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Religious Liberty in America: Where We Were, Where We're At, and Where We're Going

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I. Introduction

Since 1990, free exercise jurisprudence has been relatively straightforward. Under *Employment Division v. Smith*, religiously motivated conduct is not exempt from neutral and

generally applicable laws.[1] In other words, a law could substantially burden a sincere religious practice and still be constitutional as long as it does not single out the religious practice.[2] Though it has received widespread bipartisan criticism since its inception,[3] *Smith* has largely remained intact.

In only the last few months, however, *Smith* has begun its sunset. As a result of COVID-19, some state governments have issued orders that have impermissibly infringed religious liberties, even under *Smith*.[4] These cases have provided the Court an opportunity to re-evaluate its jurisprudence; some even argue that the Court has already done so.[5] And COVID-19 was just the beginning. In June 2021, the Court decided *Fulton v. City of Philadelphia*, in which five justices expressed a willingness to overrule *Smith*.[6]

There's a lot to be said about what the Court has done to *Smith* as it exists today and what free exercise jurisprudence will look like five years from now. This Article provides a brief overview of the history of the Court's free exercise jurisprudence, its current state, and where it is likely to go.

II. Where We Were

Substantial development of Free Exercise Clause jurisprudence began in 1963 in *Sherbert v. Verner*.[7] The plaintiff was a Seventh-Day Adventist whose faith prohibited her from working on Saturdays, ultimately causing her to lose her job.[8] When she applied for unemployment benefits, the Employment Security Commission declared that her refusal to work on Saturdays barred her from receiving benefits.[9] She argued that the disqualification abridged her free exercise of religion, and the Supreme Court agreed.[10]

The Court reasoned that her ineligibility was a direct consequence of her religion, and the state could not force religious observers to choose between following their faith and foregoing government benefits.[11] Having concluded that the state's actions imposed a substantial burden on the plaintiff, the Court explained that for the state to prevail, it had to prove that denying the plaintiff benefits was advancing a compelling governmental interest.[12] Despite the state's attempts to justify its actions, the Court held that the justification was insufficient.[13] Thus, because the state substantially burdened the plaintiff's religious beliefs and could not identify a compelling justification for doing so, the Court ruled in favor of the plaintiff.[14]

Sherbert did not withstand the test of time, however. In 1990, the Court adopted a new rule, which made it considerably more difficult for religious plaintiffs to prevail under a free exercise

claim.[15] In *Employment Division v. Smith*, the government refused to grant unemployment benefits to two Santerians (members of the Native American Church) for ingesting peyote for sacramental purposes.[16] The Santerians lost their jobs because they engaged in "work-related misconduct," which was grounds for denial of benefits under the state's unemployment policy.[17] Like the policy in *Sherbert*, the policy precluding the Santerians from receiving benefits was not designed for the specific purpose of burdening religious observers; it was applicable to any claimant.[18] In other words, a secular claimant who was terminated for smoking marijuana recreationally would have suffered the same consequence. For that very reason, the Court held that the denial of benefits was constitutional.[19] Thus, the Court rejected *Sherbert*'s "compelling governmental interest" test—commonly referred to as strict scrutiny—and essentially held that a neutral and generally applicable law must only pass rational basis review, a standard under which the government almost always wins.[20]

From the day it was decided, *Smith* received widespread objection, from the American Civil Liberties Union to the Traditional Values Coalition.[21] More important, though, *Smith* received a bipartisan, legislative overhaul through the Religious Freedom Restoration Act (RFRA), which was essentially a statutory revival of *Sherbert*.[22] It passed 97 to 3 in the Senate and unanimously in the House, with then-Representative Chuck Schumer as one of the sponsors.[23] Finally, on November 16, 1993, President Clinton signed the bill into law.[24] State governments also enacted their own RFRAs, and now there are twenty-one state RFRAS across the country.[25] Recently, though, RFRAs have lost bipartisan support and have gained significant opposition.[26]

III. Where We're At

Despite the legislative victories for religious observers, *Smith* has largely remained good case law.[27] Since the beginning of 2021, however, the Court has shown a willingness to overrule *Smith*, or at least give it a death by a thousand cuts. Before COVID-19, few, if any, cases have demonstrated how ambiguous *Smith* is. An example of this is *Commonwealth v. Beshear*.[28] There, Kentucky Governor Andy Beshear closed all public and private schools in the state but allowed gyms, fitness centers, and other indoor recreation facilities to remain open.[29] This raised a question that the Supreme Court had never answered: What does a free exercise plaintiff need to show to prevail under *Smith*? The Sixth Circuit held that the plaintiffs must show that the government allowed a secular exemption *comparable to the religious activity*, rather than the government allowed *any* secular exemption, no matter its relation to the religious conduct.[30] The plaintiffs appealed to the Supreme Court, but the Court declined to address the issue because the order would shortly expire.[31]

Only a few months later, the Supreme Court finally addressed the issue in *Tandon v. Newsom*.[32] The Court ruled that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[33] The Court further explained that treating some secular activities "as poorly or even less favorably than the religious exercise at issue" is not probative of neutrality and general applicability.[34] Some argued that this holding was an unfaithful interpretation of *Smith.*[35] No matter one's stance on *Tandon*, everyone can agree that it will make it much easier for free exercise plaintiffs to prevail.

