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RFRA, State RFRAs, and Religious Minorities

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RFRA, State RFRAs, and Religious Minorities

CHRISTOPHER C. LUND*

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Now fully a generation ago, the Supreme Court decided *Employment Division v. Smith*, which held that religious believers generally have no right to exemptions from neutral and generally applicable laws.¹ But in the twenty-five years since *Smith*, the situation has grown more complex. Shortly after *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA)² and later the Religious Land Use and Institutionalized Persons

* © 2016 Christopher C. Lund. Associate Professor of Law, Wayne State University Law School. An earlier draft of this piece was presented at a conference held at the University of San Diego Law School, and I'd like to express my thanks to the helpful editors at the *San Diego Law Review* for their work on it. This Article shares much of its text with "Keeping Hobby Lobby in Perspective," a book chapter I wrote for the forthcoming book, *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (Micah Schwartzman, Zoe Robinson, and Chad Flanders eds., 2016).

1. 494 U.S. 872, 878–79 (1990).
2. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2012)).

Act (RLUIPA).³ And many states followed suit, either adopting state Religious Freedom Restoration Acts (state RFRA) or construing generously the religious-freedom provisions of their state constitutions.⁴ As a result, the compelling-interest test discarded by *Smith* now again applies to the federal government and more than half the states. And there have been other developments too. The Supreme Court's adoption of the ministerial exception in *Hosanna-Tabor v. EEOC*,⁵ for example, carved out a constitutional exception for internal church decisions that sits in some tension with *Smith*.

Yet these protections for free exercise have also grown more controversial. Last term, the Supreme Court decided the *Hobby Lobby* case, holding that the Religious Freedom Restoration Act protected for-profit corporations.⁶ The year before, the New Mexico Supreme Court decided *Elane Photography*, about whether a Christian photographer could refuse to photograph a lesbian couple's wedding on grounds of religious conscience.⁷ *Hobby Lobby* and *Elane Photography* raise important legal questions. But they also have changed the political debate. These two cases—probably more than any others—have become the face of free exercise to the general public.

It is not clear that free exercise can withstand this association. After *Smith*, religious exemptions depend on legislative support, which in turn hinges on popular support. In recent years, proposed state RFRA have been shot down in several places, largely because of fears of cases like *Hobby Lobby* and *Elane Photography*. No state RFRA has yet been repealed. But no legislation can survive if public opposition to it grows sufficiently strong.

What the debate has often lacked is a sense of perspective. *Hobby Lobby* and *Elane Photography* are important cases. But, statistically speaking, they are outliers. The majority of RFRA and state RFRA cases have little to do with discrimination or sexual morality or the culture wars. Those cases get almost no attention, even from experts in the field. There have probably been around a few hundred state RFRA cases, which sounds like a lot though it only amounts to about one or two cases per state per year. Few of those cases look like *Elane Photography*. Perhaps my count is

3. Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified as amended at 42 U.S.C. §§ 2000cc to -5 (2012)).

4. See generally Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA*, 55 S.D. L. REV. 466 (2010) (examining state RFRA and the various issues they present).

5. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012).

6. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

7. See *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 1, 309 P.3d 53, 58–59.

mistaken, but so far I count two: *Elane Photography* itself, and a recent addition, *Arlene's Flowers*.⁸ To be sure, other controversies have been settled and still others resolved administratively. And no doubt the future will bring other similar cases. Surely no one believes *Elane Photography* to be an isolated event.

Even so, the number of *Elane Photography* cases will probably still be a small fraction of RFRA and state RFRA cases overall. A single fractious issue, highly unrepresentative of the bulk of the cases, is driving the discussion on both the left and the right. One side now supports state RFRA in large part because it wants to protect the religious claim in *Elane Photography*; the other side now opposes state RFRA for precisely the same reason. There are many things odd about this, one being that the religious claim in *Elane Photography* was so decisively rejected despite New Mexico's state RFRA. (The religious claim in *Elane Photography* ultimately went before three Human Rights Commission judges, one state district judge, three state court of appeals judges, and five state Supreme Court Justices—and it never got a single vote from any of them.)⁹ But the more important point here is that the bulk of RFRA and state RFRA cases look nothing like *Elane Photography*.

I. RFRA, STATE RFRA, AND RELIGIOUS MINORITIES

This leads into my central point. Whatever else can be said of them, RFRA and state RFRA have been valuable for religious minorities, who often have no other recourse when the law conflicts with their most basic religious obligations. Take a case out of Texas involving a five-year-old Native American boy in the Texas public school system.¹⁰ He wanted to wear his hair long, in conformity with the Apache religious beliefs of his family. This was a deeply held religious conviction: the boy's hair had never been cut, and his father's hair hadn't been cut in ten years, though he almost lost his job because of it. But the school district refused to make any exception, claiming various reasons for the ban on long hair—hygiene, safety, and security.¹¹ Those reasons might have made sense, but for one

8. *State v. Arlene's Flowers*, No. 13-2-00871-5, 2015 WL 720213 (Wash. Super. Ct. Feb. 18, 2015) (denying defendant's motion for summary judgment).

9. *Elane Photography*, 2013-NMSC-040, ¶¶ 4, 9–10, 309 P.3d at 59, 60.

10. *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 253 (5th Cir. 2010).

11. *Id.* at 253–54.

thing. The school board’s policy did not ban long hair generally. It banned long hair for boys. The school board had no trouble with girls having long hair.¹² Forced now to come up with some reason why this one little boy had to cut his hair when all the girls didn’t, the school had to go in a different direction. This Native American kindergartener, the school district patiently explained to the Fifth Circuit, had “twice been mistaken for a girl while at school.”¹³ Some parents will surely be bothered by their child occasionally (though briefly) being misidentified as a girl. But the idea that the government has a compelling interest in preventing that misidentification—an interest strong enough to justify the destruction of Native American religious identity—struck the Fifth Circuit as obviously mistaken.¹⁴ But the Fifth Circuit could only protect the Native American child because of Texas’s state RFRA.¹⁵

Or consider an example out of Kansas.¹⁶ Mary Stinemetz was a Medicaid patient in need of a liver transplant. She was also a Jehovah’s Witness, who objected to the blood transfusion that an ordinary liver transplant would require. With technology’s advance, however, has come a newfangled medical procedure called a bloodless liver transplant, which does not involve a blood transfusion and which is actually cheaper than an ordinary liver transplant. But Kansas had no facility capable of doing bloodless liver transplants. The nearest one was in Omaha, in Nebraska.

