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The evolution and analysis of legal protection for medical conscientious objectors.

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THE EVOLUTION AND ANALYSIS OF LEGAL PROTECTION FOR MEDICAL
CONSCIENTIOUS OBJECTORS

By

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B.A., Covenant College, 1977
M.A., Duquesne University, 1980
J.D. University of Pittsburgh, 1983

A Thesis Submitted to the Faculty of the College
of Arts and Sciences of the University of Louisville
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University of Louisville
Louisville, Kentucky

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A Thesis Approved on

April 1, 2016

By the following thesis Committee

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DEDICATION

This thesis is dedicated to my mother, Patricia Bryant Hill, who continues to teach me that some things are worth arguing about, and my wife, Cheryl Van Stelle Hill, who continues to teach me that not everything is worth arguing about.

ACKNOWLEDGMENTS

I gratefully acknowledge the many professors and staff who have assisted me over the last two years.

I thank my Thesis Committee team of Professors Merry and Moyer of the University of Louisville Political Science Department, and Professor Soldat-Jaffe of the University of Louisville Humanities Department, for their counsel in completing this thesis.

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Finally, there is a good deal to learn about research operations after being absent from the Academy for a generation. The sometimes anonymous staff at the Circulation desk and elsewhere in Ekstrom Library were uniformly helpful and courteous, whether retrieving my key, getting me an interlibrary loan text, or reteaching me EndNote almost every semester. Samantha McClellan provided some excellent research leads.

Thank you all very much.

ABSTRACT

THE EVOLUTION AND ANALYSIS OF LEGAL PROTECTION FOR MEDICAL CONSCIENTIOUS OBJECTORS

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April 1, 2016

Conscientious objection has a long tradition of legal and social recognition in America. It evolved as a subset of the constitutional free exercise of religion, and encompassed medical practice as well as the military after *Roe v. Wade* in 1973. Its constitutional protection abruptly changed with a Supreme Court case in 1990. Thereafter, medical conscientious objection – the exemption from performing certain acts by medical professionals – was regulated largely by legislation. Many of the conflicts arose and were resolved at the state level. Yet there is little study at the state level of why conscientious objection is protected or not. After an overview of the legal background to the issue, this thesis examines some factors that influence the enactment of state Religious Freedom Restoration Acts (RFRAs) and “Must Fill” pharmacy requirements. Using the religion analytical tools of “belonging, believing, and behaving” applied to all 50 states, the thesis concludes that there are strong positive relationships between the religiosity of a state’s population and its enactment of a RFRA, and strong negative relationships between religiosity and the enactment of a “Must Fill” requirement.

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CHAPTER ONE: INTRODUCTION

Introduction to the General Topic

I couldn't believe that I could not get my pills at a local drug store. There are high numbers of unwed teenage mothers and children growing up in poverty in Meade County. Physicians and pharmacists who can keep their jobs even when they have objections to birth control limit women's ability for family planning... causing everything from economic distress to relationship rifts... [it's like] limiting a women's (sic) access to healthy food options

Annie Hamilton, a reporter for the Meade County Messenger, writing an op-ed piece in 2014.¹

So let us work together to reduce the number of women seeking abortions, let's reduce unintended pregnancies. Let's make adoption more available. Let's provide care and support for women who do carry their children to term. Let's honor the conscience of those who disagree with abortion, and draft a sensible conscience clause, and make sure that all of our health care policies are grounded not only in sound science, but also in clear ethics, as well as respect for the equality of women. Those are things we can do.

President Obama at Notre Dame University, May 17, 2009.²

In the last generation many physicians, nurses, and pharmacists have been asked to perform some professional services which they have found to be morally repugnant. The choice may be between keeping one's job or medical license and keeping one's conscience clear. Conscientious objection by medical professionals can thus be characterized as a type of refusal to perform otherwise lawful practices when doing so

¹ Annie Hamilton, "Birth Control," *Meade County Messenger*, no. July 31, 2014 (2014). <http://www.meadecountymessenger.com/28963/2035/1/home-page> Accessed March 7, 2016. The Meade County Messenger is a weekly newspaper serving a small, rural county in Kentucky.

² Barack Obama, "Notre Dame Commencement Address," (2009). <https://www.whitehouse.gov/the-press-office/remarks-president-notre-dame-commencement> White House Press Secretary accessed March 7, 2016.

would violate their individual consciences.³ Such a refusal is often protected in federal and state law. Under what circumstances is there any legal protection for health care workers when they refuse to perform the desired or directed practice? How has the idea of conscientious exemption been recognized and protected over time? How did it evolve? What is its current status in the United States? What factors give rise to its recognition in contemporary law and society? If these factors change, is its recognition or protection also likely to change? My thesis will address these points.

Even before there was a United States, America recognized and protected conscientious objection. Several colonies, and then the young United States, exempted some of its men from military service if they met certain criteria, such as opposition to bearing arms under any and all circumstances.⁴ Such objection was usually predicated on some religious belief, such as pacifism, and was usually associated with one of the historic “peace churches”, such as the Society of Friends or Mennonites.⁵ Somewhat later, as medical practice became more advanced and effective, some Americans objected (for themselves or those they represented, such as their children) to participation in new techniques such as vaccinations or blood transfusions. These practices typically violated some religious belief, such as a reliance on faith healing only, or the sanctity or inviolability of one’s body. Limited or expanded protection was sometimes given to Americans subject to a potentially great degree of coercion, such as members of the military, or prisoners or wards of the state or other institutionalized persons who might

³ M. R. Wicclair, *Encyclopedia of Global Bioethics, Chapter on "Conscientious Objection"* (Springer, 2016). For this reason, Planned Parenthood refers to “conscience laws” as “refusal laws”. However, I will refer to them as “conscience laws” because of the long history of conscientious objection and generally accepted usage of the term.

⁴ Louis Fisher, *Religious Liberty in America: Political Safeguards* (Lawrence, Kan.: University Press of Kansas, 2002).

