Short Symposium

A Foolish Inconsistency: Religiously and Ideologically Expressive Conduct

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Abstract

In *Masterpiece Cakeshop, Ltd* v *Colorado Civil Rights Commission*, Masterpiece's owner, Jack Phillips, argued that forcing him to bake a wedding cake for a same-sex wedding would violate both his right to free speech and his right to the free exercise of religion, both of which are protected by the First Amendment to the US Constitution. Under US Supreme Court precedent, Mr Phillips's free-speech claim would be evaluated under the intermediate-scrutiny test of *United States* v *O'Brien*. Yet Mr Phillips's free-exercise claim would be evaluated under a different standard: the rational-basis test of *Employment Division* v *Smith*.

These different standards are problematic because the free-speech and free-exercise claims are inherently connected, as the freedom of expression includes the freedom to express oneself on religious topics, and religious exercise communicates beliefs and expresses devotion. The two different standards are also susceptible to manipulation by litigants, who have an incentive to characterize religious claims as philosophical or ideological to take advantage of *O'Brien*'s more favorable standard. In this Article, Professor Dimino argues that the Court should end the inconsistency either by overruling *O'Brien* and applying *Smith* to speech cases as well as religion ones, or by overruling *Smith* and applying *O'Brien* to religious cases as well as speech ones.

I. Introduction

The United States Constitution's First Amendment forbids the government from 'prohibiting the free exercise' of religion or 'abridging the freedom of speech, or of the press'.[1] Despite the textual similarity between the Constitution's protections for speech and religious exercise,[2] the Supreme Court's doctrine

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[1] US Constitution Amendment I.

[2] The two clauses do use different gerunds when referring to the kinds of laws that Congress 'shall (not) make'. There is a plausible textual argument (though the Court has never made it) that generally applicable laws 'abridge' but do not 'prohibit' a right when the effects of those generally applicable laws interfere with the ability to exercise the right. See M.W. McConnell et al, *Religion and the Constitution* (New York: Wolters Kluwer Law & Business, 4th ed, 2016), 61. Ultimately, such an argument probably fails in the kinds of cases discussed here, however,

treats them very differently when it comes to granting exemptions from 'valid and neutral law(s) of general applicability',[3] ie, laws that regulate the conduct of the general population and that do not single out speakers or religious believers for disfavored treatment.

Under the rule of *Employment Division* v *Smith*, the government need not grant an exemption from a generally applicable law for people whose religious beliefs compel them to engage in conduct that violates the law. Generally applicable laws limiting religious exercise are evaluated only under rational-basis scrutiny – a level of review extremely deferential to the government.

Free-speech claimants, on the other hand, fare much better than do individuals relying on the Free Exercise Clause. Under the leading case of *United States* v *O'Brien*,[4] generally applicable laws that regulate conduct but impose an incidental burden on speech can be enforced, even against the speaker, but only if the laws pass a form of intermediate scrutiny – a standard more demanding than rational basis.

This difference in legal standards is inappropriate, and the recent case of *Masterpiece Cakeshop, Ltd* v *Colorado Civil Rights Commission*[5] highlighted the incompatibility of *Smith* and *O'Brien*. *Masterpiece Cakeshop* involved a generally applicable law – Colorado's law prohibiting discrimination on the basis of sexual orientation – and Masterpiece's claim that it had a constitutional right to an exemption from that law. Masterpiece's owner, Jack Phillips, argued that he had a right under the Free Exercise Clause and the Free Speech Clause to refuse to bake a wedding cake for a same-sex couple.[6] According to Phillips, baking the wedding cake would have been sinful, and the law therefore compelled him to violate his religious beliefs, in violation of the Free Exercise Clause.[7] Apart from his religious objection, Phillips also asserted a free-speech claim: that forcing him to bake the cake would force him to use his artistic talents to express a message of support for the wedding – a message he had a free-speech right to refuse to make.[8]

Even though Phillips was asserting exactly the same claim under two different provisions of the same constitutional amendment, the religious aspect of the claim was governed by *Smith* and the non-religious aspect was governed by *O'Brien*.

because generally applicable laws banning a certain kind of religious exercise (like peyote use, as in *Employment Division, Oregon Dep't of Human Resources* v *Smith* 494 US 872 (1990)) or expressive conduct (like flag-burning, as in *Texas* v *Johnson* 491 US 397 (1989)) prohibit – and not just impair – the activity.

[3] *Employment Division* v *Smith* n 2 above, 879 (quoting *United States* v *Lee* 455 US 252, 263 no 3 (1982) (Stevens J, concurring in the judgment)).

[4] 391 US 367 (1968).

[5] 138 S Ct 1719 (2018).

[6] ibid 1727.

[7] ibid 1726.

[8] ibid.

This Essay criticizes that difference in legal standards, and argues that religious and secular expression should be governed by one consistent First Amendment test: Either the rational-basis test of *Smith* or the intermediate-scrutiny test of *O'Brien* should govern both speech- and religion-based claims for exemptions. Alternatively, if both tests are to be retained, the Supreme Court should more clearly define which kinds of expression or behavior trigger which standard, so that litigants cannot obtain a more favorable legal standard simply by characterizing identical conduct in different ways.

II. The Different Standards of *Smith* and *O'Brien*

Generally applicable laws, such as the Colorado law at issue in *Masterpiece Cakeshop*, directly regulate conduct, not belief or speech. At least on their face, they do not favor or disfavor particular beliefs. Because those laws may restrict one's ability to convey thoughts through actions, however, the laws can limit one's ability to express beliefs, whether those beliefs are based in religion, political ideology, morals, philosophy, or any other set of principles.

Recognizing this ability of laws limiting conduct to limit expression as well, the Supreme Court held in *United States* v *O'Brien* that regulations of conduct that incidentally limited expression would be evaluated under a test of intermediate scrutiny. More precisely, a law restricting one's ability to engage in 'expressive conduct' or 'symbolic speech' – conduct, such as waving or burning a flag, that carries a message –[9] is valid 'if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest'.[10]

The Court applied the test and upheld O'Brien's conviction for destroying his draft card, even though O'Brien had burned the draft card as part of a political protest. Importantly, though, the Court did so only after analyzing the law prohibiting destruction of draft cards to ensure that the law was sufficiently related to the government's important interest in the effective functioning of the draft.[11]

At the time *O'Brien* was decided, religious claims for exemptions from generally applicable laws were governed by an even more protective standard:

[9] See *Spence* v *Washington* 418 US 405, 410-11 (1974) (*per curiam*) (holding that Spence's conduct – displaying an upside-down American flag with a peace sign duct-taped to it – was protected by the First Amendment because '(a)n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it').

