BEARING ANOTHER'S BURDEN: WHY THE SUPREME COURT STILL NEEDS TO REVISIT *EMPLOYMENT DIVISION V. SMITH*

Tiffany Dunkin*

INTRODUCTION

The Bible instructs Christians to "[b]ear one another's burdens, and so fulfill the law of Christ."[1] In American law, however, Christians nor the members of any other religion should be required to bear the burdens that belong to the government.

The story has become an unfortunate prototype—Jack Phillips is a resident of the State of Colorado and is a devout Christian, deeply convicted of his religious beliefs.[2] He believes that God created human beings as either male or female and that God designed marriage to be solely between one man and one woman.[3] Phillips happens to own Masterpiece Cakeshop, a bakery that, among other products and services, offers custom wedding cakes.[4] When asked to create a custom cake to celebrate the wedding of a same-sex couple or the anniversary of a gender transition, Phillips declines, saying that his contribution to such a celebration violates his religious beliefs.[5] And as a result, the State of Colorado has tried to penalize Phillips numerous times under the State's anti-discrimination law.[6] Phillips then faces an impossible choice: to spend his time and the work of his hands creating a unique product to celebrate an occasion that conflicts with his religious beliefs or face serious consequences.[7]

*J.D. Candidate, 2024, Baylor University School of Law; B.F.A., The University of Texas at Austin, 2011. I am grateful to Professor Mike Berry for his invaluable mentorship, guidance, and support throughout the writing process. In addition, my husband and son have been a constant source of grace and encouragement. I am forever thankful for their generous and unwavering support, which gave me the time and space to complete this project.

[1] *Galatians* 6:2 (English Standard Version).

[2] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 626 (2018).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* at 628–29.

[7] *Id.* at 626–27.

Colorado is not the only state in which an anti-discrimination law and its citizens with sincerely held religious beliefs butt heads.[8] The Kleins in Oregon bear a similar story to Phillips's, as the State of Oregon fined them for declining to create a custom wedding cake for a same-sex couple.[9] Elane Huguenin in New Mexico declined to photograph a same-sex wedding, and courts later held that she violated the state's anti-discrimination law.[10] But this conflict between anti-discrimination laws and people with sincerely held religious beliefs exposes a deeper issue: a serious flaw in the United States Supreme Court's Free Exercise Clause jurisprudence.

The First Amendment guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[11] In *Cantwell v. Connecticut*, the United States Supreme Court incorporated the Free Exercise Clause through the Fourteenth Amendment, making the First Amendment applicable to the States and their laws.[12] In recent history, states have adopted anti-discrimination laws—or public accommodation laws—to prohibit places of public accommodation from discriminating the provision of services based on various specified characteristics, including sexual orientation and gender identity.[13]

But tension arises between these laws and individuals who, because of their sincerely held religious beliefs, do not want to provide certain services to aid in the celebration of same-sex weddings and other conduct with which their religious beliefs do not align.[14] These individuals, in bringing claims under the Free Exercise Clause, have run into trouble in the courts, often because of the precedent set forth in *Employment Division v. Smith*.[15] The *Smith* rule states that if a law is neutral on religion and generally applicable, the Free Exercise Clause does not relieve that individual from complying with that law.[16] Courts generally hold that public accommodation laws are

[8] *See id.* at 632.

[9] Klein v. Or. Bureau of Lab. & Indus., 506 P.3d 1108, 1115–16 (Or. Ct. App. 2022), *vacated*, 143 S. Ct. 2686 (2023).

[10] Elane Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53, 77.

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

[12] 310 U.S. 296, 303 (1940).

[13] *See, e.g.*, OR. REV. STAT. ANN. § 659A.403 (West 2023); COLO. REV. STAT. ANN. § 24-34-601 (West 2023).

[14] *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023); *Klein*, 506 P.3d at 1115; Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 629–30 (2018).

[15] 494 U.S. 872, 879 (1990).

[16] *Id.* at 878.

neutral and generally applicable,[17] and the burden is on the free-exercise claimant to show that the law is not neutral or generally applicable.[18] The application of *Smith* to these public accommodation laws is a case study of the unworkability of the *Smith* rule and exposes the need for the Court to revisit its free exercise jurisprudence.

This Comment explores the complications of current Free Exercise Clause jurisprudence as applied to public accommodation laws. Part I begins by discussing the Framer's intent behind the Free Exercise Clause and then reviews the history and current state of Free Exercise Clause jurisprudence. Part II reviews recent cases that highlight the difficulties when courts consider public accommodation laws as neutral laws of general applicability under *Smith*. Part III explores various alternative approaches to Free Exercise Clause jurisprudence and how different possible rules might or might not solve these complications for free exercise claimants. Finally, this Comment concludes that disregarding the *Smith* rule in favor of a different approach to free exercise claims charters a path for more substantial free exercise protections in adherence to the original intent of the First Amendment. This Comment will argue that the Court should shift the burden from the free exercise claimant back to the government by applying a compelling interest approach that incorporates a text, history, and tradition inquiry.