⁵ Peter Brock, *Liberty and Conscience*, (Oxford University Press, 2002).

object to a mandatory inoculation against diseases such as tuberculosis or even influenza.⁶

Throughout this modern evolution of the concept, from military conscientious objection, to objection to particular medical procedures or medicines, to the conscientious objection of medical professionals, a common thread has been that conscientious objection has been analyzed in terms of a religious and, more recently, a moral objection, to participation in certain religiously abhorrent acts. Accordingly, courts, elected officials, and commentators have generally characterized the issue in terms of a constitutional “freedom of exercise” analysis. Thus, the issue of medical conscientious objection is ineluctably bound up with constitutional interpretation and application.⁷

Until the mid-twentieth century, and except for military conscientious objectors, these cases were all rather rare because the adherents were often rather odd, a small minority, or otherwise marginalized from mainstream society and its norms, or because of special circumstances (e.g., because the objectors were institutionalized or hopeful immigrants just off the boat.) Beginning with the Supreme Court’s 1973 decision in *Roe v. Wade*, however, and accompanied by tremendous technical and chemical advances in medicine, there is no consensus on what is considered normative or obligatory in the sphere of medical ethics and practice.⁸ Conscientious objection has shifted from the military to medical practitioners. Both courts and legislatures have struggled to find a means of accommodating the moral objections of many medical practitioners to the demands

⁶ Kent Greenawalt, *Religion and the Constitution* (Princeton, N.J. :: Princeton University Press, 2006).

⁷ Robert D. Putnam, David E. Campbell, and Shaylyn Romney Garrett, *American Grace: How Religion Divides and Unites Us*, 1st Simon & Schuster hardcover ed. ed. (New York :: Simon & Schuster, 2010).

⁸ Carol Levine, *Taking Sides. Clashing Views on Bioethical Issues*, 12th ed. ed., McGraw-Hill Contemporary Learning Series; McGraw-Hill Contemporary Learning Series. (Guilford, Conn. :: McGraw Hill/Dushkin, 2008).

placed on them. These demands originate in the actual or perceived needs of patients who expect to benefit from the practices, procedures, and drugs that modern medicine can deliver.⁹ Access to these practices may even be deemed a fundamental constitutional right. In other cases, access might be expected because of a statutory obligation or because of a customary or codified duty of care to which all medical professionals are expected to adhere. Should all medical practitioners comply with all patient demands and expectations? In an increasingly regulated policy sphere, should all medical practitioners comply with all statutory or regulatory demands or standards? What if those demands conflict with professional ethical obligations? If these interests are fundamental and absolute, which absolute right is to be protected – that of the medical practitioner or the patient? If these interests can be balanced, what should be the balancing test? Should the test be constitutional? Should it be determined by legislatures?

After the 1990 *Oregon v. Smith* decision in which the Supreme Court abruptly and fundamentally changed its prior balancing test for free exercise, reducing the protection for religious practice, many jurisdictions, federal as well as state, responded with “religious freedom restoration acts” or “conscience clauses” in an attempt to legislatively restore the test the Supreme Court had recently abandoned.¹⁰ However, not all states did. What accounts for the differences? Why did some states pass such legislation, while other states did not? What were the factors that led to the protection of medical conscientious objection in some states but not in others? What was the public opinion of the state, and how, if at all, was this opinion translated into policy, such as legislation?

⁹ John F. Peppin et al., *Religious Perspectives in Bioethics*, Annals of Bioethics; (London: Taylor & Francis, 2004).

¹⁰ C. C. Lund, "Religious Liberty after Gonzales: A Look at State Rfrs," *South Dakota law review*. 55, no. 3 (2010).

Further, if those factors which led to adoption or rejection of balancing tests for conscientious objection can be identified, can any suggestions be made about protection of conscience if the demographic factors which influenced or caused or were necessary for that protection change over time?

Organization of the Thesis

My thesis will address these questions and will be divided into two main parts. First, I will address the federal legal and constitutional background of conscientious objection, including an evaluation of positive law such as statutes. My approach here will be primarily legal and historical, and will examine both constitutional law and the Federal Religious Freedom Restoration Act. Second, I will address how in large measure the protection of conscientious objection shifted to the states, and how the states protected conscientious objectors with legislation such as Religious Freedom Restoration Acts (RFRA), or protected other interests by either not enacting RFRA or by enacting legislation which specifically precluded the possibility of conscientious objection by medical practitioners.

There is a great deal of material on the ethical obligations of medical professionals written by medical professionals and ethicists. There is a vast quantity of material produced by lawyers evaluating the current state of the law, or advocating on behalf of a particular status quo or for changes. There is a good amount of political science literature on how public (or even elite) opinion translates into or causes public policy, such as legislation. I will review this literature. Very little research, however, examined the impact of religious demographic factors and public opinion in states on the adoption of

conscience protecting legislation such as religious freedom restoration acts. This is a significant hole in political science research that this thesis will begin to fill.

Methods, Data, and Theories

The overall framework for the thesis is to examine the development of legal protection for medical conscientious objection and to measure some possible factors which contribute or relate to its legal protection. In particular, I will test the relationship between the size and characteristics of a religious constituency and the enactment of a RFRA. This is a general relationship which does not specifically focus on a medical right of conscientious objection. RFRA's cover much more than conscientious objection, and much more than medical conscientious objection.

Conversely, I will test the relationship between the size of a secular constituency and the enactment of "must fill" pharmacy or medical practices. This is a much more precise relationship because it specifically focuses on policy outcomes affecting medical practitioners rather than the much broader class of conscientious objectors generally.

I theorize that public opinion will be reflected in public policy. The more specific and the more widespread or common the opinion, the more direct its reflection in policy. In this case, the dependent variables are the enactment of a state RFRA and the enactment a "must fill" pharmacy policy.

I hypothesize that the more religious the constituency, the more likely there will be a RFRA. Conversely, the more secular the constituency, the less likely there will be a RFRA and the more likely there will be a "must fill" pharmacy directive.

H1: The more religious characteristics a constituency has, as measured by frequency of prayer, belief in the Bible as the Word of God, belief that religion is important, and belief that religion is the primary source of guidance in determining right and wrong, the greater the likelihood of there being a RFRA.

H2: Conversely, the less these characteristics are present, the more likely the state will have a “must fill” requirement.

H3: In particular, the greater the frequency in the belief that religion is the primary source of determining right from wrong, the greater the likelihood of there being a RFRA.

H4: The greater the number of evangelicals or Roman Catholics in a constituency, the greater the likelihood of there being a RFRA.

H5: Conversely, the greater the number of respondents who identify themselves as “Unaffiliated” in a constituency, the less likely it is the state will have a RFRA.

H6: The greater the number of Unaffiliated, the more likely there will be a must fill requirement.

H7: The greater the expenditure of funds by Planned Parenthood in a given state, the more likely the state will have a “must fill” requirement. This hypothesis is an attempt to measure the effect an interest group might have on enactment of a specific policy.