Unfortunately for Stinemetz, Kansas’s Medicaid had a general policy against reimbursing out-of-state procedures, and it refused to make any exception for her.¹⁷ If that refusal seems hard to understand, the Kansas Court of Appeals felt the same way. The court concluded that Kansas’s Medicaid agency had “failed to suggest any state interest, much less a compelling interest, for denying Stinemetz’s request.”¹⁸ Stinemetz ultimately won this case. Struck by its facts, the Kansas Court of Appeals construed

12. *Id.* at 257. The policy said that “[b]oys’ hair shall not cover any part of the ear or touch the top of the standard collar in back.” *Id.* at 253 (alteration in original).

13. *Id.* at 269.

14. *See id.* at 271–72.

15. If one reads the entire case, it also says a lot about the world in which religious minorities live. The boy’s parents had feared that this very thing might happen to them. They were reluctant to move to Needville. And before they moved, they sought assurances from the school district that their child would be able to keep his long hair. *Id.* at 254–55. But the school district refused to say one way or the other, insisting that the parents had to move first and enroll in the public schools before they would make a determination. After the parents moved, the school district denied them an exemption. *See id.* at 255–56. Without exemptions, religious minorities will have to think carefully about where they can live.

16. *Stinemetz v. Kan. Health Policy Auth.*, 252 P.3d 141 (Kan. Ct. App. 2011).

17. *Id.* at 143.

18. *Id.* at 155.

the religious freedom provision in the Kansas state constitution to incorporate RFRA's compelling-interest standard.¹⁹

This story, however, does not end happily. By the time litigation ended, Stinemetz's problems had progressed to the point that she was no longer eligible for a transplant. She died of liver failure the year after her victory in the Kansas Court of Appeals.²⁰ This does not necessarily imply that Stinemetz died for want of a religious exemption. There may have been other obstacles to Stinemetz actually getting a liver transplant, and there is no guarantee the transplant would have gone successfully. All we can say is that, had Kansas offered her a religious exemption from the beginning, Stinemetz would have had a better chance.

Stinemetz is many things at once. It is a story of government intransigence in the face of dire religious need. It is a straightforward explanation of the need for RFRA and state RFRA's. It is also a rejoinder to the argument that religious accommodations necessarily amount to religious favoritism. *Stinemetz* illustrates how one can support religious exemptions without any commitment to the truth of the underlying religious claims. Almost no one reading this will share Mary Stinemetz's religious beliefs about blood transfusions; most of us will find them hard even to fathom. But there is nothing wrong with us deciding to let her live anyway. There is, in other words, a perfectly good secular reason to accommodate religious conscience.²¹

These two cases are not anomalous. Many RFRA and state RFRA claims find support from all parts of the religious and political spectrum. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* was an important victory for the Brazilian group using hoasca in their religious rituals²²—and it now has a cousin case, *Church of the Holy Light*.²³ *Holt v. Hobbs*²⁴

19. *Id.* Soon after, Kansas's legislature codified *Stinemetz*'s holding when it passed Kansas's state RFRA. See KAN. STAT. ANN. §§ 60-5301 to -5305 (2013).

20. Brad Cooper, *Jehovah's Witness Who Needed Bloodless Transplant Dies*, KANSAS CITY STAR (Oct. 25, 2012), <http://www.kansascity.com/news/local/article310218/Jehovahs-Witness-who-needed-bloodless-transplant-dies.html> [<https://perma.cc/6CCN-7VU6>].

21. See *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring).

22. 546 U.S. 418 (2006).

23. See *Church of the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 2d 1210, 1211–12 (D. Or. 2009) (enabling members of the Brazilian Santo Daime religion to drink Daime tea, which contains DMT, as part of their religious rituals). On appeal, the Ninth Circuit narrowed the scope of the district court's injunction. *Church of the Holy Light of the Queen v. Holder*, 443 F. App'x 302, 303 (9th Cir. 2011).

24. 135 S. Ct. 853 (2015).

was an important victory for Muslims and was supported by a tremendously diverse coalition of folks, liberal and conservative, religious and not. Other cases have involved Muslim women seeking the right to wear unobtrusive veils at work.²⁵ One powerful prison RFRA decision gave a Muslim woman the right to avoid cross-gender pat-down searches, which a judge found totally unnecessary in context.²⁶ RFRA and state RFRA have been used to challenge no-beard policies of police and fire departments, sometimes by Muslims,²⁷ sometimes by Orthodox Jews.²⁸ One Texas state RFRA case gave the Santeria the right to continue their religious practices sacrificing animals.²⁹ One federal RFRA case involved a Sikh employee at the IRS who sought the right to wear a *kirpan* (a ceremonial sword) that had been dulled down; after a federal district court dismissed her case, the Fifth Circuit reversed it for further examination.³⁰ And there are sympathetic cases not involving religious minorities. An important and surprisingly often litigated claim is whether churches can distribute free food to the homeless.³¹ The way these statutes sometimes work, the churches would be in the clear if they would simply *sell* the food to the homeless. City officials seem to have a hard time understanding why the churches just don't do that instead. And just as important as the results here are the rationales. It is striking how often judges in these cases make biting comments about the government's reasons for denying a religious exemption.³²

25. EEOC v. GEO Grp., Inc., 616 F.3d 265, 267–69 (3d Cir. 2010); Webb v. City of Phila., 562 F.3d 256, 258 (3d Cir. 2009).

26. See Forde v. Baird, 720 F. Supp. 2d 170, 172, 178 (D. Conn. 2010).

27. Potter v. District of Columbia, 558 F.3d 542, 544 (D.C. Cir. 2009); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999).

28. Litzman v. N.Y.C. Police Dep't., No. 12 Civ. 4681(HB), 2013 WL 6049066, at *1 (S.D.N.Y. Nov. 15, 2013).

29. Merced v. Kasson, 577 F.3d 578, 581 (5th Cir. 2009).

30. See Tagore v. United States, 735 F.3d 324, 325–26 (5th Cir. 2013). She convinced the Fifth Circuit to remand her case because the government had not established any real security risk. *Id.* at 331–32.