I. THE FREE EXERCISE CLAUSE

A. The Text and History of the Free Exercise Clause

The Framers left little instruction about the specific purpose, intent, and scope of the Free Exercise Clause. That said, other interpretive methods, when put together, paint a picture of the central purpose and idea behind including the Free Exercise Clause in the Constitution.

First, it is essential to look at the plain text of the Free Exercise Clause to discern its meaning. Justice Samuel Alito engaged in this exercise in his concurring opinion in *Fulton v. City of Philadelphia*.[19] There, Justice Alito looked to the dictionary definitions of each word at the time they were written

[17] *See* Elane Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53, 70–71; *but see* Fulton v. City of Philadelphia, 593 U.S. 522, 540–41 (2021).

[18] *See Smith*, 494 U.S. at 879; *see also* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531, 533–34 (1993).

[19] 593 U.S. at 565–66 (Alito, J., concurring).

to discern the original public meaning.[20] Each word essentially means the same as they do today. When strung together, "the ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices or worship."[21] Notably, Justice Alito concluded that the text "does not suggest a distinction between laws that are generally applicable and laws that are targeted."[22]

Next, looking at the history surrounding the written words gives insight into their meaning. Written in 1878, less than 100 years after the Framers drafted the First Amendment, the Supreme Court chronicled a brief history of the Free Exercise Clause in its opinion in *Reynolds v. United States*.[23] The Court recounted the story of Thomas Jefferson proposing a bill in Virginia, before the U.S. Constitution's ratification, with the purpose of "establishing religious freedom."[24] In that bill, Jefferson defined religious liberty, reciting "that to suffer the civil magistrate to intrude into the field of opinion . . . is a dangerous fallacy which at once destroys all religious liberty."[25] The bill's preamble also stated, "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[26] The *Reynolds* Court suggested that this is the distinction between "what properly belongs to the church and what to the State"[27]—the State can only step in when one's religious beliefs turn into actions that breach the peace. Otherwise, the Free Exercise Clause protects religious beliefs and actions that flow from those beliefs.

The following subsection chronicles the evolution of the Court's analytical framework when deciding how to apply the Free Exercise Clause in practice.

*B. Free Exercise Jurisprudence Pre-*Smith

The Supreme Court considered its first free exercise case in 1878 in *Reynolds v. United States*.[28] In *Reynolds*, a man challenged a law that

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] 98 U.S. 145, 163 (1878).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 162.

criminalized polygamy as a violation of his religious beliefs as a member of the Church of Jesus Christ of Latter-Day Saints.[29] The Court held that enforcing the law against him did not violate his right to free exercise of religion because Congress had legislative power not over his beliefs but over "actions which were in violation of social duties or subversive of good order."[30]

After incorporating the Free Exercise Clause against the states through the Fourteenth Amendment in *Cantwell v. Connecticut*,[31] the Supreme Court considered a trio of cases in the 1940s, all concerning similar facts: members of Jehovah's Witnesses were found to have violated an ordinance by accepting money while handing out religious literature without paying for a license.[32] In all three cases, the Supreme Court held that applying the ordinance to these individuals violated the free exercise of their religion.[33] However, the Court had yet to announce a level of judicial scrutiny for free exercise claims or posit a rule to follow in evaluating these claims.

But this changed in 1963 with the Court's decision in *Sherbert v. Verner*.[34] In *Sherbert*, a member of the Seventh-Day Adventist Church was discharged from her job because she declined to work on Saturdays to observe the Sabbath.[35] Later, the Employment Security Commission denied her unemployment benefits because it found that she did not have good cause to decline suitable work.[36] The Court announced an analytical framework by which to decide whether the state was unconstitutionally violating her right to free exercise of religion. First, the Court determined whether the state disqualifying the Sabbath-observer from unemployment benefits "impose[d] any burden on the free exercise of [her] religion."[37] Once the Court determined that the Commission burdened the free exercise of her religion, the Court next considered "whether some compelling state interest . . . justifie[d] the substantial infringement" of her rights.[38] The Court also

[29] *Id.* at 161.

[30] *Id.* at 164.

[31] 310 U.S. 296, 303 (1940).

[32] Murdock v. Com. of Pennsylvania., 319 U.S. 105, 106–07 (1943); Jones v. City of Opelika, 319 U.S. 103 (1943); Follett v. Town of McCormick, 321 U.S. 573, 575 (1944).

[33] *See Follett*, 321 U.S. at 575, 578.

[34] 374 U.S. 398, 409–10 (1963).

[35] *Id.* at 399.

[36] *Id.* at 401.

[37] *Id.* at 403.