I recognize the limitations of using sample sizes of N=22 (for RFRA states) and N=8 (for must fill states) for analysis, but even the small class can, nonetheless, help in an evaluation of these factors, however qualified the findings must be. Further, I use the

“must fill” criterion because this is a significant and measurable flash point in medical conscientious objection. A “must fill” requirement means that a pharmacist, when presented with a valid prescription for a pill intended to cause a chemically induced abortion up to 49 days of gestation, is legally obliged to fill that prescription under penalty of law, loss of job, and revocation of license, regardless of any moral scruples.¹¹ Of course, any other prescription must be filled as well.

For the first, federally oriented part of the thesis, I will note national religious trends using American National Election Study (ANES) data from 1992-2012 and sometimes earlier. For the second, state oriented part of the thesis, I will measure these relationships using public opinion by state using Pew’s recently released “Religious Landscape” data which can assess both national opinion and state level opinion.

I will operationalize “religiosity” and “secularism” with well-established and commonly (but not universally) used measures of religiosity such as “belief, belonging, and behaving” measures. For belief, I use how important the respondent views religion, how authoritative is the guidance the respondent receives from his or her religion, and how authoritative the respondent views the Bible. For belonging, I use measures of denominational or religious grouping self-identification, particularly with respect to evangelicals and Roman Catholics and for non-affiliated respondents. For behaving, I use how frequently the respondent prays.

¹¹ See the January, 2015 Planned Parenthood fact sheet on “Mifepristone, also known as medication abortion or “the abortion pill” (formerly known as RU-486)... which induces abortion when administered in early pregnancy, providing women with an alternative to aspiration (suction) abortion.” Accessed on March 11, 2016 at plannedparenthood.org/ and search for “Mifepristone”.

I also examine some other variables which might plausibly explain why a state RFRA or “must fill” requirement is enacted. For example, interest groups expenditures in a given state might affect policy enactment by creating visibility for their cause, generating good will from potential customers, cementing support among actual customers, or from actual education or lobbying efforts. I use two such variables here, Planned Parenthood expenditures, and Right to Life or Pro-life expenditures. These are measured in dollars spent per state resident. Finally, to provide a partisan identification measure, I use the party of the governor when the RFRA or must fill requirement was enacted.

CHAPTER TWO: THE LEGAL AND FEDERAL FRAMEWORK

Historical Background to First Amendment Protection

There is a broad consensus that America is a nation full of religious believers, that this influences public policy, and that many of its legal norms recognize and, at least to some degree, accommodate, protect, or even defer to this fact. This was true at its initial colonial settlement, at its founding and framing, and continues to a remarkable degree today, and is recognized by historians, political scientists, and the academic legal community. Typical of such recognition are law professor Ahkil Reed Amar in his analysis of the Bill of Rights and its antecedents,¹² law scholar Kent Greenaway in his study of religion and the Constitution,¹³ and standard reference works such as The Encyclopedia of American Civil Rights and Liberties¹⁴. Amar and others note that at the time the Constitution was ratified, six states had established Christian churches which continued under the Federal constitution, and eleven had some type of Christian religious qualification for office holders.¹⁵ And the denizens were rather pugnacious. There were many wars, small and large. Yet despite the frequency of war, military conscientious

¹² Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998).

¹³ Greenawalt, *Religion and the Constitution*.

¹⁴ Otis H. Stephens, Jr., John M. Scheb, II, and Kara Elizabeth Stooksbury, *Encyclopedia of American Civil Rights and Liberties* (Westport, Conn.: Greenwood Press, 2006).

¹⁵ Amar, *The Bill of Rights : Creation and Reconstruction*. 33.

objection was recognized quite early.¹⁶ Indeed, legal scholar and historian Louis Fisher chronicles how military conscientious objection was largely synonymous with “conscientious objection” for decades, and existed prior to more general notions of religious liberty or religious pluralism.¹⁷

Scholars are also agreed that neither the political branches nor the courts of the new nation were particularly solicitous of religious liberty for nearly 100 years, although some standard constitutional law texts such as Epstein’s Constitutional Law For a Changing America may ignore this and concentrate almost exclusively on 20th century cases.¹⁸ To a large degree this was because there were so few constraints on beliefs and practices, in part because of limited federal jurisdiction, and in part because of a consensus of a good deal of religious thought. But it was also because so many fact situations that would be covered under the “religious liberty” rubric occurred in a state law context. Accordingly, federal courts did not address the issue. There does not seem to be much scholarly dispute about this broad historical, cultural, and legal context. Both earlier and current editions of Epstein’s constitutional law text reflect what is standard treatment.¹⁹

Pre-*Smith* Jurisprudence

The impetus for the Supreme Court’s first decision was an 1862 federal law making bigamy criminal, targeting Mormons, and applicable in the territories of the United States. No territory could be admitted to the Union unless polygamy was outlawed. Of

¹⁶ Greenawalt, *Religion and the Constitution*. See vol.1, chapter 4, on “Conscientious Objection to Military Service”. In a land full of English dissenters and nonconformists, military conscientious objection was permitted as early as the 17th century.

¹⁷ Fisher, *Religious Liberty in America : Political Safeguards*.

¹⁸ Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America. Rights, Liberties, and Justice*, Ninth Edition. ed. (Thousand Oaks, California: CQ Press, 2016).

¹⁹ *Constitutional Law for a Changing America. Institutional Powers and Constraints*, 5th ed. ed. (Washington, D.C: CQ Press, 2004).

course, polygamy was practiced by Mormons and this was a significant sanction against an essential tenet. In *Reynolds v. U.S.*, an 1879 case, the Court upheld the law, making a distinction between “action” and “belief” which continued in its jurisprudence.²⁰ The issue before the Court was “whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land” and the answer was a unanimous “no.” The Court opined that “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”²¹

Standard treatments from *Reynolds* to *Smith* note the gradual extension of free exercise protection to religiously and then morally based behavior, and how selective and then complete incorporation of the federal constitution’s first amendment protections were applied to the states via the Fourteenth Amendment. Amar, Bertelsen, Drinan, Fisher, Gill, Greenawalt, Stephens and Witte, representing political scientists, historians, and legal scholars all agree on the main points of this narrative.²² Along the way conscientious objection was recognized as a subset of belief and behavior that was accorded some legal protection under the “free exercise” language of the First Amendment.

²⁰ *Reynolds v. United States*, 98 U.S. 145 (1879). One good way of accessing Supreme Court cases is via the Chicago Kent School of Law website at <https://www.oyez.org/cases/2015> which is often superior to the Supreme Court’s own website.

