

# The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy

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## INTRODUCTION

Transparency in lawmaking increases the accountability of representatives to the public, encourages frank debate about specifics, reveals hidden lobbyist agendas, and reduces unintended consequences. Neither representatives primarily motivated by a desire to stay in power nor special interests embrace transparency, making it an elusive goal but still a measure of a good public policy process.<sup>1</sup> On these public policy metrics, the Religious Freedom Restoration Act's ("RFRA")<sup>2</sup> process, content, and impact fail.

RFRA was enacted by Congress on the basis of a disingenuous title; it was misleadingly presented as a benevolent law for religious actors who suffer discrimination and whose actions were benign; its operative provisions contain legalistic, opaque text; and it has yielded results that could not have been imagined by the members of Congress.<sup>3</sup> This article examines the policy and lawmaking flaws in RFRA to show that there is a better way to achieve religious accommodation, which is through legislative or executive accommodation based on facts and evidence.

In this article, I will first describe the Supreme Court's Constitution-based religious accommodation jurisprudence before the first RFRA statute

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<sup>1</sup> See generally DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE (2006); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1995).

<sup>2</sup> 42 U.S.C. § 2000bb to bb-4 (2006).

<sup>3</sup> It is also unconstitutional, but that is a matter for another forum and article. See *City of Boerne v. Flores*, 521 U.S. 507 (1997); Brief of The Freedom From Religion Foundation et al. as Amici Curiae Supporting the Petitioner, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 333897; Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 6 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 469-70 (1994); Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998).

was enacted. Second, I will describe RFRA's features and enactment, which violate widely-accepted principles of transparency. Third, I will describe the negative unintended (and intended) consequences of RFRA. Finally, I will propose an evidence-based approach to religious accommodation, which is a superior process for achieving sound public policy and the common good. In a nutshell, my proposal requires two initial steps: (1) repeal RFRA and, therefore, (2) return free exercise cases to the Court's longstanding First Amendment jurisprudence, which provided ample room for legislative and executive accommodation involving a specific practice and a specific law. Once these legal repairs have been accomplished, the accommodation process should strive for greater accountability and transparency, meaning that legislators would take a more responsible position on the potential impact of the proposed accommodation by ascertaining: (1) the laws to be affected; (2) who is seeking to avoid their obligations under the law and for what practice; (3) who would be harmed by the proposed accommodation; and (4) the views of experts in the field and the public. The bottom line is that the federal and state RFRA's have been passed through ignorance, with only religious organizations knowing what laws they intend to break with a RFRA. Legislators have an obligation to all of their constituents, religious or not, and particularly to those they might be harming unknowingly. The proposal in this article is intended to create a more just process and one that shields victims of religious conduct, of which there are many.

## I. THE SUPREME COURT'S RELIGIOUS ACCOMMODATION JURISPRUDENCE BEFORE RFRA

Under the Supreme Court's approach to rights generally, which it often calls "ordered liberty,"<sup>4</sup> the Court has held that the First Amendment's Free Exercise Clause subjects a neutral, generally applicable law to rationality review.<sup>5</sup> Although the Court has not yet precisely defined these terms, generally speaking, a "neutral" law is non-discriminatory and a "generally applicable law" treats all those who take the same action identically. Therefore, unless a neutral, generally applicable law is based on animus or is arbitrary, which is the ordinary means of invalidating laws on rationality review,<sup>6</sup> the believer must obey the law just like everyone else. But if the law is discriminatory or treats the same actions differently based on whether they are religiously motivated, strict scrutiny applies. The cases, however, do not paint a full portrait of religious accommodation in the United States, where there is

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<sup>4</sup> See *e.g.*, *Sell v. United States*, 539 U.S. 166, 180 (2003); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Palko v. Connecticut*, 302 U.S. 319, 325–28 (1937) (wherein Justice Cardozo coined the phrase).

<sup>5</sup> See *Emp't Div. v. Smith*, 494 U.S. 872, 884–85 (1990).

<sup>6</sup> See, *e.g.*, *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996).

a long history of legislative and executive accommodation starting with the Quakers' ability to avoid conscription into military service.<sup>7</sup>

A. *Analysis of Neutral and Generally Applicable Laws Under Rationality Review and Subsequent Accommodation*

In 1990, the Supreme Court took the opportunity in *Employment Division v. Smith* to survey its past free exercise doctrine and to explain the constitutional standard to be applied to laws that burden religious conduct.<sup>8</sup> The *Smith* majority—which was written by Justice Antonin Scalia, who was joined by Chief Justice William Rehnquist and Justices Byron White, John Paul Stevens, and Anthony Kennedy—summarized the Court's prior doctrine accurately, stating that the “vast majority” of the Court's cases had not applied strict scrutiny to neutral, generally applicable laws.<sup>9</sup> The Court has consistently followed this reasoning that religious actors are obligated to obey the laws that govern everyone else and that no one may be a law unto oneself.<sup>10</sup>

*Smith* is the leading case on the treatment of neutral, generally applicable laws. In *Smith*, employees of a private drug rehabilitation organization were fired for using peyote, a drug illegal under the state controlled substance law, during a ceremony of their Native American Church; Oregon denied them unemployment compensation because, under Oregon state law, employees could not receive such compensation if fired for employment-related misconduct.<sup>11</sup> The drug laws and the unemployment compensation system were neutral and generally applicable; therefore, the Court applied rationality review and held that the drug counselors did not have a constitutional right to use an illegal drug in violation of their employment requirements, and, therefore, they could not get unemployment compensation.<sup>12</sup>

The *Smith* facts are admittedly complicated, so a more straightforward example of a neutral, generally applicable law being applied to a religious believer is in order: if a driver is stopped for speeding, the fact that she is a believer or that she is late for church does not relieve her of the obligation to abide by speed limits. Similarly, the religious organization that negligently or recklessly puts children at risk of pedophile employees in violation of ordinary tort law is not shielded by the First Amendment.<sup>13</sup> The Court has

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<sup>7</sup> See *Seeger v. United States*, 380 U.S. 163, 169–73 (1965).

<sup>8</sup> See *Smith*, 494 U.S. at 877–82.

<sup>9</sup> See *id.* at 885.

<sup>10</sup> See, e.g., *id.* at 879; *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878).

<sup>11</sup> *Smith*, 494 U.S. at 874.

<sup>12</sup> See *id.* at 890.

<sup>13</sup> See, e.g., *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (2d Cir. 1999); *Doe v. St. John's Episcopal Parish Day Sch., Inc.*, 997 F. Supp. 2d 1279, 1289–90 (M.D. Fla. 2014); *Colomb v. Roman Catholic Diocese of Burlington, Vermont, Inc.*, No. 2:10-CV-254, 2012 WL 4479758, at \*6 (D. Vt. Sept. 28, 2012); *Jane Doe 130 v. Archdiocese of Portland in Or.*, 717 F. Supp. 2d 1120, 1138 (D. Or. 2010); *Mary Doe SD v. The Salvation Army*, No. 4:07CV362MLM, 2007 WL 2757119, at \*5 (E.D. Mo. Sept. 20, 2007); *Doe v. Norwich Roman Catholic Diocesan Corp.*, 268 F. Supp. 2d 139 (D. Conn. 2003); *Smith v.*

applied the principle that the law applies to everyone engaging in the same action across the faith spectrum. Even though the Amish believe that the Social Security system interferes with their belief in taking care of their elders themselves, the First Amendment did not shield them from the obligation to pay their employees' Social Security taxes.<sup>14</sup> Native Americans who objected to federal plans affecting sacred sites did not have a free exercise right to direct the federal government how to use its own land.<sup>15</sup> Nor did the Free Exercise Clause accord a Jewish Air Force officer the right to wear a yarmulke in violation of the armed services uniform code,<sup>16</sup> nor Native American parents a right to refuse to have a social security number assigned to a child to obtain welfare benefits despite their beliefs.<sup>17</sup>

Historically, religious accommodation has not stopped at the courthouse. When believers were unable to obtain exemption to neutral, generally applicable laws under the First Amendment from the courts, they routinely turned to the state and federal legislatures or the executive branches for accommodation or exemptions. Each of the examples I describe in the preceding paragraph were followed by legislative accommodation in relatively short order: the Amish obtained an exemption from social security taxes;<sup>18</sup> Native Americans received protections to use sacred sites on federal land;<sup>19</sup> welfare recipients no longer had to assign a social security number to their children as a pre-condition to receiving benefits;<sup>20</sup> and members of the military received a religious headgear exemption.<sup>21</sup> There was even an exemption for communion wine for sacramental purposes during Prohibition.<sup>22</sup> State and federal law are actually awash in other permissive accommodations as well, from the bankruptcy code to civil rights to medical neglect laws.<sup>23</sup> *Smith* followed the same pattern, where legislative exemptions were

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O'Connell, 986 F. Supp. 73, 80 (D.R.I. 1997); *Doe v. Hartz*, 970 F. Supp. 1375, 1431–32 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998); *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169, 1175 (N.D. Tex. 1995), *aff'd*, 134 F.3d 331 (5th Cir. 1998); *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66 (D. Conn. 1995); *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1151 (E.D. Mich. 1995); *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002); *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436 (Tenn. 2012). *But see* *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997).

<sup>14</sup> *United States v. Lee*, 455 U.S. 252, 263 (1982).

<sup>15</sup> *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441–42 (1988).

<sup>16</sup> *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986).

<sup>17</sup> *Bowen v. Roy*, 476 U.S. 693, 712 (1986).

<sup>18</sup> 26 U.S.C. § 3127 (2006). This statute was first enacted in 1988, six years after *Lee*.

<sup>19</sup> 16 U.S.C. § 460bbb (2006). Also known as the Smith River National Recreation Area Act, this statute was passed two years after *Lyng*.

<sup>20</sup> *See, e.g.*, G.A. CODE ANN. § 49-4-184 (1997), which establishes a “good cause” exception for not cooperating with the Georgia TANF Program to establish eligibility.

<sup>21</sup> 10 U.S.C. § 774 (2006). This provision was enacted in 1987, one year after *Weinberger*.

<sup>22</sup> *Emp't Div. v. Smith*, 494 U.S. 872, 914 n.6 (1990) (Blackmun, J., dissenting) (“[R]espondents’ use of peyote seems closely analogous to the sacramental use of wine by the Roman Catholic Church. During Prohibition, the Federal Government exempted such use of wine from its general ban on possession and use of alcohol.”) (citing National Prohibition Act, Pub. L. No. 66, tit. II, § 3, 41 Stat. 305 (1919) (repealed in 1934)).

<sup>23</sup> There is an exemption in the federal bankruptcy code for houses of worship to avoid having parishioners’ donations drawn back into the bankrupt’s estate. *See* 11 U.S.C. § 438 (2006). Title VII includes exemption for religious corporations. 42 U.S.C. § 2000e-1 (2006).

enacted not long after the Court held that the exemptions were not constitutionally mandated.<sup>24</sup>

The Court also acknowledged approvingly the American tradition of legislative accommodation, which was not mandated by the Constitution but part of a generous attitude toward religious liberty.<sup>25</sup>

### B. Analysis of Discriminatory Laws under Strict Scrutiny

In dictum in *Smith*, the Court stated that strict scrutiny is required for cases involving laws that were either not neutral or not generally applicable.<sup>26</sup> The Court has not laid out clear definitions to date, but generally a non-neutral law is discriminatory and a law that is not generally applicable burdens religious conduct but not nonreligious conduct, which means that the law must serve a “compelling interest” and be “narrowly tailored” to serve that interest.<sup>27</sup> The *Smith* Court elaborated on this point to say that strict scrutiny had been reserved for instances where religious reasons were afforded less weight than secular reasons in a handful of unemployment compensation cases,<sup>28</sup> which the Court has treated as a “kind of discrimination.”<sup>29</sup> Thus, whenever a law burdens religious actors more negatively than others doing precisely the same thing, strict scrutiny has been required. For example, when Adelle Sherbert could not obtain unemployment compensation for missing Saturdays at work for religious reasons but could have for secular reasons, the Court applied strict scrutiny.<sup>30</sup> That reasoning was applied in later unemployment cases with similar issues.<sup>31</sup> When the City of Hialeah, Florida, enacted an animal “sacrifice” ordinance that burdened solely the Santerians but no others engaging in the same or similar practices of killing animals, the Court treated it as a failure of general applicability, calling it a “gerrymander,” and applied traditional strict scrutiny.<sup>32</sup>

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There are medical neglect exemptions for faith healing parents. See *Religious Exemptions From Health Care For Children*, CHILD INC., <http://perma.cc/LGQ6-7DNT>.

