] Plan B is often referred to as the "morning after pill" or as an "emergency contraceptive" because it can be taken after sexual intercourse to prevent pregnancy.[18] Both the drug's manufacturer and the FDA acknowledge that Plan B can work by preventing an already-fertilized egg from implanting in the uterus.[19] For this reason, some pharmacists object on religious grounds to selling or dispensing Plan B, because they believe they would be participating in terminating an already-started human life.[20]

In 2005, the state Pharmacy Board began getting calls asking its position about pharmacies and pharmacists who refused on religious grounds to sell Plan B.[21] The Board convened meetings with Washington State Pharmacy Association, Planned Parenthood and other interested parties to discuss whether and under what circumstances a pharmacist should be permitted to refuse to fill a prescription on religious grounds.[22] Ultimately, the Board adopted a draft rule that allowed a pharmacist to refuse to dispense a medication for religious reasons, but required that no pharmacist or pharmacy obstruct a patient's effort to obtain lawfully prescribed drugs.[23]

The immediate reaction to the Board's draft rule confirmed that the focus was on religious refusals. The same day, Washington's Governor Christine Gregoire sent a letter to the Chairman of the Pharmacy Board "stating her strong opposition to the draft rule."[24] The Governor emphasized that "no one should be denied appropriate prescription drugs based on the personal, religious or moral objection of individual pharmacists."[25] In a related press conference, the Governor stated that she could remove the entire Board with the legislature's consent but "she would prefer not to take such a drastic step."[26] The Governor then sent the Board a different draft rule, which required all pharmacies to dispense all lawfully prescribed drugs, and prevented pharmacists from refusing to dispense for religious reasons.[27] Perhaps not surprisingly, the Governor's statement prompted a change of heart, and the Board voted unanimously in favor of the Governor's proposal.[28] The Board then enacted a rule requiring pharmacies to dispense all prescribed medications, regardless of religious objections, and essentially requiring double staffing if any pharmacy wished to accommodate a pharmacist's religious objections.[29]

Shortly thereafter, the plaintiff pharmacy and pharmacists filed suit, arguing that the rule violated, *inter alia*, the federal Free Exercise Clause.[30] The pharmacy, asserting the free exercise rights of its owners, alleged that forcing it to sell Plan B would force its owners to choose between violating the law and violating their religion.[31] The pharmacists alleged that they were forced to take lower paying, less desirable jobs as a result of the State's requirement.[32]

The district court found that, although the law purported to apply to refusals to sell any drug for any reason—i.e., it appeared to be generally applicable—"[f]rom the very beginning of this issue, the focus of the debate [was] on Plan B and on religious objection to dispensing that drug."[33] The court found that the "overriding objective of the subject regulations was, to the degree possible, to eliminate moral and religious objections from the business of dispensing medication."[34] Under *Lukumi*, the court found that plaintiffs were likely to succeed on the merits of their Free Exercise challenge, and entered a preliminary injunction against enforcement of the Rule.[35]

Defendants appealed and last month the Ninth Circuit reversed. The majority held that, in deciding whether a law is subject to free exercise analysis, it would not consider "the legislative history of the law—its historical background, the events leading up to its adoption, and its legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."[36] Instead, looking solely at the text of the rule, the court concluded that it was neutral and generally applicable, because it applied to refusals to sell drugs other than Plan B, and because it would restrict even refusals to sell Plan B for reasons other than religious objection.[37] Accordingly, despite evidence that the entire point of the rule was to address refusals to sell Plan B on religious grounds, the Court found that the Free Exercise Clause did not even apply under *Smith*.[38]

The Ninth Circuit's decision is surely wrong on the issue of whether the history of the law can be considered in the *Smith* analysis. There is some agreement among the circuit courts that the *Smith/Lukumi* analysis requires consideration of these facts.[39] Indeed, the Supreme Court itself appears to consider such facts both in the free exercise context and in its Establishment Clause cases.[40]

The Ninth Circuit's refusal to look at the context of the law forced it to miss what should have been an obvious example of targeting. There seems to be little doubt that the focus of the entire rulemaking process was on religious objections to selling Plan B and how to solve the alleged problems caused by such religious objections.[41] Indeed, the very press release announcing the rules acknowledged they were "sparked by complaints that some pharmacists and pharmacies refused to fill prescriptions for emergency contraceptives—also known as morning after pills or Plan B."[42]

Nevertheless, the Ninth Circuit permitted the rule to completely avoid free exercise analysis because the rule was generally applicable.