²¹ *Reynolds*, supra, at 164. Although it did not base its opinion on this rationale, the Court also noted that “Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”

²² Amar, *The Bill of Rights : Creation and Reconstruction*; Soledad Bertelsen, "Conscientious Objection : Lessons from the Experience of the United States" (2011); "Conscientious Objection of Health Care Providers: Lessons from the Experience of the United States," *Notre Dame J. Int'l & Comp. L.* 3(2013); Robert F. Drinan and Jennifer I. Huffman, "The Religious Freedom Restoration Act: A Legislative History," *Journal of Law and Religion* 10, no. 2 (1993); Fisher, *Religious Liberty in America : Political Safeguards*; Anthony James Gill, *The Political Origins of Religious Liberty*, Cambridge Studies in Social Theory, Religion, and Politics; Cambridge Studies in Social Theory, Religion, and Politics. (Cambridge: Cambridge University Press, 2008); Greenawalt, *Religion and the Constitution*; Stephens, Scheb, and Stooksbury, *Encyclopedia of American Civil Rights and Liberties*; John Witte, *Religion and the American Constitutional Experiment : Essential Rights and Liberties* (Boulder, Colo: Westview Press, 2000).

In *Cantwell v. Connecticut*, Jehovah's Witnesses were convicted of soliciting funds without a license while distributing religious materials. The Court struck down the convictions, noting the severe burden on the religious practices, the discretionary nature of officials in granting licenses (the official could determine which speech or religious practice would be permitted), and applying First Amendment protections to the states for the first time.²³ In a 1961 case, *Braunfeld v. Brown*, the Court considered Sunday closing laws as applied to Orthodox Jews.²⁴ The case is significant for the various tests for constitutionality proposed by several members of the Court, all of whom were seeking some sort of balancing test between the governmental interest and the burdened religious interests of the litigants.

These tests for constitutionality were further refined and then settled in two other cases. In *Sherbert v. Verner*, a Seventh Day Adventist was denied unemployment benefits because she refused to work on Saturdays, her Sabbath.²⁵ The Court held for the Adventist and against the state using a balancing test that weighed how significant the burden was on the religious practice with how compelling the governmental interest was. Thus, if the burden on free exercise was "substantial", and if the governmental interest was not "compelling", the law would fail constitutional review. The law would be upheld only if the governmental interest was compelling. In *Wisconsin v. Yoder*, Wisconsin's public policy required children to attend public school until they were 16. This conflicted with the pervasive religious practices and way of life of the Amish, who formally schooled their children only through grade eight and did so outside of public

²³ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

²⁴ *Braunfeld v. Brown*, 366 U.S. 599 (1961).

²⁵ *Sherbert v. Verner*, 374 U.S. 398 (1963).

schools. The Court held for the Amish, finding that their free exercise of religion was burdened, and that the state's interest in "developing citizens and members of society" was significant but not sufficient enough to warrant the burden, and also noting that the Amish seemed to be producing productive members of society without Wisconsin's assistance or compulsion.²⁶

The cases above are all clearly "free exercise" cases. However, the analysis is not limited to those cases in which a particular, historical "religious belief or practice" is implicated. The Court applied similar analysis in military conscientious objector cases. Of course, in these cases the Court reviewed Vietnam era federal conscription and student benefits laws rather than state laws. The Court held that statutory exemptions from military service must also cover, e.g., those who hold fundamental philosophical or moral objections to war, not only those with a particularly "religious" objection to participation in war.²⁷ In *Johnson v. Robison*, the Court reviewed a federal law which distinguished between veterans who served on active duty and those conscientious objectors who performed alternative service. The law granted education benefits to the former, but denied them to the latter. The Court applied its balancing test, determining that there was little if any burden on the conscientious objector's free exercise, and thus upheld the law.²⁸

The status of First Amendment analysis was thus developed over decades and the test itself was fairly clear, however difficult it might be to actually apply in any given fact situation. Whether applied to federal law or to state law via the Fourteenth Amendment,

²⁶ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²⁷ *United States v. Seeger*, 380 U.S. 163 (1965).

²⁸ *Johnson v. Robison*, 415 U.S. 361 (1974).

the constitution required a balancing test between the religious practice (or fundamental philosophy) of a person, and the interest of the government in burdening that religious practice. The less burdened the religion, the more likely the law was constitutional. The less compelling the governmental interest, the more likely the law was unconstitutional. Legislators at the federal and state level were to balance the interests and enact legislation accordingly.²⁹ There was a broad consensus of judicial, legislative, and scholarly opinion that the religious interests of a person are to be balanced against the legitimate interests of the government when enacting and reviewing legislation. If such a balance was not found in the legislation itself, and sometimes even if it was, a balance would be made in any judicial review of that legislation for constitutionality.³⁰

In 1990, however, that all changed.

Employment Division of Oregon v. Smith and a Changing Constitutional Standard

Alfred Smith was a drug counselor in a drug rehabilitation organization. He was also a member of the Native American Church. As part of that Church's sacramental activities, he ingested peyote. It was his religious duty. He was fired from his job. When he applied for unemployment benefits, Oregon denied his claim for compensation because ingesting peyote was a criminal offense in Oregon. He appealed, claiming inter

²⁹ And legislators did. Legislation which survives from that era continues to use a balancing test. For example, Civil Rights legislation and regulations addressing religious liberty in the federal workplace typically rely on a balancing test in which the religious practices and interests must be afforded "reasonable accommodation", which involves a balancing of the interests of the religious practitioner with the needs of the federal (or state) agency in its employment practices.

³⁰ John Nowak, *Constitutional Law* (St. Paul, MN: West Publishing Company, 1978). See particularly chapters 18 and 19 on free speech and freedom of religion, respectively.

alia that his First Amendment Free Exercise rights had been violated by the state's denial of benefits.³¹

Up to this point, the case presented itself as a class example of First Amendment (and conscientious objection) analysis. The state of the law was that a government restriction on religious liberty – a “substantial burden” on the exercise of one’s religion - must be based on a compelling state interest, and narrowly drawn to accomplish that interest. By analogy to other First Amendment protections of such rights as speech or assembly, that “narrowly drawn” legislation must be the “least restrictive” available to the governmental entity, a very high standard. If that standard had been used with Mr. Smith, the case would have involved an analysis of how central smoking peyote was to Mr. Smith’s religion. If the prohibition was indeed a “significant burden” on his religious practice, then the court would have balanced this free exercise interest against how compelling the government’s interest was in outlawing peyote, and perhaps how narrowly drawn the criminal statute was. If the government’s interest was compelling and was narrowly drawn, the denial of unemployment compensation benefits would stand.