<sup>24</sup> See, e.g., OR. REV. STAT. § 475.752 (2013), which allows religious use as an affirmative defense for peyote consumption.

<sup>25</sup> *Smith*, 494 U.S. at 890.

<sup>26</sup> *Id.* at 882, 885–86.

<sup>27</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 533, 539, 542, 546 (1993). Only one Supreme Court free exercise case has employed strict scrutiny of a law that is neutral and generally applicable, and the *Smith* Court tried to explain it as an example of a “hybrid” right, *Smith*, 494 U.S. at 882, though in the end that category has been difficult to define and hard to defend. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (applying compelling interest test in a case involving state compulsory education law). See also MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* 256 (2d rev. ed. 2014) (discussing *Yoder*).

<sup>28</sup> *Smith*, 494 U.S. at 876, 883 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

<sup>29</sup> *United States v. Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J., concurring); Marci A. Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, The Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1683 (2011).

<sup>30</sup> *Sherbert*, 374 U.S. 398 (1963), cited in *Smith*, 494 U.S. at 883.

<sup>31</sup> See, e.g., *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144 (1987); *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 835 (1989).

<sup>32</sup> *Hialeah*, 508 U.S. at 521–22.

Many tried to argue that *Smith* should have been decided under the reasoning of the earlier unemployment compensation cases, but the Court did not see them as being the same. Rather, the earlier cases involved employees being treated differently according to whether their reason was religious or non-religious, and employees whose religious practice was legal. *Smith*, in contrast, involved laws that applied equally to religious and non-religious actors, and the religious practices themselves were illegal.<sup>33</sup>

C. *Super-Strict Scrutiny Was Never Applied by the Supreme Court in Free Exercise Cases*

At this juncture, it is also worthwhile to describe the standard that the Court never applied in its free exercise cases so as to explain what happened with RFRA. While RFRA was pending, the Supreme Court considered the *Hialeah* case and was urged to adopt a standard the Court had never employed in any free exercise case. In *Church of Lukumi Babalu Aye v. City of Hialeah*, Professor Douglas Laycock for the church asserted that super-strict scrutiny should be the test, stating that the “[g]overnment cannot regulate religion, except as the incidental effect of neutral and generally applicable laws, or to serve a compelling interest by *the least restrictive means*.”<sup>34</sup> In other words, he substituted “least restrictive means” for the “narrowly tailored” requirement from the Court’s prior cases.

The *Hialeah* Court had never adopted such a standard and did not adopt Laycock’s proffered standard with seven members—Chief Justice William Rehnquist, Justice Anthony Kennedy, Justice Byron White, Justice John Paul Stevens, Justice Antonin Scalia, Justice David Souter, and Justice Clarence Thomas—applying the ordinary strict scrutiny described above that only requires the government to prove a compelling interest and “*narrow tailoring*.”<sup>35</sup>

The difference between “narrow tailoring” and “least restrictive means” is significant. “Narrow tailoring” means that the law is well-tailored to the government interests it is supposed to serve. It does not mean that the means must be specifically tailored to each individual claimant, however. For narrow tailoring, the government does not have to prove that it has considered and rejected all less restrictive alternatives.<sup>36</sup>

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<sup>33</sup> See generally Hamilton, *supra* note 29.

<sup>34</sup> Brief for Petitioner at 14, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (No. 91-948), 1992 WL 541280, at \*7 (emphasis added).

<sup>35</sup> *Hialeah*, 508 U.S. at 531–32 (“Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”).

<sup>36</sup> See *Hill v. Colorado*, 530 U.S. 703, 726 (2000) (“When a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.”); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477–78 (1989); *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989) (“So long as the means chosen are not substantially broader than necessary to achieve the government’s interest . . . the regulation will not be

In contrast, proving that it is using the “least restrictive means” is significantly more difficult for the government. The practical effect of the “least restrictive means” test is that the court sits as a super-legislature, second-guessing the law and creatively imagining how to tailor this law to benefit this believer. As Justice Powell stated in 1980, and it still remains true, “this ‘means’ test has been virtually impossible to satisfy.”<sup>37</sup>

## II. THE FLAWED TITLE, PASSAGE, AND TEXT OF RFRA

It is difficult to understand or explain the vitriol leveled at *Smith*. I think it may have been the deflation of hope. Litigators in free exercise cases had been urging the Court to choose a different path on religious liberty since Justice Brennan first introduced the possibility of strict scrutiny in *Sherbert v. Verner*, but the *Sherbert* case was about a form of discrimination where a religious actor could not establish “good cause” for missing work, but someone with a secular reason could and, therefore, it was not about the application of ordinary law to everyone taking the same action.<sup>38</sup> The Court had taken the suggestion one time to apply strict scrutiny to a neutral, generally applicable law, in *Wisconsin v. Yoder*,<sup>39</sup> but that case stands alone in the Court’s jurisprudence, and a single case does not define a doctrine. Routinely, the Court had declined to pick up strict scrutiny or to hold that believers had the capacity to trump neutral, generally applicable laws. Between 1963 when *Sherbert* was decided and 1990 when *Smith* was announced, hope apparently grew that the strict scrutiny that was rarely applied in any free exercise case eventually would be applied in all. But that hope was unrealistic and failed to take into account the vast majority of the Court’s free exercise cases. The Court held to its commonsense and historically-grounded approach to free exercise with few exceptions.

RFRA is a federal statute that was enacted in reaction to *Employment Division v. Smith*,<sup>40</sup> which was unfairly maligned and mischaracterized by academics and religious lobbyists alike.<sup>41</sup> In hundreds of pages of legislative history, lobbyists demanded that Congress “reverse” *Smith* for the purpose of “restoring” constitutional doctrine.<sup>42</sup> Their actual goal, however, was not to “restore” doctrine but rather to institute a new doctrine: a single super-strict scrutiny standard to be applied across the board to all laws, which they

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invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.”); *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 98 (2d Cir. 2006) (“A content-neutral ‘time, place or manner’ restriction will be considered narrowly tailored unless ‘a substantial portion of the burden on speech does not serve to advance its goals.’” (quoting *Ward*, 491 U.S. at 799)).

<sup>37</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring); see also *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 473–74 (5th Cir. 2014).

<sup>38</sup> See *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>39</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972).

<sup>40</sup> *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

<sup>41</sup> See generally Hamilton, *supra* note 29, at 1673–74.

<sup>42</sup> See *id.* at 1693–97.

had been unable to secure from the Court. Despite the rhetoric of “restoration,” they were demanding a new, extreme standard for free exercise cases,<sup>43</sup> which was concocted from constitutional standards to be applied across unnamed and vast swaths of the law. No statute had ever been *exclusively* a constitutional standard, and no civil rights law had ever commanded that the government assume this new, heavy burden in all contexts, whether or not there was discrimination. This new, heavy burden on the government ignored the Court’s previous distinction between neutral and generally applicable laws and laws that targeted or discriminated against religion. RFRA is a prime example of the Court’s warning that “[l]egislative novelty is not necessarily fatal; there is a first time for everything. But sometimes ‘the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent’ for Congress’s action.”<sup>44</sup>

As explained in Part I, under the Supreme Court’s explanation of its own free exercise doctrine, there were two levels of scrutiny: (1) for neutral and generally applicable laws, rationality review applies;<sup>45</sup> and (2) for laws that are not neutral or not generally applicable, strict scrutiny is required, which is defined as a burden on the government to prove the law serves a “compelling interest” that is “narrowly tailored” to that interest.<sup>46</sup> RFRA effects a double replacement: first, it elevates the level of scrutiny for neutral and generally applicable laws to super-strict scrutiny, *and*, second, it does so for laws that are not neutral and generally applicable. The new burden placed on governments to defend all laws that are found to substantially burden religious conduct requires the government to prove a “compelling interest” that achieves that aim in the “least restrictive means.”<sup>47</sup>

Here is the heart of RFRA, enacted in 1993:

- (a) In General. – Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

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<sup>43</sup> S. REP. NO. 103-111, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898 (“To assure that all Americans are free to follow their faiths free from governmental interference, the committee finds that legislation is needed to restore the compelling interest test.”); H.R. REP. NO. 103-88 (1993) (“Because the ‘rational relationship test’ only requires that a law must be rationally related to a legitimate state interest, the Smith decision has created a climate in which the free exercise of religion is continually in jeopardy; facially neutral and generally applicable laws have and will, unless the Religious Freedom Restoration Act is passed, continue to burden religion.”)

<sup>44</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586 (2012) (Roberts, C.J.) (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 505 (2010) (internal quotation marks omitted)).

<sup>45</sup> *Smith*, 494 U.S. at 873.

<sup>46</sup> Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

<sup>47</sup> 42 U.S.C. § 2000bb-1(b)(1) (2006).



- (b) Exception. – Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person –
- (1) is in furtherance of a compelling governmental interest; and
  - (2) is the least restrictive means of furthering that compelling governmental interest.<sup>48</sup>

RFRA provides that its “purpose” is:

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.<sup>49</sup>

This statutory text was enacted on the basis of false premises, is opaque constitutional verbiage, and resulted from misleading lobbying tactics. In addition, it is now defended on false representations about its enactment. The inevitable result was unintended consequences.

#### A. A Misleading Title

Misleading bill titles have been a recurring problem for transparency in legislatures. A title that does not accurately reflect the content can create a nearly insuperable barrier to an honest and full debate on the merits of a bill. Some states have instituted a “one-subject” rule in order to deter hiding content behind a title that fails to accurately describe the content of the bill.<sup>50</sup> The essential problem with a misleading title is that it hides agendas and issues, leaving only insiders with the knowledge needed to assess and critique the bill. In Congress, appropriations riders with pork-barrel spending have been routinely criticized for their lack of transparency.<sup>51</sup> RFRA fails on this public policy metric.

<sup>48</sup> 42 U.S.C. § 2000bb-1 (2006).

<sup>49</sup> 42 U.S.C. § 2000bb (2006).

<sup>50</sup> ARIZ. CONST. art. XXI, § 1, art. IV, pt. 2, § 13; CAL. CONST. art. II, § 8(d); COLO. CONST. art. V, § 1 (5.5); FLA. CONST. art. XI, § 3; MO. CONST. art. III, § 50; MONT. CONST. art. V, § 11; NEB. CONST. art. III, § 2; OKLA. CONST. art. 5, § 57; OR. CONST. art. IV, § 1(2)(d); PA. CONST. art. III, § 3; UTAH CONST. art. VI, § 22; WASH. CONST. art. 2, § 19; WYOM. CONST. art. III, § 24; ALASKA STAT. § 15.45.040; COLO. REV. STAT. 1-40-106.5; NEV. REV. STAT. § 295.009; OHIO REV. CODE ANN. § 295.009.

<sup>51</sup> See Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 532–33 (2009). See generally LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON*, *supra* note 1; SCHOENBROD, *POWER WITHOUT RESPONSIBILITY*, *supra* note 1; Marc T. Law, Joseph M. Toner & Gary J. Miller, *Earmarked: The Political Economy of Agricultural Research Appropriations*, 30 REV. AGR. ECON. (2008).

There are critical differences between the First Amendment's Free Exercise Clause and RFRA. The rhetoric employed to lobby for RFRA (and its state counterparts<sup>52</sup>) as though it was a mirror image of the First Amendment has been just that—rhetoric. RFRA is not a mirror image of the First Amendment doctrine, as discussed above.