Had the Ninth Circuit considered the context of the rule, it would have seen clear evidence that the law targeted religious conduct, and that its "general applicability" was extremely dubious. In fact, over the twelve years preceding the rule, there was no evidence of any problem with refusals to sell any drug other than Plan B.[43] Thus the rulemakers essentially banned something—refusals to sell drugs other than Plan B—that rarely or never happened. And in exchange for regulating something that rarely or never happened, the lawmakers were able to directly target and outlaw the religious behavior to which they objected—religious refusals to sell Plan B—and avoid free exercise analysis entirely.

IV. *Smith* and the Proper Analysis of Targeted Laws

As the *Stormans* case demonstrates, an over-reading of the *Smith* decision can lead courts to fail to even apply the Free Exercise Clause in the cases for which it is most appropriate, namely, when lawmakers deliberately set out to prohibit religious conduct. A proper reading of *Smith*, however, requires application of strict scrutiny in such cases.

First, the shorthand version of *Smith* commonly used by courts—that "neutral and generally applicable" laws are immune from free exercise attack—is incorrect, or at least incomplete. *Smith* involved an Oregon law prohibiting possession of certain controlled substances, including peyote.[44] The plaintiffs were dismissed from their jobs at a private drug rehabilitation center when they admitted to having used peyote in sacramental ceremonies at their Native American Church.[45] Plaintiffs were then denied unemployment benefits because they were found to be ineligible for having engaged in work-related misconduct for violating the controlled substance law.[46]

Oregon's controlled substances law was clearly not targeted at religious conduct. When enacted, the law had absolutely nothing to do with religion or religious objectors, but was presumably focused on general public safety. As the Court made clear, it was not "specifically directed" at the plaintiffs.[47] Moreover, the law's impact in outlawing certain religious conduct was not its central purpose. The legislature did not first determine that the religious use of peyote was causing problems and then pass a general law to address that problem. Rather the restriction on religious use of peyote was "merely the incidental effect of a generally applicable and otherwise valid provision."[48]

Thus, the *Smith* opinion should not be read to lower the level of scrutiny for laws that target a particular religious conduct. Unlike the law at issue in *Smith*, a targeted law would be "specifically directed" at religious conduct, and would restrict that conduct as the direct or purposeful effect of the law, rather than an "incidental" one.[49] This is true in the rare case of a legislature that acts out of true religious animus, as well as in the more common situation in which the lawmakers simply wish to eliminate the religious conduct for some reason that has nothing to do with religion, as in our hypothetical Saturday openings law or the Sunday morning alcohol ban. Accordingly, *Smith* should not be read to excuse such targeted laws from free exercise analysis. To the contrary, *Smith*'s emphasis on the lack of targeting, and on the *incidental* nature of the burden to a wholly unrelated purpose, makes clear that targeted laws should still receive strict scrutiny.

Even if *Smith* had left open the question of targeted but generally applicable laws, common sense requires that such laws be subject to scrutiny under the Free Exercise Clause.

In a pluralistic society, "free exercise"—i.e., that which the Free Exercise Clause is intended to protect—necessarily means different things to different people. While a Catholic's free exercise may include attendance at Sunday Mass and consumption of sacramental wine, a Santerian's may include animal sacrifice, a Native American's may include use of peyote, and a Jew's may include observing a Saturday Sabbath. In this respect, the free exercise of religion is actually particularly *susceptible* to targeting through laws of general applicability—members of other religions will be largely unaffected by a "general" ban on animal sacrifice or consumption of wine before noon on Sundays. Thus where lawmakers are clearly targeting particular religious conduct, they should not escape all First Amendment scrutiny simply by using a generally applicable rule to do it.