[38] *Id.* at 406.

clarified that "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice."[39] The Court announced that strict scrutiny was necessary in such "a highly sensitive constitutional area" such as the right to free exercise of one's religion.[40]

The Court relied on this reasoning again in 1972 when it decided the outcome in *Wisconsin v. Yoder*.[41] *Yoder* involved members of the Old Order Amish religion and the Conservative Amish Mennonite Church.[42] These individuals were tried and convicted of violating Wisconsin's compulsory school attendance law, which required children to attend public or private school until the age of sixteen.[43] In challenging their convictions, the individuals brought free exercise claims, saying that being forced to attend high school violated their religious beliefs.[44] They argued that attending high school would "interpose[] a serious barrier to the integration of the Amish child into the Amish religious community."[45] In holding that the school attendance policy violated these individuals' free exercise rights, the Court said that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[46] Following precedent, the Court applied strict scrutiny, and the government fell short of its burden.[47]

In its opinion, the Court also emphasized that its "decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause,"[48] even if the conduct is "under regulations of general applicability."[49] The *Yoder* Court wholly rejected the notion that a neutral law of general applicability could not offend a person's free exercise right if the person's free exercise of religion was "unduly burden[ed]."[50] Although the Court said that the school attendance law in *Yoder* was a neutral

[39] *Id.*

[40] *Id.*

[41] 406 U.S. 205, 236 (1972).

[42] *Id.* at 207.

[43] *Id.* at 207–08.

[44] *Id.* at 208–09.

[45] *Id.* at 211–12.

[46] *Id.* at 215.

[47] *Id.* at 236.

[48] *Id.* at 219–20.

[49] *Id.* at 220.

[50] *Id.*

law of general applicability, the Court still held that the law violated the individuals' free exercise of religion.[51]

C. Smith *Transformed the Landscape of Free Exercise Clause Jurisprudence*

In 1990, the Supreme Court reversed course and adopted the rule it had rejected in *Yoder*. In *Employment Division v. Smith*, two individuals were fired from their jobs for ingesting peyote as part of a religious ceremony at their Native American church.[52] They then were denied employment benefits because they were fired for "misconduct."[53] The Court held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is . . . a neutral, generally applicable law."[54] By announcing this rule, the Court shifted the burden from the government to the free exercise claimant. Instead of the government having to justify its imposition on the free exercise of religion, the claimant must prove that the law is not neutral or generally applicable. And as to its holding in *Sherbert*, the Court pigeonholed that analysis to the "unemployment compensation eligibility" context, where it "len[ds] itself to individualized governmental assessment of the reasons for the relevant conduct."[55] This ended the application of strict scrutiny to free exercise claims and, as a result, knocked the teeth out of this "highly sensitive" constitutional right.[56]

To protect the free exercise of religion, Congress tried to overrule *Smith* by statute. In response to *Smith*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).[57] In RFRA, Congress sought to restore free exercise jurisprudence to its pre-*Smith* reasoning under *Sherbert*, requiring the application of strict scrutiny when a person's right to free exercise of religion was burdened, regardless of whether it was by a neutral law of general applicability.[58] Even so, the Court struck down this provision of

[51] *Id.* at 234–35.

[52] 494 U.S. 872, 874 (1990).

[53] *Id.*

[54] *Id.* at 872.

[55] *Id.* at 873.

[56] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[57] Pub. L. No. 103-141, 107 Stat. 1488 (1993).

[58] *See id.*

RFRA in *City of Boerne v. Flores*, holding that the provision was not a proper exercise of Congress's enforcement power.[59]

Since then, the Court has chiseled some at *Smith* but has not completely eradicated it. The Court in *Fulton v. City of Philadelphia* seemed to provide some escape valves by which free exercise claimants may break free of the *Smith* rule.[60] In *Fulton*, Catholic Social Services (CSS), a private organization, contracted with the city to place foster children and certify foster homes.[61] CSS held the religious belief that marriage is a sacred bond between one man and one woman and refused to certify foster homes of same-sex couples.[62] After fifty years of partnership, the city informed CSS that unless it agreed to certify foster homes with same-sex couples, it could no longer contract with the city to provide foster care services.[63] After holding that the city was burdening CSS's right to free exercise, the Court began a *Smith* analysis.[64] But while CSS urged the Court to overrule *Smith*, the Court concluded that this case fell outside the *Smith* rule, deciding this was not a neutral law of general applicability.[65] The contract between the city and CSS contained language that allowed the city commissioner sole discretion to provide exceptions to the non-discrimination provision.[66] Because the contract allowed for a "mechanism of individualized exceptions," the policy was not generally applicable, so strict scrutiny applied.[67] The Court held that the city did not satisfy its burden under strict scrutiny, and CSS prevailed in its free exercise claim.[68]

In *Fulton*, the Court pointed to another escape valve—this time, under the *Smith* neutrality requirement.[69] The Court stated that the government fails the neutrality prong, triggering strict scrutiny "when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."[70] The Court cited *Masterpiece Cakeshop v. Colorado Civil Rights*

[59] 521 U.S. 507, 511 (1997).