[10] *United States* v *O'Brien* 391 US 367, 377 (1968).

[11] ibid 381-82.

the strict-scrutiny test of *Sherbert* v *Verner*[12] and *Wisconsin* v *Yoder*.[13] That standard (at least in theory)[14] required the government to grant an exemption from a generally applicable law whenever that law would burden religious exercise, unless the government had a compelling reason to deny the exemption.[15]

The compelling-interest test of *Sherbert* and *Yoder* was severely limited, however, in the 1990 case of *Employment Division* v *Smith*. *Smith* held that neutral laws of general applicability did not require any form of heightened scrutiny, even if their effect was to make it more difficult for some individuals to exercise their religion. *Smith* left two exceptions, which allowed it to avoid explicitly overruling *Sherbert* and *Yoder*. First, if the government permits exceptions to its law when the law results in a hardship for secular reasons, it may not refuse to consider religious hardships.[16] Second, if the free-exercise claim is accompanied by another constitutional claim, 'such as freedom of speech and of the press (…) or the right of parents (…) to direct the education of their children', then the compelling-interest test would apply.[17] This 'hybrid'[18] exception does not apply in all instances where the Free Speech Clause might be implicated, however. Rather, there must be some plausibility to the speech or parental right being asserted.[19] In *Smith* itself, the Court characterized the religious exercise at issue (smoking peyote, a hallucinogenic drug, as part of a religious ceremony) as 'unconnected with any communicative activity or parental right'.[20]

Thus, after *Smith*, religious claims and speech claims for exemptions were evaluated under different standards, with religious claims being reviewed under a standard more deferential to the government. In other words, exemptions were more likely to be constitutionally required for individuals asserting free-speech rights than for individuals asserting free-exercise rights. Justice Scalia, the author of the Court's decision in *Smith*, belatedly acknowledged the incongruity of the

[12] 374 US 398 (1963).

[13] 406 US 205 (1972).

[14] The test was not nearly as 'strict' in practice as its language would have indicated. See, eg, *Goldman* v *Weinberger* 475 US 503 (1986) (rejecting a claim for an exemption from an Air Force regulation prohibiting headgear, as applied to a yarmulke). See also E. Volokh, *The First Amendment and Related Statutes: Problems, Cases and Policy Arguments* 962 (St Paul, MN: Foundation Press, 6th ed, 2016) ('Strict scrutiny here (ie, under *Sherbert*) proved far weaker than the strict scrutiny applied to content-based speech restrictions or race classifications').

[15] See *Yoder* 406 US at 221; *Sherbert* 374 US at 403.

[16] *Employment Division v Smith* n 2 above, 884.

[17] ibid 881.

[18] ibid 882.

[19] See M.W. McConnell et al, n 2 above, 162-163 (discussing a split among lower courts about the meaning of the hybrid-rights exception, with 'several' courts saying that a hybrid-rights claim requires the non-free-exercise claim to be 'colorable') (citing *Thomas* v *Anchorage Equal Rights Comm'n*, 165 F.3d 692, 703 (9th Cir 1999); *Swanson* v *Guthrie Ind School Dist*, 135 F.3d 694, 700 (10th Cir 1998); and *Axson-Flynn* v *Johnson*, 356 F.3d 1277, 1295-96 (10th Cir 2004)).

[20] *Employment Division v Smith* n 2 above, 882.

Smith and *O'Brien* standards, and suggested that *O'Brien* be overruled.[21] The rest of the Court, however, declined to act on Justice Scalia's suggestion, and as a result we continue to have different standards for free-exercise and free-speech claims.

This differential treatment is 'anomalous',[22] not only because the rights to free speech and free exercise are protected by the same amendment, but because the rights are so similar, both in theory and in practice.[23] As a theoretical matter, both rights are part of the right to be free from government interference in one's thoughts, beliefs, and feelings. As a practical matter, one's right to speak includes the right to speak about religious topics, so that '(m)any free exercise claims can (…) be recast as a freedom of speech or freedom of expressive association claims'.[24]

The same claim should not receive different treatment depending on which clause is invoked.[25] The doctrines should be brought into line, either by applying the *Smith* rule in free-speech cases as well as religious ones, or by applying the *O'Brien* rule in religious cases as well as ideological ones. *Masterpiece Cakeshop* highlights the mistake made by current law in subjecting a conceptually identical claim to two different legal standards.

III. Religion and Speech in *Masterpiece Cakeshop*

The constitutional claim in *Masterpiece Cakeshop* provides a perfect example of the overlap between speech- and religion-based claims for exemptions from generally applicable regulations of conduct. Jack Phillips, the proprietor of

[21] See *Barnes* v *Glen Theatre Inc* 501 US 560, 579 (1991) (Scalia J, concurring in the judgment).

[22] D. Bogen, 'Generally Applicable Laws and the First Amendment' 26 *Southwestern University Law Review*, 201, 233 (1997).

[23] See F.M. Gedicks, 'The Normalized Free Exercise Clause: Three Abnormalities' 75 *Indiana Law Journal*, 77, 121 (2000) ('(I)t seems intuitively correct that similar rights should be enforced to a similar extent with similar doctrine').

[24] J. Rubenfeld, 'The First Amendment's Purpose' 53 *Stanford Law Review*, 767, 810, fn 96 (2001); D.J. Hay, 'Baptizing *O'Brien*: Towards Intermediate Scrutiny of Religiously Motivated Expressive Conduct' 68 *Vanderbilt Law Review*, 177, 211-214 (2015) (suggesting that attorneys characterize free-exercise claims as expressive-conduct free-speech ones because 'their clients' acts of worship have a secondary communicative, evangelical, or didactic purpose'.). In *Rosenberger* v *Rector and Visitors of the University of Virginia* 515 US 819 (1995), for example, the Court relied on the Free Speech Clause in declaring unconstitutional a state-university policy that denied funds to a student newspaper because of its religious viewpoint. The claim could plausibly have rested on the Free Exercise Clause.