The *Smith* case fundamentally changed that approach and that standard. Although there is a broad consensus as to what happened, there is sharp disagreement among scholars as to whether the Court’s move in a new direction was good policy. The *Smith* Court held that a generally applicable, facially neutral statute which does not overtly discriminate against a particular religion passes constitutional muster, regardless of how severe a burden it places on a religious practice. In fact, such a law can completely

³¹ *Oregon v. Smith*, 494 U.S. 872 (1990). These facts are recited in the opinion. Smoking peyote was also a federal criminal offense. Oregon had simply adopted the federal drug schedule for prohibited substances, which is common.

eliminate a required religious practice. Mr. Smith would get no balancing test analysis. There would be no inquiry as to how central to his religion smoking peyote was. There would be no inquiry into how important, much less “compelling” this law was to Oregon or the United States. If the law outlawed peyote, applied to everyone, and did not intentionally target a particular group such as the Native American Church, the law would stand. With one case the Court swept away decades of First Amendment precedent and analysis. Justice Scalia, writing for the majority, opined:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.³²

Christopher Lund accurately portrays this change as fundamental,³³ and this view is reflected in standard works such as Epstein’s Constitutional Law text.³⁴ This interpretation is the consensus interpretation, but is not universal. Marci Hamilton represents the extreme, distinctly minority wing of those who defend *Smith*.³⁵ She does so, however, only by claiming that it was the earlier Supreme Court decisions which were aberrations, not *Smith*.³⁶ Her claim, echoing the claim of Justice Scalia, is that the use of a different test idolizes individual conscience above all else, and cannot be limited. If the pre-*Smith* tests for statutory validity are maintained, how can the state and society prevent

³² *Smith* at 890.

³³ Lund, "Religious Liberty after Gonzales: A Look at State RFRAs."

³⁴ Epstein and Walker, *Constitutional Law for a Changing America. Rights, Liberties, and Justice*.

³⁵ Marci Hamilton, *God Vs. The Gavel : Religion and the Rule of Law* (Cambridge: Cambridge University Press, 2005). Although distinctly a minority opinion, Hamilton represents powerful legal interests and she successfully argued the *Boerne* case which invalidated the Federal Religious Freedom Restoration Act as it applied to the states.

³⁶ Marci A. Hamilton, "The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy," *Harvard Law & Policy Review* 9, no. 1 (2015).

in those contexts. Thus, the Court's treatments of "free exercise" and "free speech" are going in different directions. The Court affords "free exercise" claims less protection than "free speech" claims.³⁹ Accordingly, any attempt to restore a balancing test would come from the federal or state legislatures.

The Federal Religious Freedom Restoration Act

The legislative response was quick and decisive. Drinan helpfully details the legislative history of the federal Religious Freedom Restoration Act (RFRA)⁴⁰. RFRA was passed with overwhelming support in 1993, passing the House without objection and in the Senate 97-3.⁴¹ Hamilton also recounts how such a diverse conglomeration of interest groups, from the ACLU to the Catholic Conference, allied to press Congress for legislation that would restore the prior constitutional test for free exercise religious protection – and conscientious objection – in the form of legislation.⁴² While she decries it, scholars such as Douglas Laycock celebrate it.⁴³ After all, if the Court could remove protection for religious or conscientious observance or behavior thorough an abandonment of a strict scrutiny standard of review, or any balancing test whatsoever, why could it not do the same regarding protected speech, assembly, or petitions?

³⁹ The Court continues to use many different tests to evaluate whether an infringement or limitation on "free speech" rights is constitutional. Among other criteria, it examines whether the speech is historically protected political speech, whether it is "commercial" speech, whether the limit on the speech was facially neutral with respect to "time, place, and manner" restrictions, whether the speech occurs in a public forum or on private property, and so on. Most of these, however, include some balancing test between the interests involved. There is some evidence that religious litigants may be shifting from a "free exercise" to a "free speech" approach to protect their interests. See Lund, *Religious Liberty After Gonzales*.

⁴⁰ Drinan and Huffman, "The Religious Freedom Restoration Act: A Legislative History."

⁴¹ Gerard V. Bradley, *Challenges to Religious Liberty in the Twenty-First Century* (Cambridge ;: Cambridge University Press, 2012). Christopher Wolf in chapter 5 notes the overwhelming support and the broad coalition of both liberals and conservatives in passing RFRA.

⁴² Hamilton, "The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy."

⁴³ Douglas Laycock, "A Syllabus of Errors," *Michigan Law Review* 105, no. 6 (2007). See also "The Remnants of Free Exercise," *The Supreme Court Review* 1990(1990). Interestingly, both Hamilton and Laycock taught at the University of Texas Law School.

I have found no scholar who supports an unfettered, absolutist position on the protection of conscience or religious practice. Thus, there is no opposite number to Hamilton. Laycock is typical of scholars who are broadly but not absolutely protective of First Amendment rights in general, and free exercise in particular.⁴⁴ Louis Fisher notes, post-*Smith*, that although the Supreme Court occasionally protected free exercise claims, most protection has come from the political branches, and especially from Congress in the form of legislation. The federal RFRA is just such a piece of legislation.⁴⁵

The Federal RFRA is codified at 42 United States Code (U.S.C.) section 2000bb. In it, Congress made findings and enacted legislation which are recorded below.⁴⁶

(a) FINDINGS The Congress finds that –

- (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;*
- (2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;*
- (3) governments should not substantially burden religious exercise without compelling justification;*
- (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and*
- (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.*

(b) PURPOSES The purposes of this chapter are—

- (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.*

⁴⁴ "The Religious Freedom Restoration Act," *Brigham Young University Law Review* 1993, no. 1 (1993).

⁴⁵ Fisher, *Religious Liberty in America : Political Safeguards*.

⁴⁶ This citation is from the online version of the U.S. Code found at the Cornell University Law School site, <https://www.law.cornell.edu/uscode/text/42/2000bb%E2%80%93931> accessed on March 9, 2016.

In 42 U.S.C. 2000bb-1, the legislation provided what Congress thought was the appropriate balancing test.

(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.

(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.