A law that deliberately targets religious conduct should also be subject to scrutiny because, by definition, the asserted government interests were presumably not strong enough to have previously resulted in a general law. In *Smith*, for example, one cannot doubt the legitimacy of the state's asserted interest in regulating hallucinogenic drugs. The state had asserted that interest, and passed laws to further that interest, having nothing to do with the plaintiffs' religious use of peyote. *Smith* may well have had a different outcome if that law had been "specifically directed" at stopping Native American religious use of peyote as its direct and not "incidental" effect, even if the legislature had been willing to ban non-religious uses in the process as well.

Likewise, in *Stormans*, despite the well-known facts that no pharmacy can stock all drugs, and that pharmacies from time to time will not be able to fill a particular prescription, Washington did not seek to mandate filling of prescriptions until it was responding to religious refusals to dispense Plan B. Courts should heavily scrutinize the arguments of lawmakers who had never before regulated a particular behavior, but who, when presented with religious exercise of that behavior, suddenly assert that neutral reasons are sufficient to foreclose free exercise. Not all such cases will lead to invalidation—there may be compelling interests at stake that, for some reason, were never previously recognized—but it makes no sense to say that free exercise analysis should not even be applied.

Finally, strict scrutiny is appropriate precisely because in many targeting cases the legislature will not be acting out of anti-religious animus, but will simply be engaging in ordinary political balancing. The fundamental point of the Free Exercise Clause is that religion is not supposed to be merely equivalent to all other interests that a lawmaking body balances, but merits special protection. If and when a lawmaking body considers religiously motivated conduct and then decides that other factors are of sufficient importance to outlaw that conduct, it would seem particularly odd for the Free Exercise Clause to be totally inapplicable simply because the end result of that balancing process is a generally applicable law.

V. Conclusion

One negative effect of the *Smith* decision is that lawmakers (and some courts) read that decision to expressly authorize the deliberate targeting and criminalization of religiously motivated conduct, so long as the targeting is achieved by a facially neutral and generally applicable law, and as long as the legislature can offer neutral reasons for opposing the conduct. In this sense, *Smith* has created the roadmap for legislatures that wish to prohibit a particular religious activity and avoid constitutional scrutiny. As the *Stormans* case indicates, when given a roadmap on how to achieve policy goals while avoiding constitutional scrutiny, at least some lawmakers will follow the map.[50]

The *Smith* decision has long been subject to intense criticism, with critics arguing that it left the Free Exercise Clause essentially a dead letter.[51] Even if the Court is loath to reconsider *Smith*, the *Stormans* case presents an ideal opportunity for the Court to confirm that *Smith* is not a roadmap for lawmakers to regulate religious conduct. Rather, the Court can make clear that *Smith* was simply addressing how courts should analyze pre-existing, generally applicable laws that were not enacted to prohibit religious conduct, and that laws that specifically target religious conduct—regardless of the motives of the legislature—are still within reach of the Free Exercise Clause.

Endnotes

1 494 U.S. 872 (1990).

2 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993).

3 *Id.* at 527-28.

4 *Id.* at 546-47.

5 *Id.* at 564 ("In being so readily susceptible to resolution by applying the Free Exercise Clause's 'fundamental nonpersecution principle' this is far from a representative free-exercise case.") (Souter, J., concurring).

6 *Id.* at 535 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object.").

7 Employment Division v. Smith, 494 U.S. 872, 879 (1990) ("Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"(citation omitted)); *id.* at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.").