[25] See D.T. Coenen, 'Free Speech and Generally Applicable Laws: A New Doctrinal Synthesis' 103 *Iowa Law Review*, 439 (2018) ('Common sense might suggest that a serious speaker should be no more able to challenge a generally applicable law than a serious worshipper'); D.J. Hay, n 24 above, 211 ('A coherent First Amendment jurisprudence would treat communicative religious conduct the same as it treats communicative political conduct'). As noted below, however, Coenen himself disagrees with this analysis.

Masterpiece Cakeshop, believed it would be sinful for him to participate in a gay wedding by making the wedding cake. Colorado law required him to serve customers without regard to sexual orientation, however, and so he was put to the choice of complying with the law and violating his religious beliefs or following his religious beliefs and violating the law. Phillips's straightforward religious-exercise claim, however, would likely have foundered because of *Smith*.

But if Phillips's religious objection to gay marriages were recharacterized as a political, philosophical, or ideological objection (as indeed it was), then *O'Brien*, and not *Smith*, would be the governing precedent. Granting that the government's interest in promoting equality for sexual-orientation minorities would be at least 'important or substantial' and 'unrelated to the suppression of free expression',[26] Phillips's claim for an exemption would turn on the final element of the *O'Brien* test: whether 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest'.[27] However that issue would be decided, the *O'Brien* standard was more favorable to Phillips than was the *Smith* test, which provided no constitutional protection at all beyond requiring that the law be neutral and generally applicable.

Thus, the very same claim of the bakery owner in *Masterpiece Cakeshop* could trigger two different legal standards, depending on whether it was evaluated under the Free Exercise Clause or the Free Speech Clause.

IV. The First Amendment Should Treat Speech- and Religion-Based Exemptions Equally

1. Speech- and Religion-Based Claims Are Intrinsically the Same

Both the freedom of speech and the freedom of religious exercise are based on the freedom of mind – the liberty against governmental interference with one's thoughts and beliefs. The freedom of *religious* thought and belief is merely a subset of the freedom of thought and belief that is protected more generally in the Free Speech Clause.[28] The Supreme Court has already recognized the

[26] *United States* v *O'Brien* 391 US 367, 377 (1968).

[27] ibid.

[28] See *Heffron* v *International Society for Krishna Consciousness*, 452 US 640 (1981); F.M. Gedicks, n 23 above, 121-122 (referring to the Free Exercise Clause as 'doctrinally redundant' after *Employment Division* v *Smith*, n 2 above, 'protecting nothing that is not also fully protected by another constitutional provision'); K. Greenawalt, 'Religion and the Rehnquist Court' 99 *Northwestern University Law Review*, 145, 156-157 (2004) (asking 'whether *anything* that is not redundant remains' of the 'Free Exercise Clause after *Smith*'); T.R. McCoy, 'A Coherent Methodology for First Amendment Speech and Religion Clause Cases' 48 *Vanderbilt Law Review*, 1335, 1350 (1995) ('To say that the Free Exercise Clause provides no protection at all from (inadvertent) impositions on religious freedom (caused by generally applicable laws) is to read the Free Exercise Clause as essentially meaningless surplusage in the contemporary context'.).

connection between the two Clauses: 'The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment'.[29]

Further, as others have pointed out, constitutional protections for free exercise and free speech often serve the same functions in society besides preserving citizens' minds as off-limits to government. Both rights

> 'implicate matters of personal choice and identity, allow for robust pluralism in our diverse society, help curb dissension and social conflict, and protect minority rights that will not necessarily be addressed through the political process'.[30]

Rights as closely connected as speech and religion – that protect the same values of liberty of thought and belief, that serve the same beneficial functions for society, and that appear next to each other in the same Amendment – should be protected through the same level of constitutional scrutiny. And yet, anomalously, *Smith* permits governments to reject claims for religious exemptions as long as the law has a rational basis, whereas *O'Brien* permits the government to reject speech-based exemptions only if the government passes intermediate scrutiny.

In a recent article, Professor Dan Coenen argued that because 'the Free Exercise Clause and the Free Speech Clause operate in different contexts to protect different values', it makes sense to deny religious observers exemptions from generally applicable laws even if such exemptions are available to non-religious speakers.[31] Coenen offered two differences between the values protected by the clauses. Ultimately, however, neither is persuasive and one's entitlement to an exemption from a generally applicable law should not depend on whether the claim is evaluated under the Free Exercise or Free Speech Clause.

Coenen's first argument is that religiously based exemptions from generally applicable laws are especially problematic because exemptions result in favoritism for religious believers – and therefore create a problem under the Establishment Clause.[32] This argument falls apart, though, because far from suggesting that religious exemptions would be unconstitutional under the Establishment Clause,

The redundancy of the Free Exercise Clause discussed in this Essay concerns protections for religious expression, including expressive conduct. The Free Exercise Clause may well retain significant independent force in other doctrinal areas, such as the prohibition on secular courts deciding religious questions, see *United States* v *Ballard* 322 US 78, 86 (1944).

[29] *Lee* v *Weisman* 505 US 577, 591 (1992).

[30] S.H. Barclay and M.L. Rienzi, 'Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions' 59 *Boston College Law Review*, 1595, 1612 (2018). See also S.D. Smith, 'The Rise and Fall of Religious Freedom in Constitutional Discourse' 140 *University of Pennsylvania Law Review*, 149, 196-198 (1991) (discussing reasons for protecting religious freedom).

[31] D.T. Coenen, n 25 above, 466.

[32] ibid.

Smith invited states to give religious exemptions. *Smith* held that states would not be *required* to give religious exemptions, but noted that states could give exemptions if they desired.[33] Subsequent cases have confirmed that religious exemptions (at least the vast majority of them) are permissible accommodations – not impermissible establishments – of religion.[34] Without the Establishment Clause as a reason to deny religion-based exemptions, there is less reason to distinguish between religion-based exemptions and speech-based ones.