RFRA's new standard was sold to Congress as a "restoration," implying not only that the Supreme Court had turned on its own previous doctrine but also that returning to this doctrine would be familiar and safe. This rhetorical sleight of hand likely carried the day, but it is false and deeply disrespectful of the Supreme Court's own description of its free exercise doctrine before RFRA entered the picture, which it reaffirmed in 1997, 2006, and 2014. In 1990 in *Smith*, the Supreme Court stated that "the sounder approach, and the approach in accord with the *vast majority of our precedents*, is to hold the [compelling interest] test inapplicable to such challenges [to neutral and generally applicable laws]."<sup>53</sup> In 1997, four years after RFRA was first enacted and three years before it was re-enacted, the Court again stated clearly that "RFRA's most serious shortcoming . . . lies in the fact that it is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections, proscribing state conduct that the Fourteenth Amendment itself does not prohibit."<sup>54</sup> In other words, the terms of RFRA did not reflect the Court's interpretation of the First Amendment, but rather amounted to nothing less than a constitutional amendment ratified through a simple majority vote. In 2006, the Supreme Court *again* stated that RFRA did not reflect the Court's free exercise standard under the First Amendment:

We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause.<sup>55</sup>

In 2014, the Court yet again stated that "the least restrictive means requirement 'was not used in the pre-*Smith* jurisprudence RFRA purported to codify'" and that RFRA "does not accurately convey the Court's pre-*Smith* First Amendment doctrine."<sup>56</sup> How many times must the Court explain its own doctrine in English before law professors and lobbyists will concede that RFRA is a leap beyond the Court's doctrine? Supporters were

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<sup>52</sup> There are currently 20 extreme state religious liberty laws, which reflect to greater and lesser degrees the federal RFRA. Marci A. Hamilton, *Development of State RFRA Statutes*, RFRA PERILS, <http://perma.cc/VB78-KT3D>.

<sup>53</sup> *Emp't Div. v. Smith*, 494 U.S. 872, 885 (1990) (emphasis added).

<sup>54</sup> *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

<sup>55</sup> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006).

<sup>56</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2793 (2014).

still making such claims the day that *Hobby Lobby* was decided.<sup>57</sup> The mythology is persistent, as state legislators introducing state-level RFRA have routinely stated that the federal RFRA “restores” prior law and, therefore, a state’s RFRA will do the same thing.<sup>58</sup>

While the standard that RFRA would impose on all laws was exceptional, the title of RFRA—the Religious Freedom *Restoration* Act—was selected to deflect this reality. It was purportedly a “restoration” of prior law. RFRA was no such thing, but members of Congress and civil liberties groups accepted the religious lobbyists’ claims uncritically, filling the legislative history with rhetoric claiming that RFRA “restored” prior religious liberty standards and would save the country from the Supreme Court’s supposedly misguided reading of its own cases in *Smith*.<sup>59</sup> Members of Congress failed at the most basic level. They did not even compare the Supreme Court’s own language about its own standards with RFRA, and instead uncritically accepted the hyperbolic claims from the pro-RFRA coalition that *Smith* was an injustice and RFRA a benign fix. The *Hialeah* case is the most recent free exercise case in which the Court has applied strict scrutiny in a Free Exercise Clause case, and, as discussed above, the Court declined the invitation to adopt a new strict scrutiny standard. The timing is important: five months after the Court rejected the “least restrictive means” test, President Clinton signed RFRA into law with that rejected standard as though RFRA was restoring tried and true tests. It is hard to put this more clearly: those who claim that RFRA “restores” the Court’s doctrine are ignoring the Court’s own description of its own cases.

RFRA not only introduces super-strict scrutiny, but also does not apply rationality review to *any* free exercise cases. Whereas rationality review was the standard applicable in the “vast majority” of prior cases, under RFRA those laws are subjected to a novel version of strict scrutiny. Second, the laws that are not neutral or not generally applicable are not subjected to the Court’s ordinary strict scrutiny doctrine. Rather, all laws are subjected to super-strict scrutiny, because RFRA’s drafters were not satisfied with ordinary strict scrutiny.

This jump in the level of scrutiny was often ignored because people are taken in by the statute’s title and the fact it invokes a return to *Sherbert v.*

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<sup>57</sup> *Newshour*, BBC WORLD SERVICE (June 30, 2014), available at <http://perma.cc/Y894-E63F>.

<sup>58</sup> Marci A. Hamilton, *Development of State RFRA Statutes*, RFRA PERILS, <http://perma.cc/VB78-KT3D>.

<sup>59</sup> S. REP. 103-111, at 8, reprinted in 1993 U.S.C.C.A.N. 1892, 1898 (“The Religious Freedom Restoration Act of 1993 is intended to restore the compelling interest test previously applicable to free exercise cases by requiring that government actions that substantially burden the exercise of religion be demonstrated to be the least restrictive means of furthering a compelling governmental interest.”); (“The purposes of this chapter [21B] are – (1) to restore the compelling interest test as set forth in and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”).

*Verner and Wisconsin v. Yoder*.<sup>60</sup> But neither of those cases, while requiring a compelling interest test, imposed the “least restrictive means” test on the government. (And, in truth, *Yoder*’s application of ordinary strict scrutiny to a neutral, generally applicable law is the exception that proves the rule.)

When the government’s burden is increased to the “least restrictive means” test, the believer has a significantly higher likelihood of success, and the people protected by the law have a lower likelihood of protection. The standard, in fact, demands that the law be tailored to this particular individual. It turns each believer into a “law unto himself,” which is precisely what the Supreme Court warned against in its first free exercise case<sup>61</sup> and its more recent cases.<sup>62</sup>

For example, in *Burwell v. Hobby Lobby*,<sup>63</sup> the Supreme Court held that RFRA absolves large, for-profit, non-religious corporations of the obligation to provide their female employees with the full panoply of contraceptive health care coverage as part of their health insurance plan. In the process of addressing the RFRA test, the majority reasoned that it is less restrictive on the employer to have the government pay for the contraceptives.<sup>64</sup> That is true, but the government had not provided in the law that it would pay for contraceptive coverage for millions of American women who work for closely held corporations that could raise a challenge under RFRA to covering some or all contraception, as such coverage is not politically feasible in an era of budget shortfalls and the movement among some to turn back not only abortion laws but also the availability of contraception. Therefore, the Court concluded that there is a pie-in-the-sky least restrictive means for the government’s compelling interest to be served, where least restrictive means apparently do not need to take into account economic or political feasibility of the lesser restrictive means. If the supposed lesser restrictive means is impossible to achieve, it should not be considered an alternative.

The “least restrictive means” test has played havoc with common sense in other cases where the courts have employed RFRA to micromanage the law for an individual believer. For example, a member of the Fundamentalist Church of Jesus Christ of Latter-day Saints argued that he should not have to testify regarding the church’s practices in a federal investigation into potential labor law violations, because of their belief in secrecy about their practices.<sup>65</sup> A Texas city ordinance that prohibited keeping animals for slaughter in a residential district had to be more tailored, e.g., by creating a permit

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<sup>60</sup> 42 U.S.C. § 2000bb-1(b)(1) (2006).

<sup>61</sup> *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

<sup>62</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 520 U.S. 508, 569 (1993); *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (citing *Reynolds*, 98 U.S. at 167).

<sup>63</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

<sup>64</sup> *Id.* (“The most straightforward way of [reaching its goal] would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections. This would certainly be less restrictive of the plaintiffs’ religious liberty, and HHS has not shown, see § 2000bb-1(b)(2), that this is not a viable alternative.”).

<sup>65</sup> *Perez v. Paragon Contractors Corp.*, No. 2:13-CV-281 RJS, 2013 WL 4478070 (D. Utah Aug. 21, 2013).

system for religious homeowners to apply individually for such uses.<sup>66</sup> The Government could not deny a permit to carry eagle feathers to sincere practitioners of Native American religions solely because they were not a part of a federally recognized tribe.<sup>67</sup> And a city's zoning board could not prohibit a church from using part of its property as a homeless shelter in a residential neighborhood.<sup>68</sup> The closest analogue to the RFRA cases for the federal courts lies in the Court's now-discredited venture into a substantive due process right to contract in *Lochner v. New York* and its progeny, which the Court eventually abandoned because it was not institutionally equipped to second-guess legislative judgments. As Senator Strom Thurmond pointed out after RFRA was surreptitiously re-enacted in 2000, this risk of judicial overreach is especially pronounced in the prison and military contexts, where the courts had previously deferred on safety and security issues.<sup>69</sup>

In any event, the "restoration" in RFRA's title is misleading in terms of content and provided a false assurance to legislators that there would be no harmful consequences. The title pulled the wool over the eyes of legislators and the public, and that blindness was abetted by the opacity of the statute's text.

### B. *Misleading Lobbying Tactics*

Mainstream religious groups took the lead in pushing for RFRA, while religious organizations and believers that would have raised warning flags were not included or mentioned in legislative testimony. As Diana Eck, who leads the Pluralism Project at Harvard University, has documented, the United States is a country of extraordinary religious diversity.<sup>70</sup> There are huge mainstream religious organizations, tiny cults, and all sizes in between, and all of them are capable of behaving in ways that are legal and illegal. Congress was persuaded to adopt RFRA by the "Coalition for the Free Exercise of Religion," which grew in membership over time.<sup>71</sup> Thirty-four mainstream organizations—a mix of religious and civil liberties groups—were listed in the Congressional Record, including the United Methodist Church, the United States Catholic Conference, the American Civil Liberties Union, the American Jewish Committee, and Americans United for Separation of Church and State, among others.<sup>72</sup>

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<sup>66</sup> See generally *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009).

<sup>67</sup> See generally *United States v. Hardman*, 297 F.3d 1116 (10th Cir. 2002).

<sup>68</sup> See generally *The Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698 (Mich. Ct. App. 1996).

<sup>69</sup> 146 CONG. REC. S7991-02 (daily ed. Sept. 5, 2000) (statement of Sen. Strom Thurmond) (objecting to application of RFRA and RLUIPA to prisons and the military, affirming the promise that the General Services Administration would study its impact and stating that future administrations should exempt the prisons and military from their reach).

<sup>70</sup> See generally DIANA L. ECK, *A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION* (2001).

<sup>71</sup> HAMILTON, *supra* note 27, at 24–27.

<sup>72</sup> The full list of organizations listed in the Congressional Record includes Agudath Israel of America, American Association of Christian Schools, American Conference of Religious

The list eventually doubled,<sup>73</sup> but the Coalition never included some long-established, mainstream religions, like Buddhism or Hinduism. It certainly did not include those that would have given members of Congress the pause they needed to realize that RFRA was a Pandora's box. Imagine the list the Coalition presented interspersed with any of the following: Al Qaeda,<sup>74</sup> Children of God,<sup>75</sup> America's Promise Ministries,<sup>76</sup> Christian Patriarchy Movement,<sup>77</sup> Church of Euthanasia,<sup>78</sup> Church of Satan,<sup>79</sup> Church of the

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Movements, American Humanist Association, American Jewish Committee, American Jewish Congress, American Muslim Council, Americans for Democratic Action, Americans for Religious Liberty, Anti-Defamation League, Association of Christian Schools International, Association of American Indian Affairs, Baptist Joint Committee, Christian Legal Society, Church of Jesus Christ of Latter-day Saints, Church of Scientology, Coalitions for America, Concerned Women For America, Conference of Seventh-day Adventists, Episcopal Church, Evangelical Lutheran Church, Jesuit Social Ministries, Mennonite Central Committee, National Association of Evangelicals, National Council of Churches, People for the American Way, Presbyterian Church, Southern Baptist Convention, Traditional Values Coalition, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations. *Id.* at 24; *see also* 139 CONG. REC. S14350 (statement of Sen. Hatch).

<sup>73</sup> By the time the coalition filed an amicus brief in favor of RFRA in *Boerne v. Flores* in 1996, the following groups were added: American Baptist Churches USA, American Ethical Union, Washington Ethical Action Office, B'nai B'rith, Central Conference of American Rabbis, Christian Church (Disciples of Christ), Christian Legal Society, Christian Life Commission, Southern Baptist Convention, Christian Science Committee on Publication, Church of the Brethren, Coalition for Christian Colleges and Universities, Council of Jewish Federations, Council on Religious Freedom, Council on Spiritual Practices, Criminal Justice Policy Foundation, Friends Committee on National Legislation, Guru Gobind Singh Foundation, Hadassah, the Women's Zionist Organization of America, Inc., Home School Legal Defense Association, International Association of Jewish Lawyers and Jurists, International Institute for Religious Freedom, The Jewish Reconstructionist Federation, Muslim Prison Foundation, Mystic Temple of Light, Inc., National Campaign for a Peace Tax Fund, National Committee for Public Education and Religious Liberty, National Council of Churches of Christ in the USA, National Council of Jewish Women, National Council on Islamic Affairs, National Jewish Commission on Law and Public Affairs, National Jewish Community Relations Advisory Council, National Sikh Center, Native American Church of North America, Native American Rights Fund, North American Council for Muslim Women, Peyote Way Church of God, Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (USA), Rabbinical Council of America, Sacred Sites Inter-faith Alliance, Soka-Gakkai International – USA, Unitarian Universalist Association of Congregations, United Church of Christ, Office for Church in Society, General Board of Church and Society, The General Council on Finance and Administration, United Synagogue of Conservative Judaism, Wisconsin Judicare, and Women of Reform Judaism, Federation of Sisterhoods. HAMILTON, *supra* note 27, at 25–27.