8 As a result, plaintiffs challenging government-imposed burdens on religion over the past two decades have largely looked to sources beyond the First Amendment for their strongest protection. In response to *Smith*, Congress, state legislatures, and state courts acted to provide greater protections for religion. Congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4 (2006), which, though held invalid as applied to state actions, Boerne v. Flores, 521 U.S. 507, 507 (1997), still provides for strict scrutiny (i.e., a law must be narrowly tailored to serve a compelling government interest) as the standard when the federal government imposes substantial burdens on an individual's religion, Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal, 546 U.S. 418, 424 (2006). Many state legislatures enacted state RFRA laws to provide similar protections from burdens on religion imposed by state and local governments. *See, e.g.,* Fla. Stat. §§761.01-761.05 (2008); 775 Ill. Comp. Stat 35/1-35/99 (2008); Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001-110.012 (Vernon 2008). Many state courts also rejected *Smith* as a matter of state constitutional law, preferring instead to retain the compelling interest test as previously articulated in *Wisconsin v. Yoder* and *Sherbert v. Verner*. *See, e.g.,* Attorney General v. Desilets, 636 N.E.2d 233, 235-36 (Mass. 1994).

9 *See, e.g.*, Blackhawk v. Pennsylvania, 381 F.3d 202 (3rd Cir. 2002) (finding law failed general applicability test); Midrash Sephardi, Inc. v. Town of Surfside

366 F.3d 1214, 1232-33 (11th Cir. 2004) ("a closer look at § 90-152 reveals that Surfside improperly targeted religious assemblies and violated Free Exercise requirements of neutrality and general applicability."); *id.* at 1234 ("Under Lukumi, it is unnecessary to identify an invidious intent in enacting a law-only Justices Kennedy and Stevens attached significance to evidence of the lawmakers' subjective motivation.").

10 494 U.S. at 874.

11 *See, e.g.,* Lighthouse Institute for Evangelism, Inc. v. City of Long Branch 510 F.3d 253, 275 (3rd Cir. 2007) ("The Plan is clearly neutral; there is no evidence that it was developed with the aim of infringing on religious practices"); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649-50 (10th Cir. 2006) ("A law is neutral so long as its object is something other than the infringement or restriction of religious practices.... In the instant case, there is no dispute that the zoning ordinance at issue is neutral on its face.").

12 *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in the judgment); *see*, *e.g.*, Vision Church v. Village of Long Grove 226 F.R.D. 323, 326 (N.D. Ill. 2005) ("For the above stated reasons, the court takes as its starting point the principle that it ought not, generally speaking, facilitate inquiries into the motivations of legislators." (referring to *Lukumi*)).

13 *See, e.g.,* San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1031-32 (9th Cir. 2004); Miller v. Reed, 176 F.3d 1202, 1206-08 (9th Cir. 1999).

14 *See*, *e.g.*, Locke v. Davey, 540 U.S. 712, 725 (2004) ("In short, we find neither in the history or text of Article I, § 11, of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus toward religion."); *Lukumi*, 508 U.S. at 540 ("Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.") (opinion of Kennedy, J, and Stevens, J.); Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F.Supp.2d 1203, 1225 (C.D. Cal. 2002) ("Here, there is significant circumstantial evidence of a discriminatory intent.").

15 *See*, *e.g.*, Olsen v. Mukasey, 541 F.3d 827, 832 (8th Cir. 2008) ("Absent evidence of an 'intent to regulate religious worship,' a law is a neutral law of general applicability" (citing Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir.1991).).

16 571 F.3d 960 (9th Cir. 2009).

17 *Id.* at 964-65.

18 Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1248 (W.D. Wash. 2007).

19 *Stormans*, 571 F.3d at 968; *see also http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm109795.htm* ("If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation)"); *http://www.planbonestep.com/plan-b-prescribers/how-plan-b-works.aspx* ("Plan B® One-Step works... by: ... [a]ltering the endometrium, which may inhibit implantation.").

20 *Stormans*, 524 F. Supp. at 1248-49.

21 *Id.* at 1250.

22 *Id.*

23 *Id.* at 1251.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Stormans*, 571 F.3d at 966-67.

30 *Id.* at 967.

31 *Id.*

32 *Id.*

33 *Stormans*, 524 F. Supp. 2d at 1260.

34 *Id.* at 1259.

35 *Id.* at 1266.

36 *Stormans*, 571 F.3d at 982.

37 *Id.* at 983-84.

38 *Id.* at 987.