Coenen's second argument is that free speech deserves special protection because of its central role in fostering an 'open society'.[35] Professor Coenen is surely correct about the importance of the freedom of speech,[36] but the Framers would not have gainsaid the importance of the freedom to exercise religion either.[37] It may be that political speech is more likely to promote societal goals such as effective self-government or the search for truth, whereas the benefits of free exercise tend more to the benefit of the individual exercising the right. But the Constitution often protects the rights of individuals for the benefit of those individuals, even when those rights harm the interests of society,[38] and governmental intrusion into one's communications with his god may be just as offensive to personal liberty as governmental intrusion into one's communications with other humans.[39]

[33] See *Employment Division* v *Smith* n 2 above, 872, 890 ('To say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts'.).

[34] See *Gonzales* v *O Centro Espírita Beneficente União do Vegetal*, 546 US 418 (2006); see also *Holt* v *Hobbs*, 135 S. Ct. 853 (2015); *Burwell* v *Hobby Lobby Stores, Inc*, 134 S. Ct. 2751 (2014).

[35] D.T. Coenen, n 25 above, 466, 467. See also, eg, *New York Times Company* v *Sullivan* 376 US 254-270 (1964); *Palko* v *Connecticut* 302 US 319, 326-327 (1937) ('(F)reedom of thought, and speech (…) is the matrix, the indispensable condition, of nearly every other form of freedom'.); *Whitney* v *California* 274 US 357, 375-376 (1927) (Brandeis J, concurring). See generally A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper Brothers Publishers, 1948).

[36] Not everyone, however, agrees that speech should enjoy a privileged position relative to other constitutional rights. Critical legal scholars, in particular, argue that equality can be threatened by free speech. See, eg, C. Mala Corbin, 'Speech as Conduct: The Free Speech Claims of Wedding Vendors' 65 *Emory Law Journal*, 241, 252, 301-302 (2015).

[37] See generally, eg, W.L. Miller, *The First Liberty: Religion and the American Republic* (New York: Paragon House, 1985).

[38] See, eg, US Constitution Amendment IV (securing the right against unreasonable searches and seizures); US Constitution Amendment V (securing the right against compulsory self-incrimination); *Mapp* v *Ohio* 367 US 643 (1961) (requiring the exclusion of illegally obtained evidence from criminal trials); *Miranda* v *Arizona* 384 US 436 (1966) (placing limits on the admissibility of criminal suspects' voluntary confessions).

[39] See, eg, *West Virginia State Board of Education* v *Barnette* 319 US 624, 638 (1943) ('The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to

In any event, if free speech and the free exercise of religion include communication with other humans about religious topics, as they certainly do, it seems odd, to say the least, to conclude that religious speech or expressive conduct fosters an open society when evaluated under the Free Speech Clause, but not when evaluated under the Free Exercise Clause.

Perhaps, then, Professor Coenen is saying that religious exercise should not be able to take advantage of the more generous *O'Brien* test, either because religious exercise is not communicative or because speech on religious topics has less constitutional value than other speech. Neither argument is tenable. Religious exercise usually communicates a message about the actor's faith, and so it is implausible that religious exercise could receive diminished protection because it is, as a class, non-communicative. Indeed, the communicative value of religious exercises is often the whole point of exercising religion in a ceremony observed by others.

Neither can one plausibly contend that religious speech carries less constitutional value than speech on other topics or exhibiting other viewpoints. Such an argument would be inconsistent with the line of cases culminating in *Rosenberger* v *Rector and Visitors of the University of Virginia*,[40] which held that government could not discriminate against speech with a religious viewpoint. Under *Rosenberger*, religious viewpoints are as entitled to constitutional protection as are any others. Like philosophy, religion 'provides ... a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered'.[41]

Because the First Amendment specifically enumerates the right of free exercise in addition to the right of free speech, it is conceivable that religious speech and expressive conduct should receive *more* protection than non-religious ideological speech and expressive conduct.[42] It is very hard to understand, however, why conduct that expresses a religious message should be accorded less protection than conduct that expresses a non-religious message.[43] In addition to the textual argument for according religion special protection, there is a practical consideration that similarly suggests that we have more to fear from

free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections'.).

[40] 515 US 819 (1995).

[41] ibid 831. See also ibid 836-837 (demonstrating that the University's policy disfavoring religious viewpoints could also apply to 'philosophic position(s)' because of the difficulty in distinguishing between religious viewpoints and philosophic ones).

[42] Cf, eg, *Lamb's Chapel* v *Center Moriches Union Free School District* 508 US 384-400 (1993) (Scalia J, concurring in the judgment) (referring to the Free Exercise Clause as giving 'preferential treatment' to religion). The reference is ironic, given Justice Scalia's authorship of the *Smith* opinion denying preferential treatment to religion.

[43] D.J. Hay, n 24 above, 209 ('(T)he text of the Constitution arguably allows for greater protection of religious exercise than it does expressive conduct. At a minimum, the text of the Constitution would seem to require parity'.).

non-religious exemptions than from religious ones: Everyone has ideological beliefs and we all act according to our philosophies and beliefs constantly. Therefore a speech-based exemption from generally applicable laws provides an opportunity for each of us to demand an exemption from nearly any law at nearly any time. Religion, on the other hand, is more circumscribed.[44] While surely many religious believers try to follow the tenets of their religion in all aspects of their lives, there are few people who could claim a religious reason for speeding or bank robbery.[45] If ideological reasons were enough to force courts to apply heightened scrutiny, however, then anybody could trigger that heightened standard of review just by claiming that the offense was committed as a way of protesting the extent of modern government or the unequal distribution of wealth.[46]

In the end, though, these arguments should be rejected. True, religion is specifically referenced in the First Amendment, but so is the freedom of the press. Yet, the Supreme Court has interpreted the freedom of the press to be virtually, if not totally, subsumed within the freedom of speech.[47] And while religious exemptions might cause fewer disruptions for society (and courts) than would speech exemptions, it would do so at the cost of providing special benefits to religious people that would not be available to non-religious ones.