31. See, e.g., Chosen 300 Ministries, Inc. v. City of Phila., No. 12-3159, 2012 WL 3235317 (E.D. Pa. Aug. 9, 2012) (granting in part plaintiff's motion for preliminary injunction); Abbott v. City of Fort Lauderdale, 783 So. 2d 1213 (Fla. Dist. Ct. App. 2001).

32. See A.A. *ex rel.* Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248, 272 (5th Cir. 2010) (“[W]hile a school may set grooming standards for its students, when those standards substantially burden the free exercise of religion, they must accomplish something.”); *Merced*, 577 F.3d at 593–94 (“The city has absolutely no evidence that *Merced's* religious conduct undermined any of its interests. . . . *Merced* has performed these sacrifices for sixteen years without creating health hazards or unduly harming any animals.”); Forde v. Baird, 720 F. Supp. 2d 170, 178 (D. Conn. 2010) (concluding that the government has “offered no evidence establishing a compelling governmental interest in permitting male correctional officers to pat search Forde” and, in fact, “there may be penological disadvantages to cross-gender pat searches”); Stinemetz v. Kan. Health Policy Auth., 252 P.3d 141, 160 (Kan. Ct.

If one wants reasons to be inclined toward the compelling-interest test for free exercise, another body of decisions also deserves attention. RFRA and state RFRA are legislative enactments. But in a number of states, the compelling-interest test for free exercise has come about through state courts interpreting the religious-freedom provisions of their state constitutions. The particular cases where courts make that decision are almost uniformly revealing. The facts themselves often illustrate why courts decide to go with *Sherbert/Yoder* rather than *Smith*. Alaska, for example, adopted the compelling-interest test in an old case about the protection of Native American funeral rituals.³³ Kansas adopted the compelling-interest test under the state constitution in *Stinemetz*, discussed above.

Mississippi did the same thing in another Jehovah's Witnesses case—this one involving a woman shot by her daughter.³⁴ The woman's chances in surgery were fair even without a blood transfusion. And she insisted she would rather die than get a blood transfusion, for which she might be damned for all eternity. But the local district attorney's office insisted that she was needed in court to testify, and so it forced a blood transfusion on her over her objections.³⁵ Why it needed to do this is somewhat of a mystery. The mother was apparently conscious and able to communicate, and any statement she made identifying the daughter would have been plainly admissible in court.³⁶ The Mississippi Supreme Court responded by holding this unconstitutional under the state constitution. Mississippi is full of Protestants, but there are few Jehovah's Witnesses in positions of power. Probably no one on that court shared the mother's views about blood transfusions. Yet the court seemed deeply troubled that the government would inflict such extraordinary and unnecessary psychic distress on an innocent human being. That sentiment drove the court to its forceful conclusion: "in this state we take seriously the right to the free exercise of religion."³⁷

Although some of these are tales of almost callous indifference to religious need, this is not some broadside against the government. Government officials are probably much more sensitive about these issues than the

App. 2011) ("[Kansas] has failed to show any state interest, much less a compelling interest, for denying *Stinemetz*' request for prior authorization for the out-of-state liver transplant.").

33. See *Frank v. State*, 604 P.2d 1068, 1069–70 (Alaska 1979).

34. *In re Brown*, 478 So. 2d 1033, 1035 (Miss. 1985).

35. *Id.* at 1035–36.

36. See *id.* at 1036.

37. *Id.* at 1039.

average person. But America is a large country, and with a large enough sample size, mistakes are inevitable. And this is not to say that the religious believers in these cases are all valorous people. Religious folks can be obnoxious, intolerant, and hypocritical. They frequently are stubbornly inflexible, often unwilling to bend even slightly on the issue of religious obligation. In one prison case, an Orthodox Jew wanted to have *pe'ot* (sidelocks) down to the bottom of his ears, while the prison insisted they stop at the middle of his ear.³⁸ The parties were fighting—quite bitterly—over half an inch. “Both the Plaintiff and the Defendants,” said the perturbed district judge, “seem unable to grasp that their area of dispute, both literally and figuratively, is narrow.”³⁹ Maybe this particular plaintiff was being difficult, although even that seems a little unfair to say. But in any event, the court was right to rule in his favor.⁴⁰ Free exercise belongs not only to nobles but also to rascals; when it is possible, we should accommodate even those who do not make it easy for us.

We have been talking about indifference, but we should also not forget the role played by misunderstanding. My first academic talk was about the congressional chaplaincies. At some point, I surprised a colleague with an offhand remark about the military chaplaincies, which seem to me to be on much more solid constitutional footing.⁴¹ My colleague took me to task, calling military chaplains unnecessary. There was no reason, he said, why laypeople in the military could not do everything that chaplains currently do.

The problem, of course, is that not everyone sees it that way. My colleague came from a Protestant background. And Protestants and Catholics—just to use examples from within the Christian tradition—differ in their views about the respective roles of clergy and laity. My friend was Protestant, and there’s no problem with that. But he was blind to the fact that his views represented only one side of a debate that has spanned centuries. He had no idea that other people—other Christians, in fact—might have an entirely different view than he did. Years later, precisely the same misunderstanding surfaced in a district court decision out of Texas. A Catholic inmate in administrative segregation had effectively lost all access

38. *Benning v. Georgia*, 864 F. Supp. 2d 1358, 1360 (M.D. Ga. 2012).

39. *See id.* at 1362.

40. The court ruled in the plaintiff’s favor, ultimately concluding that all of the prison’s purported justifications failed to pass muster. *See id.* at 1369 (“[W]hen questioned by the Court, [the prison administrator] acknowledged that sideburns extending to the bottom of the earlobe would not ‘concern us that much, other than it is not in keeping with the language in the posted standard within our current grooming policy.’”).

41. This is the Court’s position too. *See McCreary Cty. v. ACLU*, 545 U.S. 844, 875 (2005) (“[I]f the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions.”).

to a priest, and thus could not receive the church's sacraments. But this did not trouble the prison chaplain as much as it did the inmate. "[C]ommunion and confession," the Protestant chaplain explained to the court, "did not have to be administered by priests but could be done by lay people."⁴²

In a pluralistic society, these kinds of misunderstandings are to be expected, even among well-intentioned people. And if such misunderstandings are possible in modern-day America between Protestants and Catholics—two groups whose present differences seem modest if not imperceptible—you can only imagine the other kinds of culture clash we will see in modern-day America.