<sup>74</sup> Al-Qaeda's goal is to unite Muslims to fight the United States as a means of defeating Israel, overthrowing regimes it deems "non-Islamic," and expelling Westerners and non-Muslims from Muslim countries. The group planned and carried out the September 11, 2011 attacks in New York, NY, Washington, DC, and Shanksville, PA. *See Al Qaeda*, THE INVESTIGATIVE PROJECT ON TERRORISM, <http://perma.cc/R64A-KRS8>.

<sup>75</sup> Children of God is a worldwide child-sex abuse, physical abuse, and forced labor cult that started in Berkeley, CA. *See* Jay Schadler & Karson Yiu, *The Tragic Legacy of the Children of God*, ABC NEWS (Nov. 1, 2007), <http://abcnews.go.com/Nightline/story?id=3797272>, <http://perma.cc/9VQX-M7LG>; Julia Llewellyn Smith, *How a Cult Stole My Life*, THE TELEGRAPH (Nov. 1 2014), <http://www.telegraph.co.uk/culture/books/11184489/taylor-stevens-joaquin-phoenix-david-berg-children-of-god.html>, <http://perma.cc/WE8F-VNU8>.

<sup>76</sup> America's Promise Ministries is known for its white separatist and anti-Semitic message. *America's Promise Ministries*, SOUTHERN POVERTY LAW CENTER, <http://perma.cc/Y3N4-JT2W>.

<sup>77</sup> The Christian Patriarchy Movement, made famous by the Duggar family, "preach[es] a combination of beliefs that run counter to mainstream America: absolute female submission, a

New Song,<sup>80</sup> Council of Conservative Citizens,<sup>81</sup> Followers of Christ Church,<sup>82</sup> Fundamentalist Church of Jesus Christ of Latter-Day Saints or any other polygamist group,<sup>83</sup> Institute in Basic Life Principles,<sup>84</sup> Israelite Church of God in Jesus Christ,<sup>85</sup> Jewish Defense League,<sup>86</sup> Ku Klux Klan,<sup>87</sup> League

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ban on dating, homeschooling, a rejection of higher education for women, and shunning of contraception in favor of trying to have as many children as humanly possible.” Amanda Marcotte, *Sex Scandal Rocks the Duggars’ Christian Patriarchy Movement*, THE DAILY BEAST (Apr. 16, 2014), <http://perma.cc/BWA2-ACFN>. Movement founder Doug Philips was recently sued by a woman alleging that he had lured her into a five-year-long relationship as a “personal sex object.” Chelsea Schilling, *Christian Giant Sued for ‘Using Nanny as Sex Object’*, WND EDUCATION (Apr. 15, 2014), <http://perma.cc/SZS8-VCF9>.

<sup>78</sup> The Church of Euthanasia uses the slogan “Save the planet, kill yourself.” *Church of Euthanasia FAQ*, CHURCH OF EUTHANASIA, <http://perma.cc/TTGJ-7KXP>.

<sup>79</sup> The Church of Satan’s fundamental beliefs include: “. . . to be self-centered, with ourselves being the most important person (the “God”) of our subjective universe . . . Satan to us is a symbol of pride, liberty and individualism, and it serves as an external metaphorical projection of our highest personal potential. We do not believe in Satan as a being or person.” *F.A.Q. Fundamental Beliefs*, CHURCH OF SATAN, <http://perma.cc/GVD4-GPMZ>.

<sup>80</sup> The Church of the New Song is a religion created by a federal inmate, which required prisoners to be served sherry and steak as communion. *Church of New Song Under Attack in Court*, DESERET NEWS (Feb. 26, 2005), <http://perma.cc/H5VA-G54A>.

<sup>81</sup> The Council of Conservative Citizens “. . . has evolved into a crudely white supremacist group whose website has run pictures comparing pop singer Michael Jackson to an ape and referred to blacks as ‘a retrograde species of humanity.’” *Council of Conservative Citizens*, SOUTHERN POVERTY LAW CENTER, <http://perma.cc/C95H-CCXS>.

<sup>82</sup> From 1997–1998, this church, which is based in Oregon, allowed three children to die from medical neglect. A subsequent investigation led to the discovery of a seventy-eight-child grave, twenty-one of whom could have been saved by basic medical care. However, prosecutors were “stymied by Oregon law that allowed individuals who let their children die as a result of their religious beliefs to use their faith as a defense in homicide and child abuse prosecutions.” HAMILTON, *supra* note 27, at 68. In November 2013, an investigation in Idaho resulted in the discovery of ten more deceased children, dead from medical neglect. Dan Tilkin, *Fallen Followers: Investigation Finds 10 More Dead Children of Faith Healers*, KATU NEWS (Nov. 7, 2013), <http://perma.cc/4NJ5-62MB>.

<sup>83</sup> The Fundamentalist Church of Jesus Christ of Latter-Day Saints believes in practicing polygamy. CNN Library, *Fundamentalist Church of Jesus Christ of Latter-Day Saints Fast Facts*, CNN (April 22, 2014), <http://perma.cc/9YJ2-L5C8>.

<sup>84</sup> The Institute in Basic Life Principles is an organization emphasizing homeschooling, conservative garb, and “family values.” Its founder, Bill Gothard, recently stepped down as leader and from the board of directors amidst allegations of sexual harassment and failure to report suspected cases of child abuse. See Nicola Menzie, *Bill Gothard Quits Institute He Founded After Allegations of Rampant Sexual Harassment; Cites Bible Passage on ‘Reconciliation’*, THE CHRISTIAN POST (Mar. 7, 2014), <http://perma.cc/ARV7-JEQ8>; see also Sarah Pulliam Bailey, *Conservative Leader Bill Gothard Resigns Following Abuse Allegations*, RELIGION NEWS SERVICE (Mar. 6, 2014), <http://perma.cc/AP9R-T7TS>.

<sup>85</sup> This group is a “black supremacist sect headquartered in New York City,” targeting “whites and Jews.” *Racist Black Hebrew Israelites Becoming More Militant: Thousands Join Militant Black Supremacist*, SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT (Fall 2008), <http://perma.cc/JY9F-RUUA>.

<sup>86</sup> The group calls for the denial of any Palestinian claims to land and claims for the defense of Israel “by any means necessary.” The group has engaged in several terrorist attacks in the United States and abroad, as well as engaged in intense harassment of foreign diplomats, Muslims, Jewish scholars and community leaders, and officials. *Jewish Defense League*, SOUTHERN POVERTY LAW CENTER, <http://perma.cc/SGH6-PXNL>.

<sup>87</sup> The Ku Klux Klan is “the most infamous—and oldest—of American hate groups . . . . [It traditionally targets] black Americans . . . Jews, immigrants, gays and lesbians.” *Ku Klux Klan*, SOUTHERN POVERTY LAW CENTER, <http://perma.cc/L3C8-NKPP>.

of the South,<sup>88</sup> Luciferians,<sup>89</sup> Muslim Brotherhood,<sup>90</sup> Nation of Yahweh,<sup>91</sup> Paganist White Separatists,<sup>92</sup> Tony Alamo Christian Ministries,<sup>93</sup> Westboro Baptist Church,<sup>94</sup> World Church of the Creator,<sup>95</sup> Unification Church,<sup>96</sup> or individual believers who have kidnapped children, sexually assaulted them, and held them against their will.<sup>97</sup> Each of these religious groups presents its own challenge to law enforcement, prison authorities, minorities, women, children, or the LGBT community. With RFRA covering all laws, including criminal law, and with RFRA's extreme standard, members of Congress needed to understand that even fringe groups and believers could take advantage of the law to demand favorable treatment. After RFRA was in place for several years, and the Supreme Court had held it unconstitutional, some members did begin to divine its potential for mischief, making its re-passage doubtful. But their burgeoning concerns were defeated the second time around by the surreptitious procedures used to pass it on July 27, 2000, described below.

By presenting religion as a benevolent good, the Coalition lulled members of Congress into a misguided assumption that more religious liberty for all believers would impose no serious costs. This would not have happened

<sup>88</sup> This group supports Southern secession, a "European American" dominated society, and the formation of a Christian theocratic state that would "politically dominate blacks and other minorities." *League of the South*, SOUTHERN POVERTY LAW CENTER, <http://perma.cc/45CE-7C9W>.

<sup>89</sup> Luciferians worship Lucifer as a deity; Luciferianism is related to Satanism. *What is Luciferianism?*, GOT QUESTIONS MINISTRIES, <http://perma.cc/637D-BTZF>.

<sup>90</sup> See generally IKHANWEB: THE MUSLIM BROTHERHOOD'S OFFICIAL ENGLISH WEBSITE, <http://perma.cc/7GGS-XBHV>.

<sup>91</sup> The Nation of Yahweh preaches that "Whites" are the devil and that "Blacks" must vanquish them. Brentin Mock, *Nation of Yahweh Mourns Loss of Leader, Shows Signs of New Life*, SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT (Fall 2007), <http://perma.cc/CU5M-L4W7>.

<sup>92</sup> See generally MATTIAS GARDELL, *GODS OF THE BLOOD: THE PAGAN REVIVAL AND WHITE SEPARATISM* (2003).

<sup>93</sup> This group preaches "rabidly anti-gay, anti-Catholic and antigovernment doomsday rhetoric . . . [and] from its beginnings was based more on hatred and financial gain than genuine religious sentiment." Founder Tony Alamo has also advocated polygamy, sex with young girls, and faced accusations of taking child brides. Susy Buchanan, *Christhiao Coie Speaks Out About Her Stepfather, Tony Alamo*, SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT (Spring 2008), <http://perma.cc/AKZ2-AEXN>.

<sup>94</sup> The Westboro Baptist Church advocates against homosexuals through means including picketing the funerals of American soldiers. See generally WESTBORO BAPTIST CHURCH, *GOD HATES FAGS. . . THEREFORE I ABHORRED THEM*, <http://perma.cc/8WJA-337J>.

<sup>95</sup> The World Church of the Creator is known for its racist, anti-Semitic, and anti-Christian message. *Church of the Creator*, SOUTHERN POVERTY LAW CENTER, <http://perma.cc/QKZ-65U9>.

<sup>96</sup> This was a following founded by Sun Myung Moon; disciples "were expected to live in monk-like purity." Mariah Blake, *The Fall of the House of Moon*, NEW REPUBLIC (Nov. 12, 2013), <http://perma.cc/ZFR6-UHCF>.

<sup>97</sup> Brian David Mitchell, Elizabeth Smart's kidnapper, followed an extremist and fundamentalist form of Mormonism. See Anthony Bruno, *The Kidnapping of Elizabeth Smart*, CRIME LIBRARY, <http://perma.cc/RL4D-DYNF>. Phillip Craig Garrido, Jaycee Lee Dugard's kidnapper, created his own God's Desire "church" and many people close to him claimed he had fanatic and strange religious beliefs. *Kidnap Suspect: 'Wait Until You Hear the Story'*, KCRA.COM (Aug. 28, 2009), <http://perma.cc/T6LE-CX8W>.



in Europe, where there is a long, well-known history of religious oppression—even by mainstream religions—and a distrust of cults; but the United States is behind the rest of the world in fully acknowledging the potential dangerousness of sincere, blind, and determined faith.

I do not mean to argue, however, that only the fringe groups mentioned above have the capacity for illegal behavior. The mainstream religious groups that were on the original Coalition list also have had serious legal issues, for example, widespread clergy sex abuse. However, during the run-up to RFRA in the 1990s, the public had not yet learned about the systematic cover up of child sex abuse in religious institutions, so their demands for more rights set off no alarm bells. The clergy sex abuse scandals became public knowledge in 2001 when the *Boston Globe* revealed Cardinal Law's role in covering up the identities of serial pedophiles in the Boston Archdiocese.<sup>98</sup> But one need not look simply for illegal and immoral behavior by mainstream religious entities to understand that extreme religious liberty can be harmful to others. Some of the Coalition's members also have been responsible for pushing RFRA (and its state counterparts) to lengths unimagined at the time: to overcome the civil rights laws;<sup>99</sup> to deprive female workers of full reproductive health care coverage;<sup>100</sup> to avoid the requirements of federal bankruptcy law;<sup>101</sup> to challenge security measures at Guantanamo Bay;<sup>102</sup> to carry knives into schools and federal buildings;<sup>103</sup> and to avoid cooperating with government investigations into federal labor law violations.<sup>104</sup>

Nor did the dissembling cease with the enactment of RFRA in 1993 or 2000; one cannot even trust RFRA's proponents to accurately portray its history. Over and over, they have claimed both were passed "unanimously." This is simply untrue. RFRA I passed via unanimous consent in the House and by ninety-seven to three in the Senate.<sup>105</sup> RFRA II was passed via unanimous consent in both houses.<sup>106</sup> The term "unanimous" does not mean that

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<sup>98</sup> See generally THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH (2003).