[60] 593 U.S. 522, 540–41 (2021).

[61] *Id.* at 522.

[62] *Id.* at 522–23.

[63] *Id.*

[64] *Id.* at 531–33.

[65] *Id.* at 531–34.

[66] *Id.* at 534–36.

[67] *Id.* at 533–34, 540–42.

[68] *Id.* at 542–43.

[69] *Id.* at 533–34.

[70] *Id.*

Commission as the example.[71] In *Masterpiece*, the State of Colorado penalized Jack Phillips for declining to bake a wedding cake to be used in the celebration of a same-sex wedding.[72] Evidence showed that the government was hostile towards Phillips and his religious beliefs by calling his faith "one of the most despicable pieces of rhetoric people can use" and further disparaging his religion.[73] Thus, the *Masterpiece* Court held that the government failed the neutrality prong of the Smith test, applied strict scrutiny, and found for the free exercise claimant.[74]

While the Court has built some potential escape valves into the *Smith* test for free exercise claimants, the criteria to meet these exceptions is unestablished and vague. Critics assert that this is just another way for the Court to skirt eradicating *Smith* and fully restoring the Free Exercise Clause to its place as a true fundamental right.[75] The next section exposes the need for the Court to reverse and replace the *Smith* rule.

II. THE PROBLEM WITH *SMITH*, AS APPLIED TO PUBLIC ACCOMMODATION LAWS

Generally, public accommodation laws prohibit discrimination by places of public accommodation[76] based on certain protected characteristics. States originally passed these laws to guarantee that formerly enslaved people had equal access to places of public accommodation, such as hotels, theatres, and restaurants.[77] Today, however, these laws have been expanded to include other groups as protected classes. While most states have passed some version of a public accommodation law, the types of discrimination they prohibit vary significantly from state to state. Forty-five states have adopted some sort of public accommodation law, but the only aspect they have in

[71] *Id.* (citing 584 U.S. 617, 622–23 (2018)).

[72] 584 U.S. at 622–23.

[73] *Id.* at 635.

[74] *Id.* at 638.

[75] *See Fulton*, 522 U.S. at 545–55, 617–18 (Gorsuch, J. concurring).

[76] States define differently what constitutes a place of public accommodation. For example, in *Fulton*, the Court held that CSS, the foster care agency, was not a public accommodation and thus the public accommodation law did not apply. *Id.* at 538–42. While this may be another escape valve for the *Smith* rule in the public accommodation law context, this will not be the focus of this Comment.

[77] Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319, 332–34 (2015) (detailing a brief history of public accommodation laws).

common is that they all prohibit discrimination based on race, gender, ancestry, and religion.[78] Currently, twenty-four states and the District of Columbia[79] prohibit discrimination based on sexual orientation: California,[80] Colorado,[81] Connecticut,[82] Delaware,[83] Hawaii,[84] Illinois,[85] Iowa,[86] Maine,[87] Maryland,[88] Massachusetts,[89] Michigan,[90] Minnesota,[91] Nevada,[92] New Hampshire,[93] New Jersey,[94] New Mexico,[95] New York,[96] Oregon,[97] Pennsylvania,[98] Rhode Island,[99] Vermont,[100] Virginia,[101] Washington,[102] and Wisconsin.[103] All but one of these states also prohibit discrimination based on gender identity.[104] These laws often create conflict with individuals who hold sincere religious beliefs about marriage and gender. And the *Smith* rule poses a difficult barrier for these individuals when they try to vindicate their

[78] *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws (last visited Sept. 2, 2023).

[79] D.C. CODE ANN. § 2-1402.31 (West 2023).

[80] CAL. CIV. CODE § 51.5 (West 2023).

[81] COLO. REV. STAT. ANN. § 24-34-601 (West 2023).

[82] CONN. GEN. STAT. ANN. § 46a-64, 46a-81d (West 2023).

[83] DEL. CODE ANN. tit. 6, § 4504 (West 2023).

[84] HAW. REV. STAT. ANN. § 489-3 (West 2023).

[85] 775 ILL. COMP. STAT. ANN. 5/1-103 (West 2023); *see also id.* 5/5-102 (West 2023).

[86] IOWA CODE ANN. § 216.7 (West 2023).

[87] ME. REV. STAT. tit. 5, § 4591 (2023).

[88] MD. CODE ANN., STATE GOV'T § 20-304 (West 2023).

[89] MASS. GEN. LAWS ANN. ch. 272, § 98 (West 2023).

[90] MICH. COMP. LAWS ANN. § 37.2302 (West 2023).

[91] MINN. STAT. § 363A.11 (2023).

[92] NEV. REV. STAT. ANN. § 651.070 (West 2023).

[93] N.H. REV. STAT. ANN. § 354-A:17 (2023).

[94] N.J. STAT. ANN. § 10:5-12 (West 2023).