II. SOME THOUGHTS ON TAILORED STATUTORY EXEMPTIONS

If there is a case for religious exemptions, there remains the question of how they should be done. One model is specific statutory exemptions. Legislatures can draft statutes addressed to the particular religious needs of a particular religious community in the face of a particular legal conflict.⁴³ But this ends up being a somewhat unrealistic way of handling the need for exemptions. It will radically under protect free exercise.

Return again to the issue of Jehovah's Witnesses and blood transfusions. At least at first glance, it seems like an issue capable of legislative resolution. Say we agree Jehovah's Witnesses should be protected in their religious beliefs against blood transfusions. How would we go about doing it? Imagine a statute that said the following:

No Jehovah's Witness shall be in any way legally punished for choosing not to have a blood transfusion. And no Jehovah's Witness shall be permitted to deny anyone else (including their minor children) a blood transfusion.

This language comes from someone with neither training nor experience in drafting legislation. It is not perfect, but perhaps it captures some basic intuitions. Imagine that a state legislature enacted this provision and considered itself done with the issue.

But then the cases come. Again consider *Stinemetz*, the case about the Jehovah's Witness in Kansas's Medicaid system who wanted a bloodless

42. *Ramon v. Dretke*, No. 9:10CV158, 2011 WL 6963609, at *1 (E.D. Tex. Apr. 13, 2011).

43. For an example, see 42 U.S.C. § 1996a(b)(1) (2012) ("[T]he 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.").

liver transplant done out of state.⁴⁴ The case for an exemption seems quite strong—the Kansas Court of Appeals reached out to protect the religious claim with a *Sherbert/Yoder*-style interpretation of its state constitution. But it is not clear what this statute means for the religious claim here, because the statute does not speak directly enough to the situation.

Or take another case, this one about a Jehovah's Witness in a child-custody proceeding.⁴⁵ The mother is a Jehovah's Witness; the father is not. The father says the mother should be denied custody, because one day the kids might get sick and need a blood transfusion. And if that happens, she might not give it to them because of her religious beliefs. None of that has happened, but it could happen and, in any event, that's the father's argument.⁴⁶ Here too, it is not clear what the statute means for this situation.

Or take a third case, this one about the intersection of Jehovah's Witnesses and tort law's doctrine of avoidable consequences. The most famous case here is *Munn v. Algee*, which involved a Jehovah's Witness injured in a car accident who died because she refused a blood transfusion.⁴⁷ The court ruled that the defendant motorist, who negligently caused the accident, didn't have to pay damages for the death because it was a consequence that the plaintiff could have avoided.⁴⁸ Yet there are cases harder than *Munn v. Algee*, like a recent one from Michigan involving a Jehovah's Witness with an upcoming surgery who told her doctor that she would die before taking a blood transfusion.⁴⁹ The doctor knew his patient's wishes when he committed the alleged malpractice, which in turn made a blood transfusion indispensable. After the patient died—she refused the transfusion—her estate sued the doctor.⁵⁰ As in *Munn v. Algee*, the plaintiff lost.⁵¹ And maybe that too is right, though the implication is that a doctor could commit any kind of malpractice resulting in the death of a Jehovah's Witness, and it would never be actionable as long as a blood transfusion would have prevented the death. But again, however, the statute is not written with the requisite specificity to address this situation.

The point is simple. If we rely exclusively on legislatures to address these issues and resolve them in advance through particularized religious exemptions passed in the normal legislative process, we will find ourselves sorely frustrated. The situation will end up resembling the South Pacific—an archipelago of religious exemptions in a wide ocean of religious need.

44. *Stinemetz v. Kan. Health Policy Auth.*, 252 P.3d 141 (Kan. Ct. App. 2011).

45. *Harrison v. Tauheed*, 256 P.3d 851, 854 (Kan. 2011).

46. *Id.* at 861.

47. 924 F.2d 568, 570–71 (5th Cir. 1991).

48. *Id.* at 577.

49. *Braverman v. Granger*, 844 N.W.2d 485, 488–89 (Mich. Ct. App. 2014).

50. *Id.* at 489–90.

51. *Id.*

The problem, simply put, is that the cases vary far too much. There are just too many religions with too many religious beliefs, and the cases that are going to arise have such different postures, postures that are often unforeseeable and sometimes almost unimaginable.

On top of that, this whole discussion was premised on some improbable starting assumptions. We were imagining, for example, that state legislatures would take time to debate what approach to adopt with respect to Jehovah's Witnesses and their religious beliefs about blood transfusions. It is hard to imagine any legislature having time for that. Moreover, while Jehovah's Witnesses are a small group, they are also a well-known group with a well-known belief about blood transfusions. Less prominent religious groups with less prominent beliefs will have an even harder time attracting legislative attention and support.

To be sure, legislatures can be counted on for accommodations in certain types of circumstances. Congress is certainly good at stepping in when a religious group loses a case in the Supreme Court.⁵² Congress is also quite good with recurring situations that implicate the joint interests of a variety of religious groups. The Section 702 exemption, which enables religious groups to discriminate on the basis of religion in hiring, is a good example of that.⁵³ But even here, there is reason for caution. Even as Congress passed the Section 702 exception, it missed the conflict that would arise between religious organizations and *other* kinds of discrimination laws—a conflict only mediated by judicial creation of the ministerial exception.

But all this really just misses the point. Federal law is not the problem, by and large. The real problem is the state and local governments, who regulate more heavily, have less time and resources for thoughtful deliberation, and get less attention both from civil rights groups and religious organizations. Consider again the issue of religious discrimination in hiring. Congress passed the Section 702 exemption, but a surprising number of states forbid

52. See *Emp't Div. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (codified at 42 U.S.C. § 1996(a) (2012)); *Goldman v. Weinberger*, 475 U.S. 503 (1986), *superseded by statute*, National Defense Authorization Act for Fiscal Years 1988 & 1989 (NDAA), Pub. L. No. 100-180, 101 Stat. 1019 (codified at 10 U.S.C. § 774(a)-(b) (2012)); *United States v. Lee*, 455 U.S. 252 (1982), *superseded by statute*, Technical and Miscellaneous Revenue Act of 1988 (TMRA), Pub. L. No. 100-647, 102 Stat. 3342 (codified as amended at 26 U.S.C. § 3127 (2012)).