<sup>99</sup> See generally HAMILTON, *supra* note 27, at 347–59.

<sup>100</sup> See, e.g., *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–60 (2014); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 561–62 (7th Cir. 2014).

<sup>101</sup> See *In re Young*, 82 F.3d 1407, 1420 (8th Cir. 1996); *In re Archdiocese of Milwaukee*, 496 B.R. 905, 922–23 (E.D. Wis. 2013).

<sup>102</sup> See *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014) (holding RFRA does not apply to non-resident aliens, including those at Guantanamo Bay); Jason Leopold, *A 9/11 Suspect Is Using the Hobby Lobby Ruling to Argue Female Prison Guards Violate His Rights*, VICE NEWS (Oct. 22, 2014), <http://perma.cc/F2ZL-8QM7>.

<sup>103</sup> See *Cheema v. Thompson*, 67 F.3d 883, 886 (9th Cir. 1995); Allan Turner, *Former IRS Worker, U.S. Reach Agreement in Ritual Dagger Case*, HOUSTON CHRONICLE (Nov. 6, 2014), <http://perma.cc/B78H-2EVK>.

<sup>104</sup> *Perez v. Paragon Contractors, Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572, at \*1 (D. Utah Sept. 11, 2014).

<sup>105</sup> HAMILTON, *supra* note 27, at 8. See also Religious Freedom Restoration Act of 1993, H.R. 1308, 103rd Cong. (1993), available at <http://perma.cc/CYL7-ACVT>.

<sup>106</sup> HAMILTON, *supra* note 27, at 353.

there was a vote taken and every member of Congress voted in favor. Indeed, it does not even mean that all or most of the members had to be present. To the contrary, “unanimous consent” is a procedure that epitomizes congressional lack of transparency: leadership brings up a bill which is then expeditiously passed with few present and without a quorum or a roll call vote.<sup>107</sup> Afterward, supporters say it passed “unanimously,” and in colloquial use, a “unanimous vote” is one where everyone voted in favor. Opposition to RFRA was growing in 2000, with its prospects looking increasingly bleak. On July 27, 2000, as summer recess was called, opposition and most of Congress had already left Washington, and then leadership passed RFRA via unanimous consent in the Senate and then the House.<sup>108</sup> Having been outflanked by the unannounced “vote” on RFRA in July, opponents were left to express their concerns after it had already been passed.<sup>109</sup> RFRA’s proponents have repeatedly told courts and the press that it was passed “unanimously” as a way of implying that it should not be questioned or challenged. Some courts have fallen for it,<sup>110</sup> as has the press,<sup>111</sup> which means that the public as well as state legislators have been misled about this controversial law.

It is not news that lobbyists engage in deceptive behavior, but when RFRA was being urged on Congress, few Americans would have been cynical or distrustful of mainstream religious leaders’ motives. That was the era when most had little if any knowledge of clergy sex abuse or jihadist Islamic atrocities and the presumption of religious actors’ good motives held sway.<sup>112</sup>

### C. RFRA’s Opaque Text

A key element in legislative transparency is that laws are written in straightforward language that does not require an advanced degree or specialty to understand. The “plain English” movement has pushed for laws and other legal documents that are drafted to be accessible to the public

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<sup>107</sup> Unanimous consent can be called by any senator and it dispenses with the quorum requirement. ELIZABETH RYBICKI, CONG. RESEARCH SERV. 96–452, VOTING AND QUORUM PROCEDURES IN THE SENATE (2013), available at <http://perma.cc/6EAU-V66H>.

<sup>108</sup> HAMILTON, *supra* note 27, at 8; see also Religious Freedom Restoration Act of 1993, H.R. 1308, 103rd Cong. (1993), available at <http://perma.cc/CYL7-ACVT>.

<sup>109</sup> 146 CONG. REC. S7991–02 (daily ed. Sept. 5, 2000) (statement of Sen. Strom Thurmond) (objecting to application of RFRA and RLUIPA to prisons and the military).

<sup>110</sup> See *Yellowbear v. Lampert*, 741 F.3d 48, 52 (10th Cir. 2014) (“Passed nearly unanimously, RFRA was (and remains) something of a super-statute.”)

<sup>111</sup> See, e.g., Katha Pollitt, *Why It’s Time to Repeal the Religious Freedom Restoration Act*, THE NATION (July 30, 2014), <http://perma.cc/GNK6-TTXH> (RFRA was “[p]assed practically unanimously. . . .”); Sasha Volokh, *Is RFRA Unconstitutional?*, WASH. POST (July 1, 2014), <http://perma.cc/2QQH-6AYU> (“It’s true that RFRA passed unanimously in the House and nearly unanimously in the Senate—in 1993 . . . .”); Orrin Hatch, Op-Ed., *Why Religious Freedom (Still) Matters*, U.S.A. TODAY (June 30, 2014), <http://perma.cc/S3N7-F2PB/>.

<sup>112</sup> To get the flavor of that bygone era, in 1997, I was publicly rebuked for using the term “religious lobbyist.” See Marci Hamilton, *Debating RFRA: Religion’s Reach*, 114 THE CHRISTIAN CENTURY 644 (Jul. 16–Jul. 23, 1997); Oliver Thomas, *Debating RFRA: Liberty Lost*, 114 THE CHRISTIAN CENTURY 646 (Jul. 16–Jul. 23, 1997).

through clarity, brevity, and the avoidance of technical language.<sup>113</sup> RFRA fails again. It is written in constitutional jargon that is inherently opaque except for the specialists in the field, and even then it has misled many who were specialists. The legalistic text of RFRA gave away no clues that legislators and the public should look behind its title or the appearances lobbyists urged on Congress. For most, RFRA and its successor, the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) are simply indecipherable because they are constitutional jargon.

RFRA’s opacity is exemplified by the reaction to the *Hobby Lobby* case. By the time of *Hobby Lobby*, RFRA had been in place for twenty years. It had been subject to wide-ranging publicity at least twice: first, when the Supreme Court considered RFRA in *Boerne v. Flores* and held it unconstitutional as applied to states only four years after it was first signed into law;<sup>114</sup> and second, when the Court decided *O Centro*, involving the RFRA of 2000 and whether it would open the door for a small religious group to use an illegal drug in hoasca tea during its religious ceremonies.<sup>115</sup> Yet, the public by and large was shocked by *Hobby Lobby*’s claims and the existence of a statute that could give a for-profit employer the right to shape employee benefit plans according to the religious beliefs of the owners.

RFRA forces the courts to apply a standard that is legal mumbo jumbo, not a rule of governance for the people. It is derived from the Supreme Court’s constitutional doctrinal lingo, with the terminology baggage that comes with it, including “substantial burden,” “compelling interest,” and “least restrictive means.”<sup>116</sup> None of these terms are self-evident, even to a lawyer if he does not practice or teach in the area, and, at least with respect to “least restrictive means,” it was never a part of the free exercise doctrine in the first place.

But the opacity is not limited to its legalistic terms. The inability to penetrate its shell also arises from the fact that it establishes a “one-size-fits-all” rule that makes it possible not to name particular religious groups, believers, or even a single law that might be undermined. Had its provisions stated that its super-strict standard was to be applied for the benefit of evangelical Christians and Catholics and for the purpose of undermining women’s access to reproductive health care, à la *Hobby Lobby*, or that it was intended to benefit fundamentalist believers who are also apartment owners to avoid the fair housing laws when they deny leases to unmarried couples, same-sex couples, or unwed mothers,<sup>117</sup> the debates would have been loud and I would wager that RFRA never would have been enacted. These facts

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<sup>113</sup> See generally DAVID MELINKOFF, *THE LANGUAGE OF THE LAW* (1963); RICHARD WYDICK, *PLAIN ENGLISH FOR LAWYERS* (2005).

<sup>114</sup> *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

<sup>115</sup> *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).

<sup>116</sup> 42 U.S.C. § 2000bb-1(b) (2006).

<sup>117</sup> See, e.g., *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 655 F. Supp. 2d 1150 (D. Idaho 2009); *Ungar v. N.Y. City Hous. Auth.*, No. 06 Civ. 1968, 2009 WL 125236 (S.D.N.Y. 2009); *Open Homes Fellowship, Inc. v. Orange Cnty., Fla.*, 325 F. Supp.2d 1349 (M.D. Fla. 2009); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909 (Cal. 1996);

were submerged beneath the rhetoric of religious liberty and legalistic lingo. Its terminology and mechanism of co-opting arcane constitutional doctrine to range across all religions and all laws led members of Congress, civil rights groups, and those whose interests were at risk to have a false sense of security. It looked good on the surface, partly because of its title and partly because of its capacity to bury troubling agendas behind benevolent, even patriotic, religious liberty rhetoric.

A good legislative proposal is transparent on its face, is titled to reflect its content, identifies all those likely helped or harmed by the law, and is presented to legislators for what it is. A good legislative response is one that asks the hard questions. The political process can go off-track on all of these grounds, but it is the rare bill that features all of these defects, as RFRA does.

### III. RFRA'S UNIMAGINABLE AND NEGATIVE RESULTS

Opacity and its application to all statutes, whether enacted before or after,<sup>118</sup> make it impossible to predict RFRA's impact. It is blind accommodation.<sup>119</sup> Nothing about the law points to particular believers, conduct, or potential harm.<sup>120</sup>

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Donahue v. Fair Emp't & Hous. Comm'n., 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991); State ex rel Cooper v. French, 460 N.W.2d 2 (Minn. 1990).

<sup>118</sup> This retroactive element was not explicitly stated in the RFRA of 1993, which means it should not have been applicable to laws enacted prior to its enactment under the Court's due process doctrine. See Republic of Austria v. Altmann, 541 U.S. 677, 678 (2004); Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994). When RFRA was re-enacted to apply to federal law along with RLUIPA, a provision was included that explicitly states the intent to apply it to all laws before or after its enactment. 42 U.S.C.A. § 2000bb-1 (2006); 42 U.S.C.A. § 2000cc (2006).

<sup>119</sup> See Marci A. Hamilton, *The Supreme Court's New Ruling on The Religious Land Use and Institutionalized Persons Act's Prison Provisions: Deferring Key Constitutional Questions*, FINDLAW (June 2, 2005), <http://perma.cc/E94X-2YDH>. Cf. Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: The Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); Leslie C. Griffin, *The Unestablished Constitutionality of the Religious Freedom Restoration Act*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY BLOG (Dec 13, 2013), <http://perma.cc/M5WK-BSXY>.

<sup>120</sup> I have made this point at greater length in other publications. See HAMILTON, *supra* note 27, at 35 (“[H]ardly anyone comprehends how the law will operate in specific cases. RFRA, the grand blind exemption of all time, is as opaque on its surface as they come.”); Marci A. Hamilton, *City of Boerne v. Flores: A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699, 720 (1998) (“If RFRA’s record supporting its Section 5 authority was weak, then its record applying RFRA to federal law is virtually blank. As applied to federal law, RFRA should not be upheld, if for no other reason than to send a message to Congress that when a law is unusual and the enumerated power issue is opaque, Congress is constitutionally obligated to provide at least a modicum of explanation of what power it believed itself to be engaging.”); see also Eugene Gressman, *The Necessary and Proper Downfall of RFRA*, 2 NEXUS 73, 77–78 (1997); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 445 (1994).