The most convincing reason to treat religion-based and speech-based claims the same, however, is that whether one's beliefs are grounded in religion or morality, one faces the same crisis of conscience when the law requires him to engage in behavior that he believes to be wrongful. The individual who is forced to cater a gay wedding, to pay taxes to support a war, to vaccinate his children, or to limit himself to marrying one woman at a time is being compelled to do something that violates that individual's sense of morality. Whether that individual believes that the behavior is immoral *because his religion says so* should be irrelevant.[48] Whether the objections are religious or philosophical, the government

[44] See S.H. Barclay and M.L. Rienzi, n 30 above, 1599 ('(E)xpressive claims are much more pervasive than religious claims, both in absolute terms and as a percentage of all reported cases'.); L.W. Goodrich and R.N. Busick, 'Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases' 48 *Seton Hall Law Review*, 353 (2018) (finding that religious exemption claims are rare, even after the Supreme Court's decision in *Burwell* v *Hobby Lobby Stores, Inc*, n 34 above, which held that Hobby Lobby was statutorily entitled to an exemption from mandated contraceptive coverage under the Affordable Care Act).

[45] See n 21 above ('Relatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost anyone can violate almost any law as a means of expression'.).

[46] See *Rumsfeld* v *Forum for Academic and Institutional Rights*, 547 US 47, 66 (2006).

[47] See *Cohen* v *Cowles Media Co*, 501 US 663, 669 (1991); *Branzburg* v *Hayes*, 408 US 665 (1972). See also R.L. Weaver, *Understanding the First Amendment* (Durham: Carolina Academic Press, 2017), 246-47 ('Media (…) have no favored position under the First Amendment and possess freedoms coextensive with the public. (…) (T)he weight of case law has aligned with the notion that the press has no rights beyond those of an ordinary citizen'.). But see, eg, P. Stewart, 'Or of the Press' 26 *Hastings Law Journal*, 631 (1975).

[48] See R.A. Smolla, 'The Free Exercise of Religion After the Fall: The Case for Intermediate

is still burdening that person's conscience by using that person as an agent of *the government's* moral judgment.

It might be objected that individuals forced to act in a manner contrary to their moral beliefs face no penalty other than pangs of guilt for violating their consciences. Individuals forced to violate their religion, however, may believe that they will be made to suffer an eternal punishment for violating God's law. Such an argument, however, is inconsistent with Supreme Court precedent, which implies that the Religion Clauses extend to far more belief systems than ones featuring an afterlife that rewards and punishes believers for behavior on Earth. According to *United States* v *Seeger*,[49] which involved the interpretation of a statutory conscientious-objector exemption from military service, one may claim an exemption where service would be contrary to one's 'belief in relation to a Supreme Being' (the statutory phrase), even if one does not believe in a supreme being. Rather, the exemption extends to every sincere belief 'occup(ying) a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption'.[50] If 'religion' extends as far as *Seeger* suggests it does, then religious beliefs become practically indistinguishable from deeply held philosophical views.[51] An individual with a 'religion' that contains a moral code but no punishment for misbehavior is put to exactly the same choice by a generally applicable law as someone whose beliefs stem from a non-religious source.[52] In both cases, the law compels the objector to engage in behavior he believes to be wrong, but in neither case does the person need to fear eternal damnation if he chooses to subordinate those moral considerations and follow the law.

None of this is to say whether or when the government should be able to override the individual's moral judgments. Rather, this discussion says only that the government's ability to do so should be the same whether the individual's

Scrutiny' 39 *William & Mary Law Review*, 925, 942 (1998) ('(If a unified test were adopted for free-exercise cases and speech cases, n)eutral laws of general applicability that burden *either* religious or philosophical expression of beliefs would be equally protected'.).

[49] 380 US 163 (1965).

[50] ibid 166.

[51] Consider, for example, the question whether 'humanism' is a 'religion'. See *Center for Inquiry, Inc* v *Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir 2014). Humanists have ethical values that are not derived from a belief in any god. If their philosophy amounts to a religion, it is difficult to understand what philosophy protected by the Free Speech Clause would not also be protected under the Free Exercise Clause. See also *Africa* v *Pennsylvania*, 662 F.2d 1025 (3rd Cir 1981) (considering the 'religious' beliefs of an organization 'absolutely opposed to all that is wrong'); *Cavanaugh* v *Bartelt*, 2016 WL 1446447 (D. Neb. 2016) (addressing the status of Pastafarianism, a 'religion' that worships the Flying Spaghetti Monster as a way of mocking traditional religion).

[52] See R.A. Smolla, n 48 above, 942 ('(B)y bringing free exercise cases into a parity with speech cases, the problem of distinguishing when expression of conduct is religiously motivated and when it's not would disappear. The (difficult question) whether an objector's problem with a law is truly religious or merely philosophical would evaporate.') (footnote omitted).

objection to the generally applicable law is religiously based or not.

2. Under Established Supreme Court Precedent, Religious Expression Implicates Both Free Speech and Free Exercise

Masterpiece Cakeshop may be the latest case involving the confluence of the rights of speech and religion, but it is hardly the first. As early as 1940, *Cantwell* v *Connecticut* struck down a law requiring governmental approval before one could solicit contributions 'for any alleged religious, charitable or philanthropic cause'.[53] The Court rested its decision on the Free Exercise Clause, but could just as well have chosen the Free Speech Clause, and indeed it relied on *Near* v *Minnesota* –[54] a case interpreting the Free Press Clause – as support for its holding.[55] *Murdock* v *Pennsylvania*, another case from early in the Court's First Amendment jurisprudence, held that a licensing fee for solicitors violated both the Free Press Clause and the Free Exercise Clause as applied to Jehovah's Witnesses who were selling religious books and pamphlets.[56]

Several cases decided under the Free Speech Clause protected the rights of religious speakers, and accordingly stand for the proposition that government may not discriminate against religious viewpoints. In *Lamb's Chapel* v *Center Moriches Union Free School District*, for example, the Court held that it violated the Free Speech Clause for the school district to refuse to allow access to school facilities for groups with religious viewpoints.[57] *Westside Community Board of Education* v *Mergens*[58] and *Widmar* v *Vincent*[59] similarly used the Free Speech Clause to require government to grant access to religious groups on the same terms as other groups. More recently, the Court held in *Rosenberger* v *Rector and Visitors of the University of Virginia* that a student organization could not be denied university funding to publish its newsletter, when the university's reason for denying the funding was the newsletter's religious viewpoint.[60]