Finally, in June, the Court decided *Fulton v. City of Philadelphia*,[36] the case that many thought would be the apotheosis of all free exercise jurisprudence. But that was far from the case. It was a unanimous decision with a very narrow holding. *Fulton* involved a challenge to a Philadelphia policy that provided certain secular exemptions, but no religious ones.[37] For that simple reason, the Court applied strict scrutiny, and, as is often the case with strict scrutiny, the plaintiffs prevailed.[38]

Despite the narrow, fifteen-page ruling, the ninety pages of concurrences suggest that a post-*Smith* world is likely. In Justice Barrett's concurrence, joined by Justice Kavanaugh, she stated that "the textual and structural arguments against *Smith* are more compelling" and "it is difficult to see why the Free Exercise Clause . . . offers no more than protection from discrimination."[39]

Justice Barrett, this time joined by both Justice Kavanaugh and Justice Breyer, struggled with what to replace *Smith* with.[40] She expressed skepticism with returning to the *Sherbert* approach because other First Amendment rights are "much more nuanced."[41] Nevertheless, she explained that *Fulton* was not the case to address those problems because *Fulton* fell outside the scope of *Smith*.[42]

Justice Alito, joined by Justice Thomas and Justice Gorsuch, concurred in the judgment, advocating for the Court to overrule *Smith* in *Fulton* itself.[43] He demonstrated how easily the government could curtail religious liberties, even while being consistent with *Smith*.[44] For example, he explained that the Prohibition Amendment would have been constitutional even without an exception for the sacramental use of wine, which would have essentially outlawed the celebration of a Catholic Mass.[45] He also explained that if a state made it unlawful to slaughter an animal that had not yet been rendered unconscious, the law would be constitutional, even though it would effectively outlaw kosher and halal slaughter.[46] Most

significant to the case, he explained that if Philadelphia had eliminated the secular exemptions, which have never been used, the policy that infringed on the plaintiff's religious freedom would nevertheless be constitutional under *Smith*.[47] After a long discussion of the original meaning of the Free Exercise Clause and the factors considered to determine whether to overrule precedent in general, Justice Alito concluded that *Smith* should be replaced with the *Sherbert* test.[48]

Justice Gorsuch's concurrence joined by Justice Thomas and Justice Alito expressed concern over not acting upon *Smith* hastily enough.[49] He explained that the delay in clarifying the law will further confuse the lower courts, highlighting the Court's constant intervention in COVID-19 cases throughout the pandemic.[50] Further, he stated, "We owe it to the parties, to religious believers, and to our colleagues on the lower courts to cure the problem this Court created."[51]

Thus, *Smith* remains good law. Although *Tandon* has seemingly narrowed *Smith*'s holding, the Court has refused to fully get rid of it. Nevertheless, there is good reason to believe that *Smith* will not be here forever.

IV. Where We're Going

The road ahead looks promising for free exercise plaintiffs. Now, the Free Exercise Clause exists like an antidiscrimination statute; the government can infringe on one's exercise of religion, as long as it does not single it out. But in the future, the Free Exercise Clause is more likely to exist as an unassailable categorical protection for religious observers. On the other hand, even if the Court ultimately decides to reaffirm *Smith* in subsequent developments, *Tandon* places religious plaintiffs in better shape than they were a year ago.

The Court is more than ready to overrule *Smith* when apposite. Now, perhaps for the first time, there are five Justices on the Supreme Court who have expressed a desire to overrule it: Thomas, Alito, Gorsuch, Kavanaugh, and Barrett.[52] Although Justices Kavanaugh and Barrett declined to overrule it in *Fulton*, they made their dissatisfaction with *Smith* clear.[53]

Overruling *Smith* would not be easy, however, and it would require the right set of facts. As Justice Barrett explained, the problem with using *Fulton* as the vessel to overrule *Smith* was that they are not analogous cases.[54] Even when *Smith* overruled *Sherbert*, the facts were very similar.[55] Accordingly, *Smith*'s demise would likely have to involve a truly neutral and generally applicable law.

Although a post-*Smith* world is likely, a revived-*Sherbert* world is not. Only three of the Justices agreed that the Court should return to the *Sherbert* test for free exercise claims. One should ask then, what will replace *Smith*? Probably a hybrid between *Sherbert* and *Smith*. Some might argue that *Tandon* is that hybrid, but to the conservative bloc, *Tandon* is just a fair application of *Smith*, which ostensibly does not go far enough.

To conclude, even if the Court does not overrule *Smith*, its current state replicated in *Tandon* provides greater liberty for religious observers than they have been afforded in the past thirty years. Even assuming *arguendo* that *Tandon* is a fair application of *Smith*, religious plaintiffs still have a guarantee that religious conduct now has a "most-favored nation status"—a theoretical approach to interpreting *Smith* proposed by Professor Douglas Laycock, under which religious conduct is entitled to an exemption where any secular exemption exists.[56] This reading of *Smith* is far more favorable to religious plaintiffs than those proposed by other First Amendment scholars.[57] Opponents of *Smith* may not have won the war yet, but they have certainly won the battle for the time being.