No one at the time RFRA was first enacted in 1993 would have imagined, first, that there would be universal health care in the United States, and certainly not the particulars of the Affordable Care Act,<sup>121</sup> or that RFRA would then be invoked by large, for-profit, religious corporations like Hobby Lobby. When RFRA was re-enacted in 2000 and there was some discussion of small business owners potentially invoking it in a way that could be in tension with civil rights laws, members from both sides of the aisle agreed that a large corporation has no soul and therefore no right to claim RFRA's protections. Congressman Jerrold Nadler, while debating an amendment to the Religious Liberty Protection Act,<sup>122</sup> a bill that never passed, said that the amendment "recognizes that religious rights are rights that belong to individuals and to religious assemblies and institutions. General Motors does not have sincerely held religious beliefs, by its nature."<sup>123</sup> Representative Charles Canady, the primary House sponsor, opposed Congressman Nadler's amendment, but nevertheless agreed with Nadler that large, for-profit, nonreligious corporations do not have religious beliefs, stating:

I do not think that General Motors or Exxon Corporation or any other such large corporation . . . could come within a mile of showing that anything that was done would substantially infringe on their religious beliefs. They do not have a religious belief. They do not have a religious practice. It is not in the nature of such corporations to have such religious beliefs or practices.<sup>124</sup>

For those pressing RFRA in 1993 and 2000, it was in their interest to stay mum on individual agendas and to instead press the larger goal of generic "religious freedom." The Coalition in fact had an agreement that forced individual agendas under the table, whereby they all agreed to a "no-exception" stance. If there were a suggestion to remove prisons,<sup>125</sup> for example, the response was a united front and "no" from the Coalition members. The general counsel to the Roman Catholic bishops objected to the original RFRA on the ground that it would lay the groundwork for believers to argue in favor of rights to abortion,<sup>126</sup> but was persuaded to retreat by the coalition,

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<sup>121</sup> Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2010) (enacted) (codified as amended in scattered sections of 42 U.S.C.).

<sup>122</sup> Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong. (1998).

<sup>123</sup> Marci Hamilton, *The Insatiable Demand for Extreme Religious Liberty Under the RFRA's*, VERDICT (Mar. 6, 2014), <http://perma.cc/RSB5-NDV4>.

<sup>124</sup> *Id.*

<sup>125</sup> 139 CONG. REC. S14350 (daily ed. Oct. 26, 1993) (statement of Sen. Edward Kennedy).

<sup>126</sup> *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2792 Before the H. Comm. on the Judiciary*, 102nd Cong. 34, 42–43 (1992) (statement of Mark Chopko, General Counsel, United States Catholic Conference) ("[W]e do have concerns borne of long and sometimes bitter, divisive and expensive experience in the public arena in the area of abortion, in the area of public services. Whether the Religious Freedom Restoration Act if enacted in its present form will be used to promote access to abortion is a serious issue.").

which had agreed not to air specific agendas to Congress and instead to present a united front. That meant discussion of hot-button issues was short-circuited before they started and members were unaware of the problems lurking behind the attractive religious liberty shell.

When RFRA was enacted in 1993, there were very few specific religious practices under consideration. As it was motivated by the *Smith* decision, the Native American Church's use of peyote would have been understood as a possibility, but the legislative history only mentioned a small number of other practices, such as religious restrictions on autopsies among the Hmong and Orthodox Jews and the need to walk to small prayer services among Orthodox Jews.<sup>127</sup> Its vast scope and the members' failure to ask specific questions during its enactment meant that members did not know or understand that it could be invoked against child support laws,<sup>128</sup> public school safety restrictions,<sup>129</sup> ordinary land use laws,<sup>130</sup> prison security regulations,<sup>131</sup> and eventually, the Affordable Care Act and the contraceptive mandate applied to employers in *Burwell v. Hobby Lobby*<sup>132</sup> and its progeny.

A number of legislators before and after the *Hobby Lobby* decision expressed reservations about the law and particularly that they had not anticipated it would or could be applied as it had been.<sup>133</sup> Their surprise can be attributed to RFRA's resistance to transparency, from its title to the lobbyists' tactics to its opaque, legalistic text.

#### IV. LEGISLATIVE AND EXECUTIVE EVIDENCE-BASED RELIGIOUS ACCOMMODATION

I have explained the qualities of RFRA that make it bad public policy above and now turn to describing the accommodation process that can serve the common good, protect the vulnerable, and protect against unintended consequences. The fundamental problem with RFRA is not that it provides

<sup>127</sup> See 139 CONG. REC. H2356-03 (daily ed. May 11, 1993); 146 CONG. REC. E1564-01 (daily ed. Sept. 22, 2000); see also Christopher C. Lund, *Autopsies and Free Exercise Beliefs*, AMERICAN CIVIL LIBERTIES (Oct. 11, 2011), <http://perma.cc/EM35-HV3C>.

<sup>128</sup> See *Hunt v. Hunt*, 648 A.2d 843, 846 (Vt. 1994).

<sup>129</sup> *Cheema v. Thompson*, 67 F.3d 883, 884 (9th Cir. 1995) (holding that the district court did not abuse its discretion in granting a preliminary injunction), *overruled on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>130</sup> See generally HAMILTON, *supra* note 27, at 115-50.

<sup>131</sup> See generally *id.* at 180-218.

<sup>132</sup> 134 S. Ct. 2751 (2014).

<sup>133</sup> See, e.g., Kristina Peterson, *Supreme Court's Hobby Lobby Ruling Ignites Debate Over Religious-Freedom Law*, WALL ST. J. (June 30, 2014), <http://online.wsj.com/articles/supreme-courts-hobby-lobby-ruling-ignites-debate-over-religious-freedom-law-1404155510>, <http://perma.cc/M6L5-WEG8> (quoting Sen. Charles Schumer as stating RFRA "was not intended to extend the same protection to for-profit corporations, whose very purpose is to profit from the open market"); Sen. Barbara Boxer, *Why Are We Still Fighting Over Birth Control in the 21st Century?*, HUFFINGTON POST (July 15, 2014), <http://perma.cc/NVR5-2CYJ> ("The Religious Freedom Restoration Act was written to protect an individual's freedom of religion. But the conservatives on the court turned the law on its head, ruling that a corporation can put its own ideology ahead of the religious freedom and health care needs of its employees.").

accommodation, but rather how it does so. First, RFRA should be repealed. Second, accommodation should take place on a practice-specific basis, not a wholesale basis. Third, an evidence-based accommodation process should be instituted across state and federal legislatures and the executive branches whenever accommodation is considered.

Before RFRA was in place, there were many religious accommodations put into place by legislators and the executive branch at both the state and federal levels. Oftentimes, however, they were passed as a favor to the believer, with no hearings, no public disclosure, and the members not even understanding what the impact likely would be. A good example is the exemptions for clergy from the state statutes that mandate reporting child abuse to the authorities.<sup>134</sup> This lack of transparency resulted in harm: children were not protected from known pedophiles, because clergy did not share its knowledge with the authorities.<sup>135</sup> After the clergy scandals, many states repealed these exemptions.<sup>136</sup> Therefore, this pre-RFRA accommodation process shared a lack of transparency with RFRA. At least with those specific proposals, however, once harm occurred, it was not difficult to determine how to fix the problem. It may be politically difficult, as evidenced by Idaho's politicians' struggle in the last year to deal with children dying in faith-healing homes,<sup>137</sup> but it is easy to see. My proposal for evidence-based accommodation solves the lack of transparency in both the pre-RFRA and the RFRA accommodation practices.

The first step in a healthy accommodation process is for all to acknowledge the unavoidable fact that religiously motivated actors are capable of good and bad. Before it crumbled in the last fifteen years, many Americans shared a Pollyanna presumption that religious actors are good and always do good acts. That presumption proved to be a factual error.<sup>138</sup> First, on September 11, 2001, radical Islamic extremists crashed into the Twin Towers of the World Trade Center in New York City, a field in Pennsylvania, and the Pentagon, killing 2,783 people and initiating the United States' "war on terror," which is still being fought today against Islamic extremists worldwide.<sup>139</sup>

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<sup>134</sup> See e.g., GA. CODE ANN. § 19-7-5(g) (2014) ("a member of the clergy shall not be required to report child abuse reported solely within the context of confession or other similar communication required to be kept confidential under church doctrine or practice."); CAL. PENAL CODE § 11166 (2014); S.C. CODE ANN. § 63-7-420 (2014).

<sup>135</sup> See e.g., Report of the Grand Jury at 4, *In re* County Investigating Grand Jury, Misc. No. 03-00-239 (First Jud. Dist. of PA Sept. 15, 2005), available at <http://perma.cc/K7Z5-8U2C>; Report of the Grand Jury, *In re* County Investigating Grand Jury XXIII, Misc. No. 0009901-2008 (First Jud. Dist. of PA Jan. 21, 2011), available at <http://perma.cc/7QD3-B8KE>.

<sup>136</sup> Brian C. Mooney, *Senator Prods House on Abuse Bill*, BOSTON GLOBE (Feb. 19, 2002), <http://perma.cc/V4B-Y37V>.

<sup>137</sup> See Randy Stapilus, *The Tent Poles of Religious Exemption*, TWIN FALLS TIMES-NEWS (Mar. 3, 2014), <http://perma.cc/KE4L-PVN8>.

<sup>138</sup> I wrote *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005) to counteract this presumption and overcome the taboo that was impeding the protection of the vulnerable.

<sup>139</sup> See generally U.S. DEPT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, TERRORISM 2000/2001, <http://perma.cc/PKV8-527B>.

Second, on January 6, 2002, the *Boston Globe* published the first installment of its investigative report on the Catholic Church's endangerment of hundreds of children in the Boston Archdiocese by shuffling pedophile priests from post to post.<sup>140</sup> Those disclosures were followed by a cascade of clergy sex abuse scandals involving religious higher-ups across the faith spectrum who have knowingly, recklessly, and negligently let pedophiles have access to children.<sup>141</sup> Until 9/11, editors and newspaper owners concerned about their readership's reaction tended to avoid negative stories about believers and religious organizations, but that attitude has been replaced in most media by more professional journalistic standards. Thus, reporting on the bad acts of religious actors has become common fodder, from the deaths of children due to medical neglect, to polygamy involving child brides and statutory rape, to the stories about religiously-fueled cruelty and terrorism by jihadist Muslims.<sup>142</sup> Some politicians and believers have attempted to distinguish these bad acts by saying that cruel acts are not "true" religion, but that is an indefensible position in light of both history and common sense.<sup>143</sup> Religious actors are capable of great good and evil, and may be religiously motivated either way. The appropriate public policy is one that fosters good and benign religious acts but also deters and prohibits the bad religious acts. The difference between good and bad acts needs to be measured in terms of harm to the vulnerable and to the larger society as a whole.

"Religious accommodation" is a benign-sounding phrase that, in fact, means that the religious actor is not held accountable to the law that applies to everyone else. Therefore, accommodation can be positive, but it can also impose negative consequences on third parties and the public as a whole. For

<sup>140</sup> Globe Staff, *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE (Jan. 6, 2002), <http://perma.cc/TFX7-9N8B>; see generally THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH (2003).

<sup>141</sup> See generally HAMILTON, *supra* note 27; see also Kristina Davis, *\$13.5M for Jehovah's Witness Sex Victim*, UT SAN DIEGO (Oct. 13, 2014), <http://perma.cc/E6SX-4LG8>; Manny Waks, *Raped at a Mikvah, then Abandoned*, TIMES OF ISRAEL BLOG (Oct. 23, 2014), <http://perma.cc/W7YA-VZPD>; Ian Simpson, *Kansas City Diocese to Settle Sex Abuse Claims for \$9.95 Million*, REUTERS (Oct. 15, 2014), <http://perma.cc/D2X4-2P8W>.

<sup>142</sup> See John Dougherty, *Polygamist Sentenced to 10 Years in Prison*, N.Y. TIMES (Nov. 21, 2007), <http://www.nytimes.com/2007/11/21/us/21jeffs.html>, <http://perma.cc/J5YW-C53T>; see also Ian Austene & Rick Gladstone, *Gunman Panics Ottawa, Killing Soldier in Spree at Capital*, N.Y. TIMES (Oct. 23, 2014), <http://perma.cc/4PLZ-T8KZ>; Lindsey Bever, *Man Arrested in Kansas City Shooting was Reportedly a Longtime Ku Klux Klan Member*, WASH. POST (Apr. 14, 2014), <http://perma.cc/Y5AT-QMQW>; Emma G. Fitzsimmons, *Man Kills 3 at Jewish Centers in Kansas City Suburb*, N.Y. TIMES (Apr. 13, 2014), <http://perma.cc/H54G-ESA4>; Elizabeth Flock, *Warren Jeffs, Polygamist Sect Leader, Sentenced to Life in Prison*, WASH. POST (Aug. 9, 2011), <http://perma.cc/B8K5-QMZH>; Julie Hirschfield Davis, *After Beheading of Steven Sotloff, Obama Pledges to Punish ISIS*, N.Y. TIMES (Sept. 3, 2014), <http://perma.cc/Y2JK-WYXW>; Felicia Schwartz & Dion Nissenbaum, *U.S. Eyes Wider Action on Islamic State*, WALL ST. J. (Aug. 22, 2014), <http://online.wsj.com/articles/u-s-seeks-international-action-against-islamist-militants-1408663805>, <http://perma.cc/5W7N-PSDU>; Paul Viera, *Two Dead in Canada Shootings*, WALL ST. J. (Oct. 22, 2014), <http://perma.cc/D3T9-JEKB>.