The law is nearly self-explanatory. Congress perceived that the Supreme Court had changed long-standing precedent, and sought to protect the interests of free exercise by reinstating by statute what had been required by the Constitution until *Smith*. It also established a “strict scrutiny” standard of review in which if a person’s “exercise of religion” is “substantially burdened” by a government interest, that interest must be “compelling” and the law must be “the least restrictive means” of furthering that compelling interest. It does not require a particular outcome. It requires an analysis, balancing the interests involved.⁴⁷

RFRA is not the only federal legislation to protect conscientious objectors, but it is the broadest. Indeed, RFRA is a general statute which is intended to cover free exercise whether it arises from the cases of a federal employee whose religion requires a head scarf even when making a photo identification card, an employee of the NIH or CDC who objects to the introduction of viruses (live or dead) in the form of vaccinations, a man whose religion requires a particular diet even in an institutionalized setting, a student in a federal (or federally funded) school who refuses to recite the Pledge of Allegiance either because it pledges fealty to something other than God or because it mentions and

⁴⁷ By requiring “strict scrutiny”, however, RFRA does place a finger on the scale when balancing equities. There is a quip that when a law is evaluated with “strict scrutiny”, “It is strict in theory, but fatal in practice.” But so is much other legislation when dealing with civil liberties.

invokes the Deity, and innumerable other instances. Other statutes, however, provide more specific protection for conscientious objectors and even for medical conscientious objectors.

In this arena no issues are more divisive and contentious than abortion or participation in life ending practices. The Church Amendments, named after Senator Frank Church, amended the Public Health Service Act in 1973 to protect conscientious objectors if they were otherwise required to participate in the fundamental right the Supreme Court had just announced in *Roe v. Wade*. Federally funded health care workers cannot be lawfully fired, disciplined, or otherwise discriminated against for refusing to participate in practices “that would be contrary to one’s religious convictions or moral beliefs.” The protection even extended to institutions, such as Roman Catholic hospitals.⁴⁸ Federal prison personnel and prosecutors are protected from having to participate in executions pursuant to a 1994 law that exempts them “if contrary to their moral or religious convictions.”⁴⁹ There are many other such “conscience clause” federal statutes.⁵⁰

Post-RFRA Jurisprudence

Federal constitutional protections apply to everyone, of course, and require compliance from nearly everyone – from the federal government, from state governments, local and municipal governments, and anything funded with federal dollars;

⁴⁸ The 1973 Church Amendments to the Public Health Service Act are codified at 42 USC section 300a-7.

⁴⁹ 18 USC 3597(b). Interestingly, title 18 is the federal criminal code. These “conscience provisions” are scattered throughout the federal code. An excellent list of national and international laws can be found at the website of [consciencelaws.org](http://www.consciencelaws.org), accessed on March 9, 2016 at <http://www.consciencelaws.org/law/laws/usa.aspx>

⁵⁰ Some others, particularly health-care related, can be found at the HHS website at <http://www.hhs.gov/civil-rights/for-individuals/conscience-protections/factsheet/index.html> accessed on March 9, 2016.

and federal constitutional protections prevail over any other inconsistent provision, whether federal legislation or regulations, state constitutions or laws, local ordinances, and so on. Further, federal constitutional protection is generally considered more stable than federal legislation, which can be changed whenever parties or ideologies in Congress and the White House adjust their seats and representation proportionately.

One other case needs to be mentioned before proceeding to an examination of two significant post-RFRA cases. This case shows that even after *Smith* and before the passage of the federal RFRA, the Court declined to eliminate all protection for free exercise activity and defer absolutely to the political branches and states.

Santeria is an Afro-Caribbean religion which includes as part of its rites animal sacrifice. The animal's throat is cut and then it is usually eaten. When the city of Hialeah, Florida discovered that a Santeria Church was going to be established, it passed a city ordinance forbidding the possession of animals intended for sacrifice or slaughter unless otherwise exempt because of the possession of a state permit. Regular slaughter houses or butchers would have such a permit. This was a severe burden on the free exercise of Santeria. In 1993, the year RFRA was passed, a unanimous Court held that such an ordinance was unconstitutional. It was not generally applicable nor neutral – it targeted a specific group. Accordingly, the ordinance failed even the weak *Smith* constitutional test.⁵¹

The federal RFRA purported to govern both federal and state legislative restrictions on free exercise, and on state constitutional restrictions on free exercise, imposing a

⁵¹ *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

“strict scrutiny” test for any law to pass constitutional muster.⁵² The Supreme Court reviewed the federal RFRA in two significant cases. A Roman Catholic Church wanted to build onto its existing structure. A local city ordinance required doing this in such a way – consistent with the historic and architecturally significant nature of that part of the city – that the building project would not be possible or would be exorbitantly expensive. The Church sued, alleging a violation of the federal RFRA because its free exercise had been significantly burdened by this local ordinance. In the 1997 decision *City of Boerne v. Flores*⁵³ the Court held for the City, opining that the federal RFRA did not apply to state or local laws, only federal laws, agencies, and programs. The ordinance was generally applicable and the City’s interest may have been compelling, but the Court did not need to address those issues because it opined that RFRA did not limit what state or municipal laws might do, even with respect to free exercise claims.

The *Boerne* case is significant for at least two reasons. First, it eliminated federal law applicability with respect to free exercise claims at the state and local level, where most alleged burdens occur. If an aggrieved person perceives a burden on his or her free exercise, he or she cannot use either federal constitutional law (post-*Smith*) nor federal statutory law (post-*Boerne*) nor federal courts to challenge that burden on free exercise if the burden arises from state or local action except in very narrow circumstances. Secondly, it made clear that if any remedies for state or local burdens on free exercise

⁵² Congress also passed a watered down law, the *Religious Land Use and Institutionalized Persons Act* during the Clinton Administration. It covers prisoners and institutions, inter alia, and thus is beyond the scope of this thesis. Its passage was much more troubled than was the RFRA, and there was not such a legislative consensus.

⁵³ *City of Boerne v. Flores*, 521 U.S. 507 (1997). Professors Hamilton and Laycock are intellectual opponents over most things regarding the free exercise clause. Professor Hamilton, a severe critic of RFRAs, successfully argued the *Boerne* case before the Supreme Court, just as Professor Laycock, a libertarian and advocate for liberty of all types, and an ardent advocate of RFRAs, had successfully argued the *Church of Lukumi Babalu Aye* case four years earlier.

were to be made available, they could only be provided by state or local law. Thus, just as the *Smith* case generated a federal RFRA, so the *Boerne* case generated state RFRA's.