V. Conclusion

For free exercise plaintiffs, the tide is turning. Since the advent of *Smith*, challenging a law that burdens religiously-motivated conduct has been substantially more difficult. Developments in the past few months, however, have made it considerably easier for religious plaintiffs to prevail. Whether *Smith* is long gone in five years or still good law as it exists in *Tandon*, religious plaintiffs will enjoy greater protection of the First Amendment than they have in a long time.

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[1] 494 U.S. 872 (1990).

[2] *Id.* at 882.

[3] *See e.g.,* Thomas C. Berg, *What Hath Congress Wrought – An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1, 12-13 (1994)

[4] *See e.g.,* Roman Catholic Diocese of Brooklyn v. Cuomo, No. 20A87, slip op. (Nov. 25, 2020); Tandon v. Newsom, No. 20A151, slip op. (Apr. 9, 2021) (per curiam).

[5] Mark Joseph Stern, *The Supreme Court Broke Down Its Own Rules to Radically Redefine Religious Liberty*, Slate (Apr. 12, 2021, 2:51 PM), https://slate.com/news-and-politics/2021/04/supreme-court-religious-liberty-covid-california.html.

[6] No. 19-123, slip op. (June 17, 2021) (Barrett, J., concurring); *Id.* (Alito, J., concurring in the judgment).

[7] 374 U.S. 398.

[8] *Id.* at 399.

[9] *Id.* at 401.

[10] *Id.* at 402.

[11] *Id.* at 404.

[12] *Id.* at 406.

[13] *Id.* at 407.

[14] *Id.* at 410.

[15] Employment Div., Dep't. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

[16] *Id.* at 874.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 890.

[20] *Id.* at 885.

[21] Berg, *supra* note 3.

[22] *Id.* at 12.

[23] Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. Times, Nov. 17, 1993.

[24] *Id.*

[25] Paul Baumgardner & Brian K. Miller, *Moving from the Statehouses to the State Courts? The Post-RFRA Future of State Religious Freedom Protections*, 82 Alb. L. Rev. 1385, 1391 (2019).

[26] *Id.* at 1393.

[27] *But see* Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 190 (2012) (narrowing *Smith* to apply to only "government regulation of only outward physical acts").

[28] 981 F.3d 505 (2020).

[29] Plaintiff's Motion for Emergency Hearing and Temporary Restraining Order at ¶ 1, Danville Christian Academy, Inc. v. Beshear, No. 3:20-CV-00075, 2020 WL 8513856 (E.D.N.Y. Nov. 25, 2020).

[30] *Beshear*, 981 F.3d at 508.

[31] Danville Christian Academy, Inc. v. Beshear, No. 20A96, slip op. (Dec. 17, 2020).

[32] No. 20A151, slip op. (Apr. 9, 2021) (per curiam).

[33] *Id.* at 1 (citing Roman Catholic Diocese of Brooklyn v. Cuomo, No. 20A87, slip. op. (Nov. 25, 2020) (per curiam)).

[34] *Id.* (citing *Cuomo*, slip op. at 2-3 (Kavanaugh, J., concurring)).

[35] *See e.g.,* Stern, *supra* note 5. I made a similar argument in this Blog last year when the Sixth Circuit decided the Kentucky school closure case. Rebekah Durham & Jacob Hoback, *Seeing Both Sides: Was the Sixth Circuit Right About Kentucky School Closures?*, U. Cin. L.

Rev. Blog (Dec. 23, 2020), https://uclawreview.org/2020/12/23/seeing-both-sides-was-the-sixth-circuit-right-about-kentucky-school-closures/. But although I believe that *Tandon* was an unfaithful interpretation of *Smith*, I do think that *Tandon* is a more faithful interpretation of the Free Exercise Clause itself.

[36] No. 19-123, slip op. (June 17, 2021).

[37] *Id.* at 7.

[38] *Id.* at 13-15.

[39] *Id.* at 1 (Barrett, J., concurring). Justice Breyer also joined the concurrence, but he did not join the first paragraph from which the quoted portions stem.

[40] *Id.*

[41] *Id.* at 1-2.

[42] *Id.* at 2-3.

[43] *Id.* at 1 (Alito, J., concurring in the judgment).

[44] *Id.* at 1-2.

[45] *Id.*

[46] *Id.* at 2.

[47] *Id.* at 8.

[48] *Id.* at 73.

[49] *Id.* at 8 (Gorsuch, J., concurring in the judgment).

[50] *Id.* at 8.

[51] *Id.*

[52] *Id.* (Barrett, J., concurring); *Id.* (Alito, J., concurring in the judgment).

[53] *Id.* at 1 (Barrett, J., concurring).

[54] *Id.* at 2.

[55] *Supra* Section II.

[56] Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 49 (1990).

[57] *See e.g.,* Brief for Professor Eugene Volokh as Amicus Curiae in Support of Neither Party, *Fulton*, No. 19-123, slip op.

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