<sup>143</sup> See, e.g., Marci Hamilton, *Mr. President: The Islamic State Is a Religion*, VERDICT (Sept. 18, 2014), <http://perma.cc/P52T-B3B9>.



example, as I discuss below, there are thirteen state exemptions<sup>144</sup> and a federal exemption<sup>145</sup> for the religious use of the otherwise illegal drug peyote. Only believers can get around the law. Everyone else is still bound by the federal Controlled Substances Act<sup>146</sup> and its state counterparts. These exemptions appear to have been good policy, providing religious accommodation while not harming others. However, legislative and executive accommodation can also lead to negative consequences, which is why it should be evidence-based and not granted by state or federal legislators presuming no harm. Consider, for example, the exemptions in some states for the medical neglect of children in faith-healing families, which I will discuss in more detail below.<sup>147</sup>

Legislative and executive accommodation of religious practices (or any other) should not proceed unless legislators have a minimum quantum of information:

*First*, which law or laws in particular would be affected by this accommodation?

*Second*, who seeks to overcome these laws and for what practices?

*Third*, who will be harmed if the accommodation is permitted?

*Fourth*, what do experts in the field and the public think about the proposal?

This is a system of evidence-based accommodation. This approach is appropriate whether it involves children,<sup>148</sup> marriage,<sup>149</sup> land use,<sup>150</sup>

<sup>144</sup> ARIZ. REV. STAT. ANN. § 13-3402 (1989); IDAHO CODE ANN. § 37-2732A (2014); IOWA CODE ANN. § 124.204 (2014); N.M. STAT. ANN. § 30-31-6 (2014); OR. REV. STAT. ANN. § 475.752 (2014); S.D. CODIFIED LAWS § 34-20B-14 (2014); TEX. HEALTH & SAFETY CODE ANN. § 481.111 (2013); UTAH CODE ANN. § 58-37-8 (2014); WIS. STAT. ANN. § 961.115 (2013); WYO. STAT. ANN. § 35-7-1044 (2014).

<sup>145</sup> American Indian Religious Freedom Act, 42 U.S.C. § 1996a(b)(1) (2006) (“Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State.”).

<sup>146</sup> Controlled Substances Act, 21 U.S.C. § 841 (2006) (“Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.”).

<sup>147</sup> *Religious Exemptions to Medical Treatment of Children in State Civil Codes*, CHILDREN’S HEALTH IS A LEGAL DUTY, INC. (July 15, 2014), <http://perma.cc/96N3-CGVV>.

<sup>148</sup> See Dirk Johnson, *Trials for Parents Who Chose Faith Over Medicine*, N.Y. TIMES (Jan. 20, 2009), <http://www.nytimes.com/2009/01/21/us/21faith.html>, <http://perma.cc/BDN6-E4QM>. See also HAMILTON, *supra* note 27, at 67 (“Kara Neumann died in 2008 of untreated diabetes after her parents, who were members of an internet-based faith-healing group, shunned medical treatment in favor of prayer for 3 weeks prior to her death . . . . Kara’s condition was treatable even on the day of her death.”).

<sup>149</sup> HAMILTON, *supra* note 27, at 106 (“Twenty-seven legislators asked the Arizona attorney general to prosecute criminal violations by polygamous communities, including rape, incest, and bigamy. In response to the political pressure, within months a multi-use facility was established in the Arizona/Utah enclave, which was staffed by local and state officials and provided a place for victims to report abuse. The FLDS [The Fundamentalist Church of Jesus Christ of Latter-Day Saints] harassed its believers who tried to take advantage of the facility to the point that it had to be shut down.”); Joseph A. Reaves, *Troubles Dogging Polygamy*

schools,<sup>151</sup> prisons,<sup>152</sup> or the civil rights laws.<sup>153</sup> It is the open-endedness on these specifics that makes the RFRA formulation such a threat to sound public policy. RFRA is an extreme example of accommodation that fails to satisfy the requirements of evidence-based accommodation, but there have been others that also failed the criteria for evidence-based accommodation, which I will discuss below.

I imagine that there will be those who might object to this line of reasoning, saying that the civil rights laws also suffer from a lack of precision regarding which religious entities will benefit. For example, Title VII affords a right against religious discrimination in employment that applies to every believer.<sup>154</sup> There are three critical differences. First, Title VII does not li-

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*Prophet*, ARIZONA REPUBLIC (Aug. 1, 2004), <http://perma.cc/FA4T-CPSD> (listing “key dates” for FLDS); Amanda J. Crawford, *Polygamy Town Gets Outside Aid*, ARIZONA REPUBLIC (Aug. 10, 2004), <http://perma.cc/A5BU-ZRQM>.

<sup>150</sup> Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, No. 915 F. Supp. 2d 574, 581 (S.D.N.Y. Jan. 4, 2013); HAMILTON, *supra* note 27, at 146 (“In the most extreme case to date of a religious applicant attempting to avoid local procedures involves the Rabbinical College of Tartikov, which seeks to impose a campus on the small bedroom community of Pomona, New York, whom I represent. It jumped into federal court without filing a single application for any of the many uses the complaint indicates may be intended, houses of worship, study halls, libraries, museums, or multi-family housing.”).

<sup>151</sup> James C. McKinley, Jr., *Texas Conservatives Win Curriculum Change*, N.Y. TIMES (Mar. 12, 2010), <http://www.nytimes.com/2010/03/13/education/13texas.html>, <http://perma.cc/HT78-ZU9L>; Motoko Rich, *Texas Education Board Flags Biology Textbook over Evolution Concerns*, N.Y. TIMES (Nov. 22, 2013), <http://www.nytimes.com/2013/11/23/education/texas-education-board-flags-biology-textbook-over-evolution-concerns.html>, <http://perma.cc/2CDT-BKAU>; Dan Quinn, *How Science Won in the Texas Textbook Battle*, TFN INSIDER (Nov. 25, 2013), <http://perma.cc/JU5F-FYKA>; Dan Quinn, *Breaking News, Texas Review Panel Rejects Creationist Objections to Pearson Biology Textbook*, TFN INSIDER (Dec. 17, 2013), <http://perma.cc/PM9B-XHB9>; see also HAMILTON, *supra* note 27, at 177 (“Starting in 2009, Texas legislators sought to ‘water down’ the Texas science and history curriculums by ‘placing a conservative stamp’ on textbooks, ‘stressing the superiority of American capitalism, questioning the Founding Fathers’ commitment to a purely secular government and presenting Republican political philosophies in a more positive light.’ The latest battle in 2013 surrounded the adoption of environmental and biology textbooks. After much debate among members of the State Board of Education panel on how climate change and evolutionist theories should be taught, science eventually prevailed and popular, factually sufficient textbooks were adopted into the curriculum.”).

<sup>152</sup> Theriault v. Silber, 453 F. Supp. 254, 260 (W.D. Tex. 1978), *appeal dismissed*, 579 F.2d 302 (5th Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); see also HAMILTON, *supra* note 27, at 205 (“The CONS [Church of the New Song] was founded in the early 1970s by a federal inmate, Harry Theriault, who said it was a ‘game.’ And what a game it is. This ‘religion’ requires a prisoner to be served Harvey’s Bristol Creme and steak every Friday at 5:00 p.m. . . . This is a classic case of a group testing the waters with insincere claims of religious devotion. Common sense should have sent their free exercise claims packing. While no prisoner has yet won the right to steak and sherry on Fridays, the courts have been dealing with their claims ever since.”); PAUL W. KEVE, PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS 211–12 (1991).

<sup>153</sup> HAMILTON, *supra* note 27, at 231 ([C]onservative religious lobbyists raced to a number of states with the bright idea of expanding state RFRAs so that private businesses and individuals could refuse to do business with anyone they chose, based on religious belief. Up to this point, all RFRAs, including RLUIPA, were limited to actions against the government.”).

<sup>154</sup> 42 U.S.C. §2000e-2 (2006).

cense the avoidance of all existing and future laws, which are not and cannot all be named. Second, it is limited to particular circumstances involving all three of the following elements: (1) employment; (2) employers with over 15 employees; and (3) discrimination.<sup>155</sup> Third, and this may be the most important distinction: it is limited to circumstances where the believer is being treated less well than others. Therefore, it is raising the believer to the level of equality with others. In sharp contrast, RFRA mandates that believers receive privileges that no one else can obtain.

The inherent dangerousness of blind accommodation lies in the fact that humans and their institutions (religious or not) inevitably take advantage of the tools at hand, to increase their power, reach, and dominance. This was the central and critical insight of the Framers of the federal Constitution.<sup>156</sup> RFRA began with the patina of goodness and innocence, but became a tool for the powerful to wield as a sword against the less powerful. As I explained in *God vs. the Gavel: The Perils of Extreme Religious Liberty*,

RFRA's legislative history contained a few anecdotes about individual Hmong and Orthodox Jews objecting to the autopsies states require when there is a suspicious death. The Hmong believe that the physical invasion inherent in conducting an autopsy inhibits the body's path to the afterlife, and "unnecessary" autopsies violate Orthodox Jewish beliefs, because the Talmud forbids "mutilating" the dead. Then Congress was told that extreme religious liberty for land use was necessary to help a minyan (a small group of Jewish men meeting to pray each morning) meeting in a home in a residential neighborhood, because they must walk and so that houses of worship could be built without discrimination. RFRA, RLUIPA, and the state RFRA's are sold as though underdog believers needed [legislative] assistance.<sup>157</sup>

These examples led members to believe that RFRA would only be deployed against invidious discrimination and that its beneficiaries were small, politically powerless believers in need of Congress's protection. In fact, RFRA, with its one-size-fits-all formula, covers all believers and all conduct, and the eventual net result was that large for-profit corporations deployed it to fight elements of the Affordable Care Act's requirements (after they were unable to persuade Congress to vote against it and then the

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<sup>155</sup> *Id.*

<sup>156</sup> BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 162–71 (1967); MARCI A. HAMILTON, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293–306 (Michael W. McConnell et al. eds., 2001); MARCI A. HAMILTON, *The Reverend John Witherspoon and the Constitutional Convention*, in LAW & RELIGION: A CRITICAL ANTHOLOGY 54–66 (Stephen M. Feldman ed., 2000); Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule With an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 482 (1994).

<sup>157</sup> HAMILTON, *supra* note 27, at 347 (citations omitted).

Supreme Court that it was unconstitutional *in toto*).<sup>158</sup> Hobby Lobby objected to four forms of contraception.<sup>159</sup> Numerous other corporations are now arguing that they should not have to fund coverage for any.<sup>160</sup> In addition, other businesses have sought state RFRA coverage to fight public accommodation laws for the LGBT community and doing business with same-sex couples.<sup>161</sup>

The best process for religious accommodation requires repeal of all RFRA's (and RLUIPA) and a return to the process prior to RFRA's enactment,<sup>162</sup> but with the added requirement that accommodation only proceed based on facts and evidence about believers, practices, and laws specifically affected. This approach solves the transparency issues in RFRA, dramatically reduces unintended consequences, and makes legislators and lobbyists accountable to the public good. I will first describe a process involving a significant quantum of evidence where the end result was a positive policy development for all affected, the peyote exemptions. Then I will turn to a process that was flawed on the parameters I have laid out and that has led to unnecessary and unacceptable suffering, the exemptions for faith healing parents who medically neglect their children.

Taking the accommodation process for neutral and generally applicable laws out of the courts and placing them into the legislative or executive rulemaking arena increases the likelihood that accommodation can be achieved through broader knowledge and more input. The courts are constrained to consider only the cases and parties before them, and they may only take into account the facts of the case before them. In the context of this case and plaintiff-focused inquiry, the needs of the vulnerable shrink into the background, leaving courts to mistakenly conclude that certain policy objectives are desirable based on insufficient knowledge.

This approach leaves the Court's free exercise constitutional doctrine in place for all laws with the courts in control in cases involving laws that are

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<sup>158</sup> See generally *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>159</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2755 (2014).