53. See Title VII of the Civil Rights Act of 1964, § 702, 42 U.S.C. 2000e-1 (2012).

religious discrimination in hiring without making any special exception for religious groups.⁵⁴

In his famous study, James Ryan estimated that Congress and the states have created, by statute, as many as 2,000 religious exemptions. He was quite optimistic about legislative ability to accommodate religion. Ryan noted, for example, how “each of the states grants some unique exemptions to religious groups,” such as how “California allows religious exemptions from mandated autopsies.”⁵⁵ Ryan’s work was very well done, but his point can be taken almost the opposite way. California may recognize religious objections to autopsies, but what about the other forty-nine states? Those who object to autopsies—the Hmong, Orthodox Jews, Navajo Indians—live in other states too. And this state of affairs has worsened since Ryan’s work, because of *Boerne*.⁵⁶ Now religious groups do not need one exemption; they need fifty-one. *O Centro* protected a Brazilian group’s use of hoasca from federal authorities, which is wonderful for the group’s members who happen to live in New Hampshire and Vermont—the two states that do not criminalize DMT (the active ingredient in hoasca). But the other forty-eight states all criminalize DMT, and none of them make any exception for its religious use.⁵⁷

III. SOME THOUGHTS ON THE COMPELLING-INTEREST TEST AND FREE EXERCISE

In an important sense, then, things are all or nothing. We can insist on specific statutory exemptions, each oriented around a particular conflict between legal and religious obligation. But only salient conflicts will create legislative battles, and only uncontroversial religious practices will get accommodated. The fundamental choice then becomes whether or not to have an exemption regime based on a broadly applicable standard (such as the compelling-interest test).

54. See Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 26–27 (2011).

55. See James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445, 1448 (1992) (citing CAL. GOV’T CODE § 27491.43 (Deering 1991)).

56. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding the federal RFRA inapplicable to state and local law).

57. With the exception of New Hampshire and Vermont, states have adopted verbatim the Uniform Controlled Substances Act (which criminalizes DMT). See Lund, *supra* note 4, at 473–74 (explaining these points and providing citations).

A. *The Parade of Horribles*

One way to begin the debate is in analytical terms. When we choose a legal standard for religious exemptions, we set a balance between two risks—the risk of denying exemptions that should be granted and the risk of granting religious exemptions that should be denied. To talk like this, of course, presumes we will be able to agree on those issues—on when exemptions should be given and when they should be denied. And universal agreement is indeed impossible. But it is striking how much agreement there often is, at least at the level of results.⁵⁸

If we begin this way, one thing is striking. Thoughtful people oppose RFRA, just as thoughtful people opposed *Sherbert/Yoder*. But those folks have few examples of RFRA being interpreted in threatening ways. Consider Justice Scalia's opinion in *Smith*. In explaining his fears of the *Sherbert/Yoder* test, he cites a dozen cases in the lower courts, all involving challenges to important governmental interests.⁵⁹ In her concurrence, Justice O'Connor refers to this part of the opinion as a parade of horrors.⁶⁰ But the phrase does not quite fit, because none of Justice Scalia's cases involved inappropriately granted exemptions. All of the cases denied the religious claims at issue. This is striking. Supreme Court Justices have clerks with the finest legal-research skills, and Justice Scalia had every inclination to portray the *Sherbert/Yoder* standard in its worst possible light. But he could not find a single example of the *Sherbert/Yoder* standard being used to give an exemption that he found inappropriate—or that he thought other people might find inappropriate. Stocked with twenty-five years of cases in fifty states, he could not find one example.⁶¹ If this is right, it is astonishing. The *Sherbert/Yoder* era involved a legal rule with all the risk of error placed on one side of the ledger. And *Sherbert/Yoder* was thrown out anyway.

58. In earlier work, I have asked why there is often so much agreement about particular exemption cases, but so little agreement about the doctrine necessary to reach the right results in those cases. Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 371 (2010) (“But given that there is so much agreement on the level of results, why is there so much disagreement on the level of doctrine?”).

59. *Emp't Div. v. Smith*, 494 U.S. 872, 889 (1990).

60. *Id.* at 902 (O'Connor, J., concurring).

61. Justice O'Connor saw this at the time. “The Court's parade of horrors . . . not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.” *Id.*

We are now another twenty-five years down the road. Of course, if you tell people now that there is zero risk of an inappropriately granted exemption, they will not believe you. Even before *Hobby Lobby*, there was *Thomas v. Anchorage Equal Rights Commission*.⁶² Even so, less has changed than people think. There are still few examples of RFRA and state RFRA giving controversial exemptions. Of course, religious people sometimes make tendentious claims, particularly prisoners.⁶³ But those claims do not win. At every turn, the tendency has been toward under enforcement not over enforcement.

To be sure, there are troubling religious exemptions. But they are not the ones given by courts under the compelling-interest test. The troubling exemptions are the ones issued by legislatures. It is hard to imagine any court giving a religious exemption from a generally applicable vaccination law.⁶⁴ But the vast majority of legislatures have given such exemptions. It is hard to imagine any court on its own exempting religious believers from child abuse or neglect statutes, but legislatures do so routinely. Maybe the exceptions can be justified. Maybe, as in the case of child neglect, a legislature could conclude that the harm is utterly incapable of being deterred and that the intense nature of the underlying religious beliefs reduces the retributive case. But I am a strong supporter of religious exemptions, and I would not exempt this conduct. The federal government and something like forty-six states exempt religious hospitals from performing sterilizations and abortions,⁶⁵ which is sensible in theory but recklessly overbroad in practice.⁶⁶

62. *Thomas* involved the religious claim of landlords who refused to rent to unmarried couples in violation of state law. On appeal, the landlords initially won, but that opinion was eventually withdrawn and the case dismissed for lack of standing. *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 696 (9th Cir. 1999), *withdrawn*, 192 F.3d 1208 (9th Cir. 1999), *vacated*, 220 F.3d 1134 (9th Cir. 2000).

63. For some nonprison examples, see *United States v. Lepp*, 446 F. App'x 44, 46 (9th Cir. 2011) (upholding a Rastafarian's marijuana conviction despite RFRA, in part because he was caught selling a pound of it to an undercover officer); *Griffin v. Cudjoe*, 2012 OK CIV APP 46, ¶ 21, 276 P.3d 1064, 1068–69 (denying that a minister has a constitutional right to embezzle funds from his church and spend them on flagrantly nonchurch purposes).