In each of these cases, the Court relied on the Free Speech Clause,[61] but the Free Exercise Clause would also have provided support for the Court's holding (which presaged the Court's holding in *Masterpiece Cakeshop*)[62] that the

[53] 310 US 296, 301-02 (1940).
[54] 283 US 697 (1931).
[55] See ibid, 304 no 5 (citing *Near* v *Minnesota* n 54 above, 713).
[56] 319 US 105, 117 (1943) (holding that the challenged law was 'an abridgment of freedom of press *and* a restraint on the free exercise of religion' (emphasis added)). Other cases similarly protected the right to distribute religious literature. See S.H. Barclay and M.L. Rienzi, n 30 above, 1613, fn 106 (citing *Follett* v *McCormick*, 321 US 573, 577 (1944); and *Jamison* v *Texas*, 318 US 413, 414, 417 (1943)).
[57] 508 US 384, 393-94 (1993).
[58] 496 US 226 (1990).
[59] 454 US 263 (1981).
[60] 515 US 819 (1995).
[61] See ibid 828-37.
[62] See *Masterpiece Cakeshop, Ltd* v *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1728-

government could not discriminate against religion or religious expression.[63] Indeed, that was the major point of those cases: prohibitions on viewpoint discrimination apply to protect religious viewpoints as much as political ones.[64] Such discrimination is unconstitutional for the same reason it is unconstitutional to discriminate against disfavored political groups, expression, and behavior: The government may not control thought by privileging viewpoints with which it agrees.[65] Again, the two Clauses provide the same protection for religious and ideological expression because both protect the freedom of thought and belief that is implicated by both kinds of expression.

In *West Virginia Board of Education* v *Barnette*,[66] perhaps the most canonical of all First Amendment cases, the Court did not even say which portion of the First Amendment required the government to grant an exemption to Jehovah's Witnesses who refused to salute the American flag. The Court noted that the compulsory flag salute was alleged to be a denial both 'of religious freedom, and of freedom of speech',[67] and held that the compulsion violated the First Amendment without distinguishing between those two arguments. Quite the contrary. In perhaps the most eloquent passage in Supreme Court history, the Court equated the First Amendment's protection of ideological and religious thought:

> 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in *politics, nationalism, religion, or other matters of opinion*, or force citizens to confess by word or act their faith therein'.[68]

Masterpiece Cakeshop was therefore hardly novel in presenting a situation with overlapping claims of rights to exemptions grounded in the Free Speech Clause and the Free Exercise Clause. Not only had several other cases presented comparable scenarios, but the Court has recognized and acknowledged that the two Clauses protect the same right of thought and belief.

1732 (2018).

[63] See *Church of the Lukumi Babalu Aye* v *City of Hialeah*, 508 US 520 (1993).

[64] That is, unless the Establishment Clause prohibits the government from supporting religious belief or expression. As *Rosenberger* and *Lamb's Chapel* hold, however, the Establishment Clause does not prohibit the government from granting religious groups access to government facilities on the same terms as those available to other groups. See *Rosenberger*, 515 US, n 40 above, 837-46; *Lamb's Chapel*, 508 US, n 42 above, 394-96.

[65] See, eg, *Masterpiece Cakeshop*, 138 S. Ct., n 62 above, 1731 (saying that the government may not discriminate among viewpoints 'based on the government's own assessment of offensiveness'); *Texas* v *Johnson*, 491 US 397, 414 (1989) ('If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable'.).

[66] 319 US 624 (1943).

[67] ibid 630.

[68] ibid 642 (emphasis added).

3. Different Standards Can Be Manipulated by Litigants

The previous two sections argued that speech- and religion-based claims for exemptions from generally applicable laws should be evaluated under the same standard because one's ideological, political, philosophical, and religious commitments are all part of that person's belief system or conscience.[69] Even if a different standard should apply to claims grounded in the freedom of religion from the standard applicable to claims grounded in the freedom of speech, however, it makes no sense for those categories to be so ill-defined as to permit rights-claimants to manipulate the law by choosing the more favorable legal rule.

Under current law, religious claims are governed by *Smith* and speech claims are governed by *O'Brien*, but what about cases, like *Masterpiece Cakeshop*, in which claimants could raise both claims? Surely an individual with a speech claim that qualifies for intermediate scrutiny under *O'Brien* cannot be relegated to the rational-basis rule of *Smith* simply because he *also* has a religious claim. Therefore, the *Smith* rule would apply only in cases where there is a religious claim but no claim under the Free Speech Clause.

As one commentator has pointed out, however, such cases are exceedingly rare, if there are any at all. 'Most acts of worship serve a dual sacramental-communicative purpose' by exhibiting the worshipper's devotion and 'implicitly encourag(ing) others to behave likewise'.[70] Accordingly,

> 'the space between *O'Brien* and *Smith* creates an opportunity for creative advocates to recast their clients' religious conduct as expressive conduct, triggering an intermediate standard for a claim that would otherwise receive only minimal scrutiny'.[71]

Such 'creative advoca(cy)' was apparent in *Masterpiece Cakeshop*. If free-speech and free-exercise claims were evaluated under the same standard, Mr Phillips's objection to baking a cake for a gay wedding could have been approached as a free-exercise claim, as a free-speech claim, or both. The constitutional standard, and the ultimate result, would be the same regardless of which of the three approaches were followed. The ideologically or philosophically expressive elements of Mr Phillips's claim, such as his desire not to make a literal or metaphorical statement in support of gay marriage, would have added nothing (and taken nothing away) from the claimed freedom of religious expression.

[69] I use the term 'conscience' in its modern sense to refer to one's internal sense of morality, or of right and wrong, whether stemming from religious beliefs or philosophical ones. At the time of the First Amendment's adoption, 'conscience' had a decidedly religious meaning. See W.L. Miller, n 37 above, 122-123; J. Witte Jr, 'The Essential Rights and Liberties of Religion in the American Constitutional Experiment' 71 *Notre Dame Law Review*, 371, 394 (1996).

[70] D.J. Hay, n 24 above, 211.

[71] ibid 214.