<sup>160</sup> *Armstrong v. Burwell*, No. 13-cv-00563, 2014 WL 5317354, at \*1 (D. Col. Sept. 29, 2014) (permanently enjoined the enforcement of the contraception mandate against Cherry Creek Mortgage Co., a closely-held corporation who had a religious objection to the contraception mandate); see also *Autocam Corp. v. Burwell*, 134 S. Ct. 2901, 2901-02 (2014) (judgment vacated in light of *Hobby Lobby* in case where a closely-held corporation held by a practicing Roman Catholic family raised a religious objection to the contraception mandate); *Gilardi v. Dep't. of Health and Human Servs.*, 134 S. Ct. 2902 (2014) (judgment vacated in light of *Hobby Lobby* in a case where owners of Freshway Foods, a closely held corporation owned by Roman Catholic practicing brothers, raised a religious objection to the contraception mandate); *Eden Foods, Inc. v. Burwell*, 134 S. Ct. 2902 (2014) (judgment vacated in light of *Hobby Lobby* in a case where the owners of a closely-held corporation owned by a practicing Roman Catholic raised a religious objection to the contraception mandate); *O'Brien v. U.S. Dep't. of Health and Human Servs.*, 766 F.3d 862, 862-63 (8th Cir. 2014) (judgment reversing a District Court's dismissal of a complaint in light of *Hobby Lobby* in a case where a for-profit mining company owned by Roman Catholic man who raised a religious objection to the contraception mandate).

<sup>161</sup> See, e.g., *Elane Photography, LLC v. Willock* 309 P.3d 53 (N.M. 2012).

<sup>162</sup> That would be the process approvingly described in *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

discriminatory, not neutral, or not generally applicable. Courts are more than competent to apply the Court's traditional strict scrutiny test in those cases, and the focus is appropriately on the facts as applied to that believer or religious group. This approach has been more than adequate to vindicate believers when they were being treated less well than others, including less well than secular counterparts.<sup>163</sup>

A. *Benign Accommodation Through an Evidence-Based Process:  
The Peyote Exemptions*

One of the surreal elements of the political history of RFRA is that it was motivated by a belief that the *Smith* decision was either anti-Native American<sup>164</sup> and/or that politically powerless organizations could not obtain accommodation without RFRA.<sup>165</sup> Yet, the decision itself pointed explicitly and approvingly to existing state exemptions for the religious use of peyote, which disproved the point that peyote exemptions were unconstitutional or politically impossible<sup>166</sup> and pointed to the country's long history of religious accommodation. Ironically, while the Coalition for the Free Exercise of Religion and members of Congress were railing against the Supreme Court's peyote decision, lobbyists sought exemptions for peyote use and obtained them across the country.<sup>167</sup>

The peyote exemption process was close to an evidence-based model. First, the requests specified the law to be affected, the peyote restrictions. Second, the universe of believers likely to invoke the exemption was relatively well-known and the practice was known to be used only during religious ceremonies. Third, despite the fact it was a request for use of an illegal drug, the effect on others and the society as a whole was known; peyote was not a drug known for widespread illegal use or for its addictive properties. It

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<sup>163</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); see also *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>164</sup> Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1135 (1990) (“[T]he decision to ban the sacramental use of peyote but not the sacramental use of wine is not based on any objective differences between the effects of the two substances. Rather, it is based on the fact that most ordinary Americans are familiar with the use of wine and consider Christian and Jewish sacramental use harmless and perhaps even a good thing; but the same ordinary Americans consider peyote a bizarre and threatening substance and have no respect or solicitude for the Native American Church. In short, the difference is attributable to prejudice.”).

<sup>165</sup> See 139 Cong. Rec. H2356-03 (daily ed. May 11, 1993); 146 CONG. REC. E1564-01 (daily ed. Sept. 22, 2000).

<sup>166</sup> *Smith*, 494 U.S. at 890 (“Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.”); see also *id.* at 917–18 (“Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years”) (O’Connor, J. concurring in the judgment).

<sup>167</sup> See *supra* note 145 and accompanying text.

was not a request for heroin or cocaine. Fourth, the public was not being sandbagged. The requests were made in the context of a national conversation about the *Smith* decision, with the process described in detail in the opinions in *Smith* preceding the 1990 decision.<sup>168</sup> Thus, legislatures had most of the knowledge necessary to enact an evidence-based exemption. The one element that was left out, and about which I still wonder, is whether children or adolescents are given peyote during religious services and how often, and what effect that has on their developing brains.<sup>169</sup> In the main, however, the process and resulting exemptions were superior to the RFRA formula and process. Moreover, my concern about the effects on children illuminates one of the virtues of evidence-based accommodation, rather than mandated accommodation through RFRA or the First Amendment; if it turns out that anyone is harmed as a result of an accommodation, the legislature or executive can adjust the accommodation to reduce the harm. In contrast, the medical neglect exemptions offer an example of legislative accommodation that was not evidence-based and that led to serious harm to children in particular and the public good generally.

*B. Harmful Accommodation Through a Less Transparent Process:  
The Medical Neglect Exemptions*

The federal government created incentives to include religious exemptions from state laws that forbid the medical neglect of children in the 1970s.<sup>170</sup> The first federal law to address child abuse was the Child Abuse

<sup>168</sup> *Emp't Div. v. Smith*, 485 U.S. 660, 667 n.11 (1988) (quoting *Black v. Emp't Div. of Human Res.*, 721 P.2d 451, 453–54 (Or. 1986)) (“A meeting connotes a solemn and special occasion. Whole families attend together, although children and young women participate only by their presence. Adherents don their finest clothing, usually suits for men and fancy dresses for the women, but sometimes ceremonial Indian costumes. At the meeting the members pray, sing, and make ritual use of drum, fan, eagle bone, whistle, rattle and prayer cigarette, the symbolic emblems of their faith. The central event, of course, consists of the use of peyote in quantities sufficient to produce an hallucinatory state. At an early but fixed stage in the ritual the members pass around a ceremonial bag of peyote buttons. Each adult may take four, the customary number, or take none. The participants chew the buttons, usually with some difficulty because of extreme bitterness; later, at a set time in the ceremony any member may ask for more peyote; occasionally a member may take as many as four more buttons. At sunrise on Sunday the ritual ends; after a brief outdoor prayer, the host and his family serve breakfast. Then the members depart. By morning the effects of the peyote disappear; the users suffer no aftereffects.”); *State v. Whittingham*, 504 P.2d 950, 954 (Ariz. Ct. App. 1973) (citing *People v. Woody*, 394 P.2d 813 (Cal. 1964)).

<sup>169</sup> See, e.g., Leonora E. Long et al., *Transmembrane Domain Nrg1 Mutant Mice Show Altered Susceptibility to the Neurobehavioural Actions of Repeated THC Exposure in Adolescence*, 16 INT'L J. NEUROPSYCHOPHARMACOLOGY 163, 163 (2012) (explaining studies that showed adolescents appear particularly vulnerable to developing psychosis-like symptoms from chronic THC exposure); Melanie O'Shea et al., *Chronic Cannaboid Exposure Produces Lasting Memory Impairment and Increased Anxiety in Adolescent but not Adult Rats*, 18 J. PSYCHOPHARMACOLOGY 502, 506 (2004) (explaining that THC exposure had a more negative effect on memory and anxiety in adolescent versus adult rats).

<sup>170</sup> See CAROLINE FRASER, *GOD'S PERFECT CHILD: LIVING AND DYING IN THE CHRISTIAN SCIENCE CHURCH* 284–85 (2001); JANET HEIMLICH, *BREAKING THEIR WILL: SHEDDING LIGHT ON RELIGIOUS CHILD MALTREATMENT* 223–25 (2011); SHAWN FRANCIS PETERS, *WHEN*

Prevention and Treatment Act (“CAPTA”), which provides funds for the protection of children from abuse, negligence, and maltreatment.<sup>171</sup> It did not include an exemption for religiously motivated medical neglect, but the Department of Health, Education, and Welfare enacted a regulation in reliance on a statement made in a House committee report.<sup>172</sup> The exemption stated: “a parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian . . . .”<sup>173</sup> The required period of public comment followed. The final rules required as a prerequisite to receiving federal funding for the protection of children that each state enact religious exemptions to their child abuse and neglect laws.<sup>174</sup> By 1983, when the federal requirement was rescinded, every state had enacted a religious exemption.<sup>175</sup>

This nationwide movement was fueled in large part by sophisticated and aggressive lobbying by the Church of Christ, Scientist, which believes that illness is a sign of spiritual weakness and, therefore, can be cured by prayer alone. Legislators and the public, however, did not understand the implications of this belief. Thus, the initial federal incentive, followed by the state exemptions, occurred on the basis of little, if any, understanding of its practices or the potential for children to die or be permanently disabled due to medical neglect. It seemed like a generous thing to do, and not a dangerous one. Many states,<sup>176</sup> though not all,<sup>177</sup> have pulled back on those protections since 1983 as the evidence of harm to children in faith-healing settings has emerged. Had Congress in 1974 engaged in evidence-based accommodation and refused to favor such an exemption based on a lack of knowledge, the protection of children would be more secure today.

These children are now at risk because of RFRA and the state RFRAs. What is the least restrictive means of protecting a child from medical neglect in a faith-healing home? The RFRA formulation lets faith-healers argue that it is less restrictive to impose civil penalties than criminal penalties and deters state actors from interfering when it appears children are at risk of disability or death. It also sends a message to such believers that they have a right to special treatment and, therefore, need not be especially concerned about the medical neglect laws that apply to everyone else. Thus, the RFRAs must be repealed to pave the way to evidence-based accommodation and the adequate protection of children.

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PRAYER FAILS: FAITH HEALING, CHILDREN, AND THE LAW (2007); ALAN ROGERS, *THE CHILD CASES: HOW AMERICA'S RELIGIOUS EXEMPTION LAWS HARM CHILDREN* (2014).

<sup>171</sup> Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4, 4–5 (1974).

<sup>172</sup> House Committee on Education and Labor on CAPTA, H.R. REP. NO. 93-685 (1974), reprinted in 1974 U.S.C.A.N. 2763, 2767.

<sup>173</sup> Child Abuse and Neglect Prevention and Treatment Program, 45 Fed. Reg. 43, 936–37 (Dec. 19, 1974) (to be codified at 45 C.F.R. Part 1340).

<sup>174</sup> 45 C.F.R. § 1301.31 (1994).

<sup>175</sup> ROGERS, *supra* note 170, at 27.

<sup>176</sup> ROGERS, *supra* note 170, at 155–96.

<sup>177</sup> *Religious Beliefs, State Child Welfare Policy Database*, CASEY FAMILY PROGRAMS, <http://perma.cc/Q7RS-MJXN>.

## CONCLUSION

From the perspective of good public policy and especially transparency, RFRA fails at every level. Its misleading title, opaque content, and the deceptive practices of its promoters yielded a feel-good, but dangerous law that increases the odds that the vulnerable will be harmed and that powerful interests will turn it to ends previously unimagined.

Many early supporters like the ACLU and Americans United for Separation of Church and State are now concerned about its defects,<sup>178</sup> while those supporters that remain have the difficult burden of explaining how RFRA serves the common good. Most of their defenses have fallen by the wayside. They can no longer claim it actually reflects Supreme Court doctrine, with the *Hobby Lobby* majority Court most recently confirming it does not.<sup>179</sup> They also cannot say in truth that it was passed unanimously with strong bipartisan support, as it was not, either in 1993 or 2000.<sup>180</sup> And they can no longer credibly claim that it will only be used to protect the powerless believer needing benign accommodation, as groups like jihadists<sup>181</sup> and the FLDS<sup>182</sup> invoke it.

RFRA is a powerful weapon, the outlines of which are just beginning to be divined by the public and those at most risk. It is my hope that this article will assist lawmakers and the public with separating the rhetoric from the reality. We should base religious accommodations on facts and evidence.

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<sup>178</sup> See Brief for Julian Bond et al. as Amici Curiae Supporting the Government, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13–354, 13–356).

<sup>179</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014).

<sup>180</sup> See *supra* notes 105–111 and accompanying text.

<sup>181</sup> See *supra* note 102 and accompanying text; *Holt v. Hobbs*, 134 S. Ct. 1512 (2014).

<sup>182</sup> *Perez v. Paragon Contractors, Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572, at \*1 (D. Utah Sept. 11, 2014).