64. See, e.g., *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353–54 (4th Cir. 2011) (refusing to give a religious exemption from West Virginia's requirement that public schoolchildren be vaccinated, and citing a laundry list of cases with similar holdings without any counterexamples).

65. See Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 77, 85, 90–91 (Douglas Laycock et al. eds., 2008).

66. Most agree about nonemergency situations. In the absence of a medical emergency and time constraints, if a woman comes into a Catholic hospital for sterilization or an abortion, it seems perfectly sensible to have her go someplace else. The problem is when there is no time or ability to send the woman someplace else. See *Motion to Dismiss*

All this, though, reinforces the key point that the compelling-interest test on its own rarely results in inappropriate exemptions. No academic or judicial discussion of the compelling-interest test ever seems complete without some reference to a likely parade of horrors. In her *Hobby Lobby* dissent, Justice Ginsburg feared religious objectors would be entitled to provide insurance without coverage of blood transfusions, antidepressants, and vaccinations.⁶⁷ In *Smith*, Justice Scalia feared courts giving exemptions to child labor laws and manslaughter statutes.⁶⁸ But such hypothetical claims seem less scary when one realizes that they are rarely brought and do not win. In *Reynolds*, Chief Justice Waite hinted that a system of religious exemptions would necessarily mean exemptions for involuntary human sacrifice.⁶⁹ With a hundred years of hindsight, we see that pretty clearly as a straw man.

A common position, even for people supportive of religious exemptions, is to argue that RFRA is simply too strong. Strict scrutiny is too potent a standard. Instead we should go with some lesser standard—say intermediate scrutiny or rational basis with bite.⁷⁰ I do not mean to attack these alternatives; anything is better than *Smith*. But why this issue has been so important to so many is lost on me. In deciding whether strict scrutiny is too potent a standard, the single most important thing must be the results that it yields. So the argument that strict scrutiny is too powerful seems anemic to me, without examples of exemptions erroneously granted. Otherwise, the objection is just semantic. The results of strict scrutiny are fine, but the name needs to be changed for some reason.⁷¹

at 7, *Means v. U.S. Conference of Catholic Bishops*, No. 2:13-CV-14916-DPH-PJK (E.D. Mich. Mar. 12, 2014), ECF No. 23.

67. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting).

68. *Emp't Div. v. Smith*, 494 U.S. 872, 889 (1990).

69. *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

70. See, e.g., Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1264 (2008) (“rationality with bite”); Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 943 (1998) (“intermediate scrutiny”); cf. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1503 (1999) (“burden is justified”).

71. Eugene Volokh, for example, has worried that a weak strict-scrutiny test used for free exercise will dilute the strong strict-scrutiny test used for free speech. See Volokh, *supra* note 70, at 1500. There is logic to this argument, although it seems a bit strange that one constitutional right should be deliberately weakened in order to make sure that another constitutional right is not accidentally weakened.

B. The Fear of Inconsistency

Sometimes the fear about inappropriately granted exemptions morphs into a different kind of concern—a concern about inconsistency. Professor Ira Lupu, for example, has developed this argument well in a recent paper.⁷² Lupu has long been a thoughtful and sophisticated critic of exemptions. He agrees that cases of over enforcement are rare or nonexistent, but he sees the risk of inconsistency as grave enough to threaten basic rule-of-law values.⁷³

But the charge of inconsistency is not a perfect fit. Or maybe inconsistency is not quite the right word. In an important way, Lupu and I agree on a central point—that a chief problem of free exercise over the past fifty years has been the simple diversity of cases.⁷⁴ America marries tremendous religious pluralism with federalism and a thick regulatory state. This results in an incredible variety of cases that makes it virtually impossible for discretion-less doctrinal rules to develop. In other areas of law, situations recur. Over time, general standards distill down into a set of administrable bright-line rules. The Fourth Amendment prohibits “unreasonable searches and seizures,” and reasonableness is, of course, among the most standard-ish of legal concepts. But over the years, the Court has tried, with mixed success, to work the Fourth Amendment down into a set of discrete rules—the core being the requirement of a warrant based on probable cause.⁷⁵

But the big question is whether there is any real evidence grounding these concerns. Volokh cited two free-speech cases over the previous fifteen years, where courts upheld viewpoint-based restrictions on speech and used the free exercise analogy as justification. *Id.* at 1500 n.108. He also cited two other free-speech cases where courts seemed more inclined to uphold such restrictions on free speech, though the cases did not actually come to that issue. *Id.* at 1501 n.111. But the key point is this. In all of Volokh’s cases, the references to free exercise seemed gratuitous and unnecessary to the result. In the cases upholding arguably unconstitutional restrictions on speech, courts clearly wanted to uphold those restrictions: they almost certainly would have done the same thing without the free-exercise analogy. To make the same point a different way, consider whether the weak version of strict scrutiny adopted in *Grutter v. Bollinger*, 539 U.S. 306 (2003), is likely to weaken strict scrutiny in the context of free speech. It is possible, I suppose. But such a counterintuitive claim would require strong empirical support, and there seems to be little of that for this proposition, at least with regard to free exercise.

72. Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35 (2015).

73. *Id.* (concluding that the compelling-interest test will “tend to be strong in rhetoric and weak in practice,” but that the “application of vague, general standards for adjudicating religious exemption claims cannot satisfy values associated with the rule of law”).

74. *See id.* at 72–73.

75. *See Riley v. California*, 134 S. Ct. 2473, 2491 (2014) (explaining the Court’s “general preference to provide clear guidance to law enforcement through categorical [Fourth Amendment] rules”). There are areas, of course, where the Fourth Amendment’s standard has not translated into a set of bright-line rules. Think of the “special needs” cases, where the Court engages in wholesale balancing between governmental and individual

But the *Sherbert/Yoder* standard never could be reduced like that. This is no one's fault; it is just that the situations were never reoccurring enough. The Supreme Court would have a case one year involving a Christian objecting to having a picture on her driver's license.⁷⁶ The next year there would be a case about yarmulkes in the military;⁷⁷ the year after that it would be Muslim worship services in prison.⁷⁸ Every case would involve a different religious practice, a different law being challenged, and a different set of governmental interests behind each law.