39 *See*, *e.g.*, Eulitt *ex rel*. Eulitt v. Maine, Dept. of Educ., 386 F.3d 344, 356 (1st Cir. 2004) ("[T]he legislative history clearly indicates Maine's reasons for excluding religious schools from education plans."); Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084, 1090 (8th Cir. 2000) ("To determine whether strict scrutiny applies, a court looks at a law's text, legislative history, and real operation" (citing *Lukumi*)); *see also* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226 (11th Cir. 2004) ("Although the legislative history of a statute is relevant to the process of statutory interpretation, we do not resort to legislative history to cloud a statutory text that is clear."). *But see* St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 633 (7th Cir. 2007) ("[W]e do not run the risk of selective use of statements in legislative history that might not reflect the intent of the legislature.").

40 *See*, *e.g.*, McCreary County v. American Civil Liberties Union of Ky., 545 U.S. 844, 862 (2005) (Establishment Clause); Locke v. Davey, 540 U.S. 712, 725 (2004) ("[W]e find neither in the history or text of Article I, § 11, of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus toward religion."); Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (Establishment Clause).

41 *See*, *e.g.*, Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1259 (W.D. Wash. 2007) (quoting letter from Washington State Human Rights Council stating that "the drug at the center of this issue is Plan B.").

42 *Id.*

43 *Id.* at 1261 ("A review of complaints referred to the Board from 1995 to 2007 does not indicate a problem with access to HIV-related medications, or any other medications for that matter.").

44 Employment Division v. Smith, 494 U.S. 872, 874 (1990).

45 *Id.*

46 *Id.*

47 *Id.* at 878 ("They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice.").

48 *Id.*

49 *See*, *e.g.*, McTernan v. City Of York, 564 F.3d 636, 647 (3rd Cir. 2009) (citing *Smith* and *Lukumi*); Cornerstone Christian Schools v. University Interscholastic League, 563 F.3d 127, 135 (5th Cir. 2009) (citing *Smith* and *Lukumi*); Colorado Christian University v. Weaver, 534 F.3d 1245, 1257 (10th Cir. 2008) (citing *Smith*).

50 A similar problem occurs in the free speech context, where cases such as *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), established that legislatures could abridge free speech rights so long as they did so through content-neutral time, place, and manner regulations. Given this roadmap, legislatures have shown considerable creativity in regulating very particular speech through time, place, and manner regulations. The city of Seattle, for example, wished to regulate protesters at the 1999 World Trade Organization conference. Rather than proceed by injunction (which would have faced heightened scrutiny under *Madsen v. Women's Health Ctr., Inc.,* 521 U.S. 753 (1994)) or by a law that specifically identified the WTO protests as the problem, Seattle instead proceeded by a mayoral emergency order that outlawed all speakers for the exact time and location of the WTO conference. Because, in theory, protesters might have shown up at that exact time and location to talk about other issues, the order was treated as neutral by the courts. *See* Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005).

Even more egregiously, Massachusetts has used the "time, place, and manner" test to create a law that obviously targets abortion protesters without,

so far, facing strict scrutiny. Massachusetts has enacted a statute banning speech only (a) within 35 feet of an abortion clinic, and (b) while the clinic is open. Because these restrictions technically relate to the "place" and the "time" of the speech and because in theory someone could show up at an abortion clinic to protest about issues other than abortion, courts have, quite remarkably, deemed the law neutral. *See* McCullen v. Coakley, 571 F.3d 167 (1st Cir. 2009).

As in the Free Exercise context, these legislatures are taking a test announced by the Court when it was evaluating a non-targeted law—i.e., a law that was passed with no intention of regulating a specific group of speakers or religious observers—and using that test as a roadmap for how to target disfavored speakers or conduct while avoiding constitutional scrutiny.

51 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 577 (1993) (Souter, J., concurring) ("'Neutral, generally applicable' laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government."); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1153 (1990) ("Religious exercise is no longer to be treated as a preferred freedom; so long as it is treated no worse than commercial or other secular activity, religion can ask no more.").