[95] N.M. STAT. ANN. § 28-1-7(f) (West 2023).

[96] N.Y. CIV. RIGHTS LAW § 40-c (McKinney 2023).

[97] OR. REV. STAT. ANN. § 659A.403 (West 2023).

[98] 43 PA. STAT. AND CONS. STAT. ANN. § 953 (West 2023); 16 PA. CODE § 41.206 (2023).

[99] 11 R.I. GEN LAWS ANN. § 11-24-2 (West 2023).

[100] VT. STAT. ANN. tit. 9, § 4502 (West 2023).

[101] VA. CODE ANN. § 2.2-3904 (West 2023).

[102] WASH. REV. CODE ANN. §§ 49.60.215, 49.60.040(27) (West 2023).

[103] WIS. STAT. ANN. § 106.52 (West 2023).

[104] Wisconsin does not currently prohibit discrimination based on gender identity. *See* WIS. STAT. ANN. § 106.52; *supra* text accompanying notes 79–103.

right to free exercise in the courts. Because half the country has one of these laws on the books, these conflicts are likely to arise.

Zeroing in on one of these states and its public accommodation law demonstrates this conflict. In *Masterpiece* and *303 Creative*, Colorado's public accommodation law, which is part of the Colorado Anti-Discrimination Act, was at issue.[105] Colorado's law states, in part:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .[106]

While the Supreme Court did not explicitly rely on *Smith* in the outcome of either case, the lower courts in both cases held that the Colorado public accommodation law was a neutral law of general applicability under *Smith*.[107]

In *Masterpiece*, Jack Phillips owned a bakery that, as part of the business, sold custom wedding cakes.[108] A same-sex couple requested that Phillips create a custom wedding cake for their wedding celebration.[109] Phillips declined, stating that his religious views on marriage prohibited him contributing to such a celebration.[110] The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination based on sexual orientation in violation of Colorado's public accommodation law.[111] When the Commission determined that the cakeshop's actions violated the law, Phillips challenged the ruling as violating his right to free exercise of his

[105] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 627–28 (2018); 303 Creative LLC v. Elenis, 600 U.S. 570, 580 (2023); COLO. REV. STAT. ANN. § 24-34-601 (West 2023).

[106] COLO. REV. STAT. ANN. § 24-34-601.

[107] *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 292 (Colo. App. 2015), *rev'd sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018); *see also* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1183 (10th Cir. 2021), *rev'd in part*, 600 U.S. 570 (2023).

[108] 584 U.S. at 626.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 628.

religion.[112] Eventually, the Supreme Court ruled that because the Commission acted with hostility towards Phillips's religious beliefs,[113] the Commission failed the neutrality prong of *Smith*.[114] As a result, strict scrutiny applied, and the Court held that the Commission violated Phillips's right to free exercise.[115]

This was not the end of Phillips's trouble with Colorado's law, however. Currently, he is undergoing a second lawsuit for declining to create a custom cake to celebrate an individual's gender transition.[116] There, Phillips did not want to aid in the celebration of a gender transition because doing so would violate his religious beliefs about God's design for gender.[117] In January 2023, the Colorado Court of Appeals held that Colorado's public accommodation law was a neutral law of general applicability under *Smith* and did not violate Phillips's free exercise of religion.[118]

Colorado's law was once again at issue in *303 Creative*. In *303 Creative*, Lorie Smith owned a custom graphic design company.[119] Worried that the same Colorado Civil Rights Commission that violated Jack Phillips's rights would do the same to her, she sought to clarify whether she had the right to deny creating a custom wedding website for a same-sex couple because doing so would violate her religious beliefs about marriage.[120] While the Tenth Circuit held that the Colorado law was a neutral law of general applicability under *Smith*,[121] the Supreme Court did not even address this question. Instead, the Court only analyzed the issue under a free speech framework, punting on the free exercise issue.[122]

While Lorie Smith ultimately succeeded in her case at the Supreme Court, the free exercise issue still plagues Jack Phillips[123] and others. For example, Aaron and Melissa Klein are still battling Oregon over its public

[112] *Id.* at 629.

[113] *See supra* text accompanying note 73.

[114] *Id.* at 625.

[115] *Id.*

[116] *See* Scardina v. Masterpiece Cakeshop, Inc., 528 P.3d 926 (Colo. App. 2023).

[117] *Id.* at 931.

[118] *See id.* at 942–43.

[119] 303 Creative LLC v. Elenis, 600 U.S. 570, 582 (2023).

[120] *Id.* at 580.

[121] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1183 (10th Cir. 2021), *rev'd in part*, 600 U.S. 570 (2023).

[122] *See 303 Creative*, 600 U.S. at 579, 603.