This is why the charge of inconsistency fails, or at least needs to be refashioned. There simply are not enough cases for them to be inconsistent with one another. If there were true inconsistency, the normal procedures of appellate review would smooth them out. Lupu seems to think apples are being treated differently from apples. But that is not what is going on. Apples are being treated differently from oranges, which are being treated differently from pineapples—and that, of course, may be entirely appropriate.

Lupu's charge of inconsistency then becomes a different kind of attack. The Fourth Amendment sets out a general standard—reasonableness—that courts have tried to reduce to a set of discrete rules. But now consider reasonableness as it shows up in negligence law, in the general requirement that people act reasonably under the circumstances. Justice Holmes always hoped that reasonableness would be broken down into a set of bright-line rules that could be implemented by judges rather than juries.⁷⁹ That never happened.⁸⁰ This then led to the understandable charge that juries were

interests. *See, e.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995). The persistent criticism has been that this balancing inevitably waters down the right, even the core of the right. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 639–40 (1989) (Marshall, J., dissenting) (arguing that the “special needs” exception has the Court engaged in “an extended inquiry . . . in which it balances ‘all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself’ . . . [and] [t]he result is special needs balancing analysis’ deepest incursion yet into the core protections of the Fourth Amendment” (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985))).

76. *Jensen v. Quaring*, 472 U.S. 478 (1985) (mem.), *aff'g* *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984).

77. *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986).

78. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987).

79. *See, e.g.*, OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 98 (Mark D. Howe ed., 1967) (“But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever?”).

80. *See* Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1192 (2001) (“[T]he rejection of Holmes’ proposal is [usually] explained on the ground that even recurring cases differ sufficiently in their details that development of *per se* rules to govern them has proved infeasible”).

not applying a preexisting legal standard, but instead were making one up as they went along. Best conceived, this is Lupu's charge against the *Sherbert/Yoder* regime, which echoes Justice Scalia's in *Smith*: it goes against the rule of law to have such a fuzzy standard vesting such discretion in judges.⁸¹

Yet there are some differences here worth noting. In negligence cases, the defendant is usually a private party, and the remedy is usually damages, which renders the problem of fair notice particularly acute. By contrast, with free exercise, the defendant is usually the government. And the remedy is almost always declaratory or injunctive relief. Damages are rarely pertinent to redressing the harm, rarely sought, and rarely available anyway.⁸²

But of course, at some point the truth will out. There is a core of Lupu's and Scalia's charge that cannot be deflected. RFRA and state RFRA, like the *Sherbert/Yoder* test before them, give judges an irreducible degree of discretion in balancing. But once the fears of dangerous results and inconsistency are removed, it is not altogether clear what the complaint is about. In *Smith*, the principal objection was that judicial balancing impinged upon core democratic values. Even at the time, this was a little hard to accept, given the ubiquity of balancing in constitutional law.⁸³ But in any event, this objection no longer carries any weight at all. *Sherbert* and *Yoder* were the Court's creations. But RFRA and state RFRA are legislative enactments—products of, not obstacles to, democratic decision-making.⁸⁴

81. *Emp't Div. v. Smith*, 494 U.S. 872, 879, 890 (1990); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (suggesting a general preference for rules over standards).

82. RFRA does not authorize damages against the federal government. *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 840 (9th Cir. 2012); *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006). RLUIPA does not authorize damages against state governments. *Sossamon v. Texas*, 563 U.S. 277, 288, (2011). State RFRA differ on whether damages are allowed. Compare VA. CODE ANN. § 57-2.02(D) (2014) (Virginia's RFRA) ("A person whose religious exercise has been burdened by government in violation of this section may assert that violation as a claim or defense in any judicial or administrative proceeding and may obtain declaratory and injunctive relief from a circuit court, but shall not obtain monetary damages."), with OKLA. STAT. tit. 51, § 256(A) (2014) (Oklahoma's RFRA) ("Any person whose exercise of religion has been substantially burdened by a governmental entity in violation of this section may assert that violation as a claim or defense in any judicial or administrative proceeding and may obtain declaratory relief or monetary damages.").

83. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); see also Volokh, *supra* note 70, at 1491–92 (making this same point).

84. And of course, the same allegations about discretion, balancing, and inconsistency are routinely made with regard to the Establishment Clause. See, e.g., *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13, 21, 14, 15 & n.3, 17, 22 (2011) (Thomas, J., dissenting from denial of certiorari) (quoting various descriptions of Establishment Clause jurisprudence as being "in shambles," "nebulous," "erratic," "no principled basis," "purgatory," "impenetrable," "ad hoc patchwork," "limbo," "incapable of consistent application,"

C. The Fear of Denominational Discrimination

A final charge against the compelling-interest test, which also relates back to the charge of inconsistency, is a claim about denominational neutrality. At the level of text, RFRA is denominationally neutral and perfectly so. RFRA lays out a rule applicable to every free exercise dispute; the same compelling-interest test applies, regardless of the religious denomination, belief, or practice at issue. The results of cases will vary based on their facts, of course, but the standard to be applied is the same.

One persistent fear has been that the compelling-interest standard will, in application, be unfair to minority faiths. This is a fair concern. Judges are only human. They have biases and make mistakes. That these faults might work to the detriment of minority faiths should not surprise anyone. Back in the *Sherbert/Yoder* era, some detected a pattern of uneven enforcement in Supreme Court decisions.⁸⁵ This concern is hard to substantiate. Again, the paucity of cases and the variety of circumstances make it impossible for charges of inconsistency to really stick.⁸⁶ But the fear is not illogical—I have expressed the same worry on occasion.⁸⁷

“our mess,” “little more than intuition and a tape measure”) (citations and quotations omitted). For a common sense reply, see *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 858 (7th Cir. 2012) (Hamilton, J., concurring) (“The solution is not to require those troubled by government endorsement of religion to stop complaining and adopt an austere, Senecan stoicism. Rather, as judges, we must do our level best to overcome our individual perspectives. We can do so by deliberately trying to see the situation from others’ points of view.”).