The third significant post-*Smith* case from the Court interpreted the federal RFRA as applied to federal action. In a strange case of déjà vu, a “Spiritist Church” with roots in Brazil and 130 members in the U.S. requires its members to drink a sacramental tea with hoasca, which contains a hallucinogen proscribed by federal law. This was a post-RFRA, 2006 case. The Court reviewed the case using the standards of the federal RFRA. Writing for a unanimous Court, Chief Justice Roberts applied the RFRA balancing test; found that the members of the Church were required to participate in this “communion”; that rendering this act illegal was a significant burden on Church members; and that the governmental interest in proscribing the drug in all circumstances was not compelling; and held for the Church members against federal law enforcement agencies.⁵⁴

Thus, while the Court in *Smith* did not protect such activity as a matter of constitutional law, the Court in *Gonzales* enthusiastically and unanimously applied the statutory RFRA test in striking down other federal legislation. Ironically, however, most state drug codes are based on the federal schedules of prohibited substances. Accordingly, while Church members could not be prosecuted under federal law, they could continue to be prosecuted under state law by state prosecutors. A federal constitutional test would have covered all circumstances. A federal RFRA test is only applicable to federal cases. Church members would only have some semblance of protection – would only get a balancing test – if the state had also adopted a RFRA or otherwise provided for free exercise or conscience protection. In effect, notwithstanding

⁵⁴ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegatal*, 546 U.S. 418 (2006). Ironically, the *Smith* case also dealt with drugs used in a religious rite.

a “win” at the Supreme Court, Church members could still face prosecution if they participated in their hallucinogenic sacrament.

Subsequent and Other Statutory and Regulatory Developments

RFRA was not enacted in a vacuum, and was neither the first nor the last federal law to attempt to protect religious expression. One law which protects free exercise was passed in the 1960s. Another, which largely maintained conscience protection for individuals but changed it drastically for institutions, was enacted in 2010. Both were implemented with an extensive regulatory scheme. These laws will now be examined in turn.

One of the most important laws providing for federal accommodation of religious practice is Title VII of the Civil Rights Act of 1964. The law includes a federal statute, federal regulations for enforcement in the private sector and in federal agencies, investigative and enforcement mechanisms with the Equal Opportunity Employment Commission for the private sector, and federal agencies’ own mini-EEOC entities for investigation and enforcement within each federal agency. The codifiers of the U.S. Code considered RFRA to address a civil rights issue and codified it at 42 USC chapter 21B. The codifiers placed the Civil Rights Act at 42 USC Chapter 21.

The basic statute provides, among other things, that

§2000e–2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, **religion**, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, **religion**, sex, or national origin.⁵⁵ (Emphasis added)

The implementing regulations make clear that the law prohibits not merely “religious” discrimination, but also discrimination based on one’s ethical or moral beliefs. At 29 Code of Federal Regulations Part 1605, the EEOC defines and explains “religious discrimination” in its generally applicable regulations, which cover the private sector. The basic rule is that “[It is] an unlawful employment practice under section 703(a)(1) [of the Civil Rights Act] for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.⁵⁶ The regulations generally address specific topics such as hiring and promotions, scheduling accommodations, attire and grooming, and other common issues.⁵⁷

EEOC regulations are applicable both in the private sector and in the public sector. The particular regulation cited above is applicable in the private sector. Each federal agency has its own EEO regulations which govern EEO practice in that particular agency, but which must be consistent with general EEO law. For example, the Department of State has internal policies which govern what it somewhat oddly calls “discriminatory harassment” on the basis of the usual civil rights categories of race, gender, age,

⁵⁵ 42 USC 2000e-2, accessed on March 12, 2016 at <https://www.gpo.gov/fdsys/pkg/USCODE-2014-title42/html/USCODE-2014-title42-chap21-subchapVI-sec2000e-2.htm>

⁵⁶ 29 CFR 1605.2, accessed on March 14, 2016 at <https://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1605.xml>

⁵⁷ These matters are addressed in the generally applicable federal regulation itself. The EEOC webpage contains helpful summaries and links to most of the actual legal authorities. The EEOC webpage on religious discrimination and accommodation, accessed on March 12, 2016 at <http://www.eeoc.gov/laws/types/religion.cfm>

disability, religion, and so on. The aggrieved person can pursue remedies through the agency apparatus created to ensure EEO policies are complied with, such as through its Office of Civil Rights.⁵⁸ As a relatively small agency, the State Department does not have a robust regulatory scheme for addressing discrimination in the workplace. Indeed, its “reasonable accommodation” website addresses only disability issues and not, e.g., religious discrimination.⁵⁹ Larger federal agencies such as the Department of Defense have much more developed policies and regulatory investigative and enforcement structures.⁶⁰

Finally, although it does not have the force and effect of a generally applicable regulation or agency regulation, the EEOC webpage has an illuminating gloss on regulatory interpretation which shows, in part, the ideological and enforcement emphases and priorities of different presidential administrations. The current webpage, e.g., retains the phrase “undue hardship”, but also has the following description of what EEO law provides:

*The law requires an employer or other covered entity to reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause **more than a minimal burden** on the operations of the employer's business. This means an employer may be required to make reasonable adjustments to the work environment that will allow an employee to practice his or her religion.*⁶¹ (Emphasis added.)

⁵⁸ See, e.g., the State Department policies and investigatory and resolution structure at <http://www.state.gov/s/ocr/c24959.htm> accessed on March 14, 2016.

⁵⁹ See its “Reasonable Accommodation Policy”, accessed on March 14, 2016 at <http://www.state.gov/s/ocr/c24975.htm>

⁶⁰ Department of Defense Office of Diversity Management and Equal Opportunity website, accessed on March 14, 2016 at <http://diversity.defense.gov/About.aspx> See also Defense Department Directive 1020.02E, *Diversity Management and EO in the DoD*, June 8, 2015, accessed on March 14, 2016 at <http://www.dtic.mil/whs/directives/corres/pdf/102002E.pdf>

⁶¹ EEOC webpage describing “Religious Discrimination and Workplace Accommodation”, accessed on March 14, 2016 at <http://www.eeoc.gov/laws/types/religion.cfm> The EEOC also tracks the number and resolution of religion complaints which is accessible at <http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm> The number of cases soared in the federal fiscal years for the first Obama term. Of course, these numbers do not indicate that cases are well-founded, only that complainants are filing complaints in large numbers.

Compare this language with how the EEOC describes the burden of proof and analysis in racial discrimination cases. Although the statutory language is the same and there is no statutory reason to distinguish between the different categories of protected persons, the EEOC makes such distinctions. Compared to its analysis of religious discrimination cases, its treatment of racial cases is much more robust and aggressive.

Race discrimination involves treating someone ... unfavorably because he/she is of a certain race or because of personal characteristics associated with race... [It] also can involve treating someone unfavorably because of a person's connection with a race-based organization or group... Discrimination can occur when the victim and the person who inflicted the discrimination are the same race or color.

The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

It is unlawful to harass a person because of that person's race or color. Harassment can include, for example, racial slurs, offensive or derogatory remarks about a person's race or color, or the display of racially-offensive symbols...