V. Potential Resolutions

Smith denied constitutional protection to religious adherents who wished to exercise their religion in ways that violated generally applicable laws. *O'Brien*, however, granted some constitutional protection (though not total immunity) to political and ideological speakers who wished to express their thoughts and beliefs in ways that violated generally applicable laws. As demonstrated above, it is wrong to apply different standards to exemption claims that differ only in that one person's reason for wanting an exemption is religious and another person's reason is moral, philosophical, or ideological.

In this section, I note some potential ways of resolving the conflict between *Smith* and *O'Brien* – first by overruling one or the other, and second by narrowing the application of *Smith* to cases of religious exercise that are not communicative. It is not within the scope of this Essay to argue for one or another of these options. Rather, I will leave that issue for a future article, and be content here to set forth a few options that might permit the Court to bring some coherence to this area of law.

1. Overrule *Smith* or *O'Brien*

The most obvious way to resolve the conflict between *Smith* and *O'Brien* is for the Court to overrule one of the cases. The Court could hold that *O'Brien*'s test of intermediate scrutiny applies to all incidental restrictions on expression imposed by generally applicable regulations of conduct, whether the expression is religious or not. Alternatively, the Court could overrule *O'Brien* and hold that generally applicable laws that impose restrictions on expression, like generally applicable laws that impose restrictions on the free exercise of religion, would trigger only the rational-basis test.

Several commentators have proposed replacing *Smith* with *O'Brien*, and applying intermediate scrutiny to claims for religious exemptions from generally applicable laws.[72] They argue that *O'Brien*'s test of intermediate scrutiny appropriately balances the competing considerations in *Sherbert* and *Smith*: protecting religious exercise against unnecessary (and perhaps unintentional) interference by government, while not being so demanding on the government as to permit a religious believer to become 'a law unto himself'.[73] The disadvantage of the test is its flexibility and therefore unpredictability. Reasonable people are

[72] See D.A. Bogen, 'Generally Applicable Laws and the First Amendment' 26 *Southwestern University Law Review*, 201, 253 (1997); B.A. Freeman, 'Expiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability' 66 *Modern Law Review*, 9, 57 (2001); D.J. Hay, n 24 above, 214-222; J.M. Oleske Jr, 'A Regrettable Invitation to 'Constitutional Resistance', Renewed Confusion over Religious Exemptions, and the Future of Free Exercise' 20 *Lewis & Clark Law Review*, 1317, 1361-63 (2017); R.A. Smolla, n 48 above, 940-942.

[73] *Reynolds* v *United States* 98 US 145, 167 (1879).

likely to disagree about whether a government's law is justified by an 'important or substantial' government interest, and whether the law is sufficiently well tailored to that interest.[74]

The opposite approach – overruling *O'Brien* and extending *Smith* – was proposed by Justice Scalia in *Barnes* v *Glen Theatre*.[75] *Barnes* involved a strip club that claimed that its dancing was constitutionally protected free speech, and that wanted an exemption from a generally applicable ban on nudity. The Court applied *O'Brien* and rejected the claim for an exemption.[76] In the view of the Court, the nudity ban was justified by the government's interest in 'protecting societal order and morality'.[77] Justice Scalia would have preferred not to apply *O'Brien* at all. He pointed out that *Smith* allowed the government to enforce generally applicable laws without granting religious exemptions, and he argued that the same rule should apply to reject individuals' claims for speech-related exemptions from generally applicable laws.

The *Smith* approach is relatively easy to apply and has an analogy in the Court's approach to the Free Press Clause.[78] Laws that are targeted against religious action, or laws that are targeted against speech or the press, would not be 'neutral' and so would be evaluated under heightened scrutiny. But speakers, members of the press, and religious persons would have to adhere to the same limitations on their conduct that neutral laws impose on everyone else.[79]

For the same reason, *Smith* has an element of fairness. Constitutionally mandated exemptions to general rules for speakers, the press, and religious people can lead to unfair impositions on other members of the population and resentment among those others who have to follow rules that the exempted groups do not have to follow. Further, exemptions can lead to false claims of religious or ideological scruples as a way of escaping the dictates of law. Heightened scrutiny also places a significant burden on government (which has to defend individual applications of its generally applicable laws) and courts (which have to evaluate the claimed exemptions). Finally, to the extent that exemptions are granted, the beneficiary of an exemption is permitted 'by virtue of his beliefs, "to become a

[74] *United States* v *O'Brien* 391 US 367, 377 (1968).

[75] See n 21 above.

[76] See ibid 567 (opinion of the Court).

[77] ibid 568.

[78] There is also an analogy to equal-protection law. Laws that discriminate on their face between racial groups, for example, trigger heightened scrutiny. But laws that merely impose disproportionate burdens on one race or another do not trigger heightened scrutiny unless they were motivated by a discriminatory purpose. *See Washington* v *Davis* 426 US 229 (1976). Likewise here, laws that facially discriminate against religious exercise, or speech, or the press would receive heightened scrutiny, but neutral laws that merely impose a burden on religious exercise, speech, or press would not.

[79] Dean Smolla, who advocated extending *O'Brien* to religious claims, favored extending it to press claims as well. See R.A. Smolla, n 48 above, 942, fn 80.

law unto himself" '.[80] The *Smith* rule is much simpler, providing a guarantee against laws that are designed to suppress religion (or speech or press), but allowing the unfettered operation of laws that merely have a disproportionate impact on religious exercise (or speech or press).

On the negative side, applying *Smith* to free-speech cases would permit the government to restrict more expressive conduct, causing society to lose benefits resulting from the free exchange of ideas. Even *Smith* itself recognized that a more protective standard might be appropriate where necessary to protect 'an unrestricted flow of contending speech'.[81]

A further problem with extending *Smith* to the free-speech context is that it would widen the disparity between the legal rule (strict scrutiny) applicable to the regulation of pure speech and the legal rule (rational basis) applicable to the regulation of expressive conduct. Because of how common it is to express ourselves through actions (eg, hand-gestures, flag-waving, eyebrow-raising, hair styles, etc), it may be inappropriate to apply a strict standard of review when the government regulates the words we use, but to apply a very deferential standard of review when the government regulates expressive conduct.