85. This is Tushnet’s famous charge in the *Sherbert/Yoder* era that “sometimes Christians win but non-Christians never do.” Mark Tushnet, “*Of Church and State and the Supreme Court*”: *Kurland Revisited*, 1989 SUP. CT. REV. 373, 381. In the twenty-five years since Tushnet’s claim, however, there have been a number of powerful (and unanimous) Supreme Court victories for religious minorities. See *Holt v. Hobbs*, 135 S. Ct. 853, 856 (2015) (Muslim); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425 (2006) (Christian Spiritist); *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005) (Wiccan, Satanist, Asatru, Church of Jesus Christ Christian); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 524 (1993) (Santeria).

86. Recent empirical studies have suggested that at least some religious minorities, like Muslims, win in the lower courts at significantly lower rates than other groups. See, e.g., Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1386 (2013) (“[C]laimants from other religious communities were nearly twice as likely to prevail as Muslims.”). But the reasons for this are unclear. It may be judicial bias, either conscious or unconscious. But it could be that religious minorities seek exemptions from different rules. Without knowing more, it is impossible to conclude that the differential treatment is a product of discrimination.

87. See Lund, *supra* note 4, at 496.

But however deep this problem goes, getting rid of RFRA would not solve it. Getting rid of RFRA would only make it worse. At bottom, it does not matter whether RFRA is, in application, denominationally neutral in some perfect sense. The question is whether RFRA is better than *Smith*. And if we are concerned about denominational neutrality, *Smith* is the worst-case scenario. Justice Ginsburg’s *Hobby Lobby* dissent made a number of astute points. But, in my mind, the most troubling part was her passing thought that it might be better to get rid of the compelling-interest test than to assume the possible risk that minority claims might be disfavored by it.⁸⁸ We should not make the perfect the enemy of the good, especially when the perfect is so unobtainable as to be imaginary. We all know that religious folks will never be allowed to conduct religious practices of involuntary human sacrifice. We do not need to throw out everyone else’s religious liberty due to some misplaced sense of fairness to those folks.

IV. CONCLUSION

This piece was written largely before events that transpired in Indiana—events that make a postscript to this piece almost unavoidable. In the last five years, six more states have adopted state RFRAs, and in each case the *Elane Photography* issue was part of the debate. But Indiana was different. Now the debate seems to have nothing else left in it. One side sees *Elane Photography* as the *raison d’être* for state RFRAs; the other side sees it as the *bête noire*. But on both sides, *Elane Photography* is all that matters.

An unfortunate consequence is that all the other kinds of state RFRA claims—including the sympathetic ones mentioned here—have gotten completely lost in the shuffle. For those interested in protecting free exercise without protecting the claim in *Elane Photography*, there are several options going forward. The first is the simplest and probably the best—one can, by statute, simply exclude for-profits. There is nothing path-breaking about this suggestion. The state RFRAs in Pennsylvania and Louisiana do this already.⁸⁹ And it would not imply anything about

88. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting) (“There is an overriding interest, I believe, in keeping the courts ‘out of the business of evaluating the relative merits of differing religious claims’ . . . or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be ‘perceived as favoring one religion over another,’ the very ‘risk the Establishment Clause was designed to preclude.’” (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in judgment))).

89. Drafting here would be crucial. Pennsylvania and Louisiana exclude for-profit corporations by defining “person” statutorily as “[a]n individual or a church, association of churches or other religious order, body or institution which qualifies for exemption from taxation under section 501(c)(3) or (d) of the Internal Revenue Code.” 71 PA. CONS. STAT.

the rightness or wrongness of *Hobby Lobby*—the Supreme Court there was stuck with the statute Congress passed. A more complicated and more uncertain alternative would be to create a global exclusion of civil rights claims, as Texas and Missouri both do.⁹⁰

This recalls the old adage, “Half a loaf is better than no bread.” But this is not half a loaf. This is nine-tenths of a loaf, and the other tenth is moldy anyway. Texas’s RFRA, by my estimation, has been the most powerful of the state RFRA, despite its categorical exclusion of civil rights claims.

To be sure, there is something deeply troubling about these exclusions. One virtue of RFRA was how it created a single standard to govern all claims of religious liberty. The point of these exclusions is to create a double standard, to stack the deck against certain disfavored claims. But there is a different and more charitable view of these exclusions—that there generally is a compelling government interest in a particular class of cases, and that case-by-case adjudication of compelling interest risks too much. And besides, these exclusions have a long history. In the *Sherbert/Yoder* era, the Court itself crafted exclusions for prisons, the military, and tax systems.⁹¹ State RFRA often have litanies of legislatively created exclusions—no drug-law challenges, no prisoner suits, no religious claims contesting child support.⁹² The Religious Land Use and Institutionalized Persons Act (RLUIPA) itself provides more support for the idea of exclusions: it may be strange to have a federal statute that protects religious liberty only in the contexts of land use and institutionalized persons, but Congress prudently thought that this was better than nothing.

§ 2403; *see* 13 LA. STAT. ANN. § 5234(1). The problem is that this definition leaves many religious nonprofits in a very uncertain position. It is not clear, for instance, whether this definition would even cover religious schools. It would be probably better to exclude for-profits directly, perhaps with “person” defined simply to exclude “businesses” and with “businesses” defined along the lines of “any entities that are organized and operated for profit, including a sole proprietorship, partnership, limited liability company, corporation, company, firm, society, joint-stock company, unincorporated association, or other similar entity.”

90. *See* MO. ANN. STAT. § 1.307(2) (West) (“[N]othing in these sections shall be construed to establish or eliminate a defense to a civil action or criminal prosecution based on a federal, state, or local civil rights law.”); TEX. CIV. PRAC. & REM. CODE ANN. § 110.011 (West) (“[T]his chapter does not establish or eliminate a defense to a civil action or criminal prosecution under a federal or state civil rights law.”).

91. *See* *Hernandez v. Comm’r*, 490 U.S. 680, 684 (1989) (taxes); *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987) (prisons); *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986) (military).

92. *See* *Lund*, *supra* note 4, at 491–93 (providing various examples of exclusions).

One thing is vital. The baby must not be thrown out with the bathwater. However one feels about *Hobby Lobby* and *Elane Photography*, RFRA and state RFRA do valuable work for religious minorities—work that no longer seems to get much attention from anyone. Twenty-five years ago, free exercise was associated strongly with the difficult position of religious minorities in an overwhelmingly Christian America. Things are more complicated now, but that aspect of the story remains a true and vital part of it.