[123] *See supra* text accompanying notes 108–110.

accommodation law.[124] Much like Phillips in *Masterpiece*, the Kleins owned a bakery and declined to create a custom wedding cake to celebrate the wedding of a same-sex couple.[125] The Court of Appeals of Oregon held that Oregon's public accommodation law was a neutral law of general applicability under *Smith*.[126] The Kleins petitioned for certiorari, asking the United States Supreme Court to reconsider *Smith*.[127] However, the Court granted the petition, vacated the judgment, and remanded to the Court of Appeals of Oregon in light of *303 Creative*—on free speech grounds.[128] Once again, the Court punted on the free exercise issue.

III. ALTERNATIVE APPROACHES TO FREE EXERCISE CLAIMS

Given the issues addressed in this Comment, the United States Supreme Court should soon address the roadblock that *Smith* creates for the free exercise of religion. This section will suggest several alternative approaches and the potential problems and criticisms of each. While many scholars have proposed alternative approaches, this Comment will focus on three that the Court has previously discussed: the Hybrid Rights Approach, the Compelling Interest Approach, and the Text, History, and Tradition Test.

A. The Hybrid Rights Approach

Ironically, one possible alternative approach is embedded in the *Smith* opinion.[129] There, the Court attempted to distinguish *Smith* from previous free exercise cases, suggesting that one of the primary reasons that strict scrutiny should not apply was because the individuals were only challenging the neutral, generally applicable law under the Free Exercise Clause and not along with another constitutional provision, such as freedom of speech.[130] So the test that the *Smith* Court suggested is this—if the case presents a free exercise claim plus another constitutional claim, strict scrutiny applies.[131] If

[124] *See generally* Klein v. Or. Bureau of Lab. & Indus., 506 P.3d 1108 (Or. Ct. App.), *review denied*, 509 P.3d 119 (Or. Ct. App. 2022), *cert. granted, judgment vacated*, 143 S. Ct. 2686 (2023).

[125] *Id.* at 1114.

[126] *Id.*

[127] Petition for Writ of Certiorari at 27–29, *Klein*, 506 P.3d 1108 (2022) (No. 22-204), *cert. granted, judgment vacated*, 143 S. Ct. 2686 (2023).

[128] *Klein*, 143 S. Ct. at 2687.

[129] *See* Emp. Div. v. Smith, 494 U.S. 872, 881 (1990).

[130] *Id.*

[131] *See id.* at 881–82.

only a free exercise claim is present and a neutral law of general applicability is at issue, the free exercise claimant loses.[132]

The primary benefit of this approach is that it would not require the Court to overrule *Smith*. The support for this test is already embedded in that opinion, and the Court could take the opportunity to clarify *Smith* while taking a small step towards bolstering protection for religious liberty. Additionally, the circuit courts are split on whether *Smith* expressly authorizes this approach or if it was just dicta.[133] Thus, the issue is easily teed up for the Court to address.

However, the Court could have easily addressed this issue in either *303 Creative* or *Klein*, but chose not to. Both cases posed free exercise and free speech issues to the Court,[134] and the Petition for Certiorari in *Klein* specifically discussed the circuit split and the hybrid rights approach.[135] Even so, the Court refused to take up the hybrid rights issue in both cases.[136]

This approach is flawed in another way—it predicates the success of a free exercise claim on the existence or success of another constitutional claim. This keeps any standalone meaning out of the right to free exercise, and the juxtaposition of the *303 Creative* and *Klein* cases exposes this problem. In *303 Creative*, Lorie Smith originally petitioned the Court to grant certiorari on free speech and free exercise grounds.[137] Yet, the Court only took up and addressed the free speech question, resolving her case solely on that issue.[138] The Court then vacated and remanded the *Klein* case, which also presented both free exercise and free speech issues, with instructions for the Court of Appeals of Oregon to review the case in light of *303 Creative*.[139] But the factual differences between *Klein* and *303 Creative* create shaky ground for the Kleins' free speech claim. While *Klein*, like *303 Creative*, involved a public accommodation law and a person declining to create a product for a same-sex wedding, the products they were declining to create

[132] *See id.*

[133] Petition for Writ of Certiorari, *supra* note 127, at 22–29 (discussing the circuit split on the Hybrid Rights Approach).

[134] *See id.*; Petition for Writ of Certiorari, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476).

[135] Petition for Writ of Certiorari, *supra* note 127, at 22–29.

[136] *See* Klein v. Or. Bureau of Lab. & Indus., 143 S. Ct. 2686 (2023); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

[137] Petition for Writ of Certiorari, *303 Creative*, 600 U.S. 570 (No. 21-476).

[138] *See id.*; *303 Creative*, 600 U.S. at 570.

[139] 143 S. Ct. at 2687.

were different.[140] In *303 Creative*, Smith created custom websites, which are clearly "pure speech," as they contain "images, words, symbols, and other modes of expression."[141] However, the Kleins create cakes, and the Court of Appeals of Oregon has already held that wedding cakes do not "constitute fully protected speech, art, or other expression."[142] Thus, if the Kleins' free speech claim fails, they must be able to rely on a free exercise claim that is not tied to the success of their free speech claim. Other event service providers—lighting designers, caterers, florists, and many others—would also struggle under a hybrid rights approach. While their services may not be considered protected speech, their religious beliefs would still be violated by being forced to participate in a same-sex wedding or gender transition party.