2. Narrow the Applications of *Smith* to Truly Non-Communicative Exercises of Religion

One intriguing way of squaring *Smith* with *O'Brien* is to limit *Smith*'s rational-basis test to religious exercise that is non-communicative. Stated differently, this approach would broaden *Smith*'s exception for hybrid rights to include all claims in which the religious exercise communicated a message.[82] *O'Brien* would thus apply in all instances of symbolic speech or expressive conduct because by definition only communicative conduct can be expressive conduct or symbolic speech. Religious conduct that is not expressive, however – like any other non-expressive conduct – would be evaluated under the rational-basis test.

This approach can be squared with the language of *Smith*,[83] which accepted heightened scrutiny in cases involving both speech and religious exercise,[84] and which noted that Smith's peyote-smoking was 'unconnected with any communicative activity'.[85] Where religious activity *is* communicative, then, *O'Brien* rather than *Smith* might control.

In order to square this approach with the *facts* of *Smith*, though, one would have to define 'expressive' or 'communicative' extremely narrowly so as not to include religious rites of the sort involved in *Smith*. But if 'ingest(ing) peyote for

[80] See n 2 above, 885 (quoting *Reynolds* v *United States* 98 US 145, 167 (1879)).
[81] ibid 886 (1990).
[82] See D.J. Hay, n 24 above, 214.
[83] For one attempt to do so, ibid.
[84] See *Smith* n 3 above.
[85] ibid.

sacramental purposes at a ceremony of the Native American Church'[86] is not an expressive or communicative exercise of religion, it is difficult to imagine what would be. As Daniel Hay has noted, 'acts of worship have a secondary communicative, evangelical, or didactic purpose' in addition to the purpose of serving as 'symbols of personal devotion, fidelity, or virtue.'[87] They may 'communicate stories central to their faiths'[88] or encourage others to act in accordance with the beliefs of the religion.[89] At the least, when performed in public, religious acts communicate the actor's profession of his belief in, or identification with, the religion.[90]

So while one could alleviate the inconsistency between *Smith* and *O'Brien* by limiting *Smith* to a certain class of cases and *O'Brien* to a different set, such a limitation presents challenges. The distinction would either appear to require a crabbed view of the communicative qualities of religious exercise (deeming many religious rituals 'noncommunicative' despite their genuine communicative value) or would require that *Smith* be limited to only truly noncommunicative religious exercise – a limitation that would come very close to practically overruling *Smith*.[91]

A more-promising way of limiting the conflict between *Smith* and *O'Brien* is to adopt a relatively narrow understanding of expressive conduct, but to apply *O'Brien*'s intermediate scrutiny to all expressive conduct, whether religious or ideological. The Supreme Court has already recognized that there must be limits on expressive conduct, or else *O'Brien* would apply whenever someone claimed an ideological reason for violating the law.[92] The Court's definition of expressive conduct is not well established – and a full examination is the subject of a future article – but the Court has insisted that conduct does not trigger intermediate scrutiny under *O'Brien* unless it is 'inherently' expressive.[93] That test is problematic because nothing – not even spoken sounds or lines written on paper – is *inherently* expressive. Nevertheless, the Court correctly wishes to limit expressive conduct to that conduct that would be perceived by others (not just the speaker himself) as conveying a message.[94] A mere intention of expressing oneself should not be sufficient to trigger *O'Brien* if others would not recognize the conduct as communicating a message.

As applied to *Masterpiece Cakeshop*, the question would be whether others

[86] ibid 874.
[87] D.J. Hay, n 24 above, 214.
[88] ibid.
[89] ibid 211.
[90] ibid 212.
[91] Cf M.W. McConnell, n 2 above, 163 (suggesting that a very broad reading of the hybrid-rights exception would amount to overruling *Smith*).
[92] See n 46 above.
[93] ibid 66.
[94] See n 9 above, 410-411 (requiring a likelihood that expressive conduct would be 'understood by those who viewed it').

would recognize Mr Phillips's refusal to bake the gay-wedding cake as conveying a message (whether religious or philosophical), or whether others would recognize baking such a cake to be expressive of a message (whether religious or philosophical). If the conduct would be understood as expressive, intermediate scrutiny would apply. If the conduct would not be understood as expressive (even if Mr Phillips believed it to be expressive), rational basis would apply. Either way, the religious or philosophical/ideological nature of the message would be irrelevant.

As with an approach that more simply narrows *Smith*'s scope, an approach focused on defining the limits of expressive conduct would apply the rational-basis test to non-expressive conduct. In other words, *Smith*'s rational-basis test would apply to non-communicative religious conduct, just as the rational-basis test applies to non-communicative secular conduct. Instead of either pretending that religious rituals are non-communicative or applying *O'Brien* to all conduct that is related to one's religious beliefs, however, this approach would represent a middle course. It would protect religious and ideological expression equally under *O'Brien*, but intermediate scrutiny would apply only to those behaviors that are commonly understood to be (or that are 'inherently') expressive.

VI. Conclusion

Masterpiece Cakeshop highlighted the inconsistency between two different areas of First Amendment law. By providing greater protection to ideologically motivated expressive conduct than to religiously motivated expressive conduct, the Supreme Court has created two different legal standards to evaluate conduct that is, at its essence, the same. To make matters worse, the dual standards encourage litigants to characterize religious claims as free-speech claims, permitting the dual standards to be manipulated and further demonstrating the interchangeability of the right to engage in expressive conduct found in the Free Speech Clause and the Free Exercise Clause.

The free-exercise claim and the free-speech claim in *Masterpiece Cakeshop* were the same. Regardless of which provision of the First Amendment he invoked, Mr. Phillips wished to engage in the same behavior. The fact that he had two overlapping moral reasons – religious and philosophical – for seeking an exemption from Colorado's anti-discrimination law should not have changed the legal standard applicable to his claim.

Masterpiece Cakeshop may have been decided, but other cases raising First Amendment challenges to anti-discrimination laws are on their way to the Supreme Court. When they arrive, the Court should bring coherence to this area of the law by holding that religious and secular expressive conduct holds the same constitutional value and should be evaluated under the same standard: either the intermediate scrutiny of *O'Brien* or the rational basis of *Smith*.