The harasser can be the victim's supervisor ... a co-worker, or someone who is not an employee of the employer, such as a client or customer.

An employment policy or practice that applies to everyone, regardless of race or color, can be illegal if it has a negative impact on the employment of people of a particular race or color and is not job-related and necessary to the operation of the business.⁶²

There is no mention of a “more than minimal burden”. The interpretation is much more expansive. Discrimination can occur when the parties are of the same race and extends to racially offensive symbols and even to customers or business associates of a different business. Finally, the last paragraph rejects the “facially neutral” analysis of the *Smith* decision and emphasizes that a generally applicable policy or practice that is not “necessary” for employment is discriminatory if it has a “negative impact.” None of this language is duplicated under its “religion” analysis.

⁶² EEOC webpage describing “Race/Color Discrimination”, accessed on March 14, 2016 at http://www.eeoc.gov/laws/types/race_color.cfm

Notwithstanding this agency gloss, however, complainants continue to pursue cases, and the EEOC occasionally pursues cases on their behalf. In the case of *Dynamic Medical Services*, the EEO settled a case in which a private company was requiring its employees to attend classes and engage in Scientology religious practices, including prolonged staring at other people. In an even more bizarre case, the EEOC won a jury trial in 2013 against a coal company that required its administrative employees to wear a biometric hand scanner so the company knew where they were and had been. One employee objected to the hand scanner because he considered it a “mark of the beast”. The company refused to attempt any accommodation at all and the company lost.⁶³

A more typical case made its way to the Supreme Court, where Justice Scalia, writing for the Court, held that Abercrombie and Fitch violated the Civil Rights Act when it did not hire a woman who interviewed while wearing a hijab. The Company asserted that to permit an employee to wear such garb would violate its “no cap” policy which helped insure the maintenance of the Company’s “Look.” To permit the Muslim attire would not be consistent with the image the Company sought to maintain. Again, no accommodation at all was made, let alone an attempt at reasonable accommodation.⁶⁴

Medical practitioners also use Title VII. In a federal case a nurse who worked in a county hospital was terminated because she refused to perform duties associated with performing abortions. She had informed her employer of her objections. The employer made no effort to accommodate her religiously based objections and simply fired her.

⁶³ These two cases are reported on the EEOC website. The result in the coal company case may have been considerably different if the company had made any attempt at all to accommodate the employee’s sincerely held but very odd religious belief. <http://www.eeoc.gov/eeoc/newsroom/release/9-25-13d.cfm>

⁶⁴ *EEOC v. Abercrombie and Fitch*, No. 14-86, decided June 1, 2015. Accessed on March 14, 2016 at http://www.supremecourt.gov/opinions/14pdf/14-86_p86b.pdf

The nurse prevailed under Title VII and on other grounds.⁶⁵ In another case with a similar procedural posture, a nurse sued under Title VII for religious discrimination after she was terminated for refusing to participate in performing abortions. The plaintiff had established a prima facie case by demonstrating that her removal was based on a refusal to perform duties based on a conscientious religion objection, but the court held that the defendant hospital had successfully met its burden by offering a reasonable accommodation to the plaintiff. In this case, the hospital had offered her a lateral transfer to a position where she would not be assisting in performing abortions, and there was no evidence that this accommodation would be burdensome. Accordingly, the court held that the removal was lawful and denied the plaintiff any remedy.⁶⁶

The significant feature of these cases is that Title VII requires some obligation on the part of the employers to accommodate the free exercise claims of plaintiffs. The obligation may be only slightly “more than minimal,” but a balancing of interests exists. Contrast this with the case of an employee in a non-RFRA state, North Carolina, who was discharged for refusing to get a flu vaccination. The employee, who worked in a skilled nursing facility, was a Christian Scientist who had religious objections to receiving any organic material derived from pigs. She was fired. She appealed on the basis of religious discrimination. She lost because, the court held, the employer was under no duty to provide her with any accommodation because the requirement to get the

⁶⁵ *Elaine L. Tramm v. Porter Memorial Hospital*, U.S. District Court, N. D. Indiana, Civil No. H-87-355 cited at 1989 U.S. Dist. LEXIS 16391 (1989).

⁶⁶ *Yvonne Shelton v. University of Medicine and Dentistry of New Jersey*, C.A. 3d Cir., 223 F. 3d 220 (2000).

vaccine and the basis for her removal were legitimate and nondiscriminatory reasons. The court did not need to balance anything.⁶⁷

Two other developments subsequent to the enactment of the federal RFRA bear mentioning. After *Smith* it was apparent that any federal free exercise or conscientious objection relief must come from Congress, not the Supreme Court. And after *Boerne* it was apparent that either state law or a newly adopted federal law must provide protection for, e.g., churches which are restricted by zoning regulations. This resulted in the Religious Land Use and Institutionalized Persons Act of 2000.⁶⁸ Unlike the earlier RFRA, there was significant opposition to this law. It pertains to institutions such as hospitals and universities more than individuals.

The second and much more significant development was the promulgation or enactment of federal regulations and new federal legislation. Federal legislation is often not self-executing and relies on implementing regulations to accomplish its intended purpose. The Bush Administration through the Department of Health and Human Services issued regulations strongly supportive of conscience exemptions from morally objectionable federally funded or controlled medical practices in its waning days in the White House. The Obama Administration, perceiving that these regulations unnecessarily and unreasonably burdened women in their pursuit of reproductive medical services, almost immediately revoked them.⁶⁹

⁶⁷ *Head v. Adams Farm Living*, N.C. Court of Appeals reported in North Carolina Lawyers Weekly August 27, 2015, accessed on March 21, 2016 at lexisnexis.

⁶⁸ 42 USC section 2000cc (2000).

⁶⁹ Julie D. Cantor, "Conscientious Objection Gone Awry — Restoring Selfless Professionalism in Medicine," *New England Journal of Medicine* 360, no. 15 (2009).

The Patient Protection and Affordable Care Act of 2010 also contains conscience provisions, although for the individual health care provider these are not as protective as the current HHS website would lead one to believe.⁷⁰ It does provide, however, that a health care plan cannot discriminate against an individual health care provider for his or her refusal to perform or refer for abortions. Otherwise, it attempts to maintain the status quo by providing that “Nothing in this Act shall be construed to have any effect on Federal laws regarding – (i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion.”⁷¹ So far as I have been able to determine it does not discuss conscience protection in other contexts. Similarly, President Obama in Executive Order 13535 stated that

*Under the Act, longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8) remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.*⁷²

What is a huge change is that the PPACA immediately required large, well established institutions representing millions of