Ultimately, the hybrid rights approach does not look promising as the answer to this issue. Free exercise claims must hold their own water—these claimants' success should not entirely rely on a free speech or other constitutional analysis to protect their right to free exercise of religion.

B. The Compelling Interest Approach

Also known as strict scrutiny, this is the approach that the Court predominately applied before *Smith*,[143] Congress preferred when it enacted RFRA,[144] and many states have adopted in their RFRA statutes.[145] This approach is a simple two-part test that has the benefit of familiarity and precedent. First, the court determines whether the government "imposes any burden" on the person's free exercise of religion.[146] If so, then the court applies strict scrutiny—the government has the burden to prove that the law furthers a compelling interest and that the law is the least restrictive way to achieve that interest.[147]

---

[140] *303 Creative*, 600 U.S. at 581; Klein v. Or. Bureau of Lab. & Indus., 410 P.3d 1051, 1056 (2017), *cert. granted, judgment vacated*, 139 S. Ct. 2713 (2019).

[141] 600 U.S. at 587.

[142] *Klein*, 410 P.3d at 1065.

[143] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963) (applying strict scrutiny); Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) (applying strict scrutiny).

[144] *See* City of Boerne v. Flores, 521 U.S. 507, 507 (1997).

[145] Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010); *see, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (requiring the government to satisfy strict scrutiny if it substantially burdens a person's free exercise of religion).

[146] *Sherbert*, 374 U.S. at 403.

[147] *Id.* at 406–07.

Returning to this test has several advantages. First, courts are familiar with applying this analytical framework to constitutional challenges, as they do so in many other contexts, including due process claims,[148] equal protection claims,[149] and within the First Amendment itself to free speech claims.[150] Furthermore, this test shifts the burden back to the government to justify its imposition on the free exercise of religion, as it would only be able to do so if it has a compelling interest and that the imposition is the least restrictive means of achieving that interest.[151] Justice Sandra Day O'Connor described the merits of this test in her concurrence in *Smith*, stating that "the compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests of the highest order."[152] Put another way, this test gives teeth to the Free Exercise Clause and puts this fundamental right back in a preferred position.

But opponents of this approach fear that it will lead to individuals using their religious beliefs as an excuse to discriminate against others—specifically in the context of public accommodation laws, against individuals who identify as LGBTQ.[153] And while the government certainly has an interest in protecting its citizens against discrimination, the compelling interest test allows that to be balanced against the individual's fundamental right to free exercise of religion. This approach allows the courts to weigh those competing interests and hold the government to a higher standard before burdening a constitutional right. It returns the burden to the government.

The other side of that coin, however, is that judges are human beings with personal biases and policy assessments. And any time a court is asked to

[148] *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 499–500 (1977) (applying strict scrutiny when city ordinance infringed on fundamental right to define family).

[149] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict scrutiny to a law that utilized a racial classification); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (applying strict scrutiny to a law permitting human sterilization).

[150] *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015) (applying strict scrutiny when a town passed an ordinance placing content-based restrictions on signs).

[151] *See, e.g., id.*

[152] 494 U.S. 872, 895 (1990) (O'Connor, J., concurring) (internal quotations omitted).

[153] *See* Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 21 (2016).

weigh competing interests, those biases can easily affect the evaluation. Justice Brett Kavanaugh has recently criticized this test for these reasons, arguing that it is often hard for a court "to know where to draw the line" and to "make difficult judgments about the strength of the State's interests and whether those interests can be satisfied in other ways that are less restrictive of religious exercise."[154] Amid the criticism, however, Justice Kavanaugh hinted at an additional inquiry that might curtail these negatives: text, history, and tradition.[155]

C. The Text, History, and Tradition Approach

A popular inquiry employed by the Court in recent years, the phrase "text, history, and tradition" has popped up in several contexts. The Court has established some form of this inquiry in Second Amendment jurisprudence,[156] to answer whether a fundamental right exists under substantive due process,[157] and to the First Amendment Establishment Clause analysis.[158] Perhaps the current Court could look to apply some sort of text, history, and tradition test in the free exercise context as well. And in fact, Justice Kavanaugh has even hinted as much.[159]

In a recent law review article, William J. Haun articulated what this test might look like in the free exercise context.[160] He proposed that "religious exercise that has a strong analogical connection to the Founding Era would be presumptively protected, unless the opposing party shows that a long history of analogous restriction can overcome that protection."[161] This approach very clearly shifts the burden to the government to overcome a presumption of constitutional protection—a marked difference from the

[154] Ramirez v. Collier, 595 U.S. 411, 443–45 (2022) (Kavanaugh, J., concurring) (criticizing the compelling interest test in the context of the Religious Land Use and Institutionalized Persons Act).

[155] *See id.* at 444–45.

[156] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 598 U.S. 1, 17 (2022).

[157] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

[158] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 215, 535–36 (2022).

[159] *See Ramirez*, 595 U.S. at 444–45 (Kavanaugh, J., concurring) (discussing the role of history and tradition in determining whether an inmate's free exercise rights were violated under RLUIPA when the State refused to allow him to have his pastor present at his execution).

[160] *See* William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 HARV. J.L. & PUB. POL'Y 419, 444 (2023).

[161] *Id.* at 448–49.

Smith rule, under which the burden is on the individual seeking to be protected.[162]

Indeed, this approach would be well supported by precedent. In *Reynolds v. United States*, the Court engaged in a similar inquiry.[163] The *Reynolds* Court, in answering whether a law criminalizing polygamy violated a member of the Mormon church's right to free exercise of religion, first looked to the history of the Free Exercise Clause.[164] The Court determined that the original meaning of the Clause meant that the government could still regulate actions "in violation of social duties or subversive of good order."[165] Then, to determine whether the act of polygamy was "in violation of social duties or subversive of good order, " the Court looked to the social and legal history and traditions of polygamous marriages.[166] The court determined that there was a long history, both in England and in the States, of prohibiting and punishing polygamy.[167] The Court also considered that, traditionally, there was not a time where "polygamy has not been an offence against society" and that it was "impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life."[168] Because the Court found that polygamy was historically and traditionally "in violation of social duties or subversive of good order," the Court concluded that the States could criminalize polygamy without violating the right to free exercise of religion.[169]

But when scrutinizing recent cases in which the Court engaged in a history and tradition inquiry, a legitimate criticism emerges: the role of history and tradition may be less of a test than it is just a general consideration. For example, the history and tradition analysis served different roles in *Dobbs*, *Bruen*, and *Kennedy*.[170] In *Bruen*, the Court looked at history and tradition to identify the content of an enumerated right, while in *Dobbs*, the Court looked to history and tradition to determine the mere existence of

[162] *See id.*; *see also* Emp. Div. v. Smith, 494 U.S. 872, 885–90 (1990).

[163] *See* 98 U.S. 145, 162–64 (1878).

[164] *See id.* at 164–66; *see supra* text accompanying notes 23–27.

[165] *Reynolds*, 98 U.S. at 164.

[166] *See id.* at 164–66.

[167] *Id.*

[168] *Id.* at 165.

[169] *Id.* at 164, 166.

[170] Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 440–42 (discussing the different roles the history and tradition analysis served in the Court's decision in these three cases).

a right.[171] And in *Kennedy*, the Court seemed to use the analysis as a method to determine original public meaning,[172] perhaps similar to the analysis the Court performed in *Reynolds*.[173] This approach could leave broad discretion for the Court to determine how to apply this test to the Free Exercise Clause and may lead to uneven results for free exercise claimants that depend on the ideological makeup of the Court, especially at first.

CONCLUSION

Notwithstanding the criticisms, the text, history, and tradition analysis could play well in the context of a compelling interest approach. Consider the following potential analytical framework. First, the free exercise claimant must show that the government is burdening the free exercise of their religion. If shown, the Court would then presume that the State action is unconstitutional unless the government can show a compelling interest and the law at issue is the least restrictive means of achieving that interest. But in order to determine if the government's stated interest is compelling, the Court looks first to the text,[174] then to whether the government has historically been able to burden free exercise in the manner presented, and finally, if necessary, to tradition and whether the government can show "an unbroken, analogous tradition of restriction."[175] A framework like this allows courts to balance the competing interests of the parties, but shifts the burden to the government to convince the court that it can constitutionally burden a person's free exercise of religion. Additionally, it narrows the scope of a court's discretion by giving guidelines as to how to weigh the competing interests of the parties. Finally, by engaging in a text, history, and tradition analysis, courts give appropriate consideration to the Framer's intent of the Free Exercise Clause.

The holding in *Smith*, which courts have applied in free exercise cases since 1990, has severely weakened the fundamental right to free exercise of religion. It is time that the United States Supreme Court takes up a case that squarely addresses this issue and takes the opportunity to meaningfully restore this right to Americans of all faiths. By disregarding the *Smith* rule in favor of a compelling interest approach that incorporates a text, history, and tradition inquiry, the Court can finally shift the burden back to the

[171] *Id.* at 476–77.

[172] *Id.* at 477.

[173] *Id.*; *see Reynolds*, 98 U.S. 145 at 165–66; *see supra* text accompanying notes 163–169.

[174] *See supra* text accompanying notes 19–22.

[175] Haun, *supra* note 160, at 450, 453–54.

government where it belongs. Ultimately, this approach will lay a path for more substantial free exercise protections in adherence to the original intent of the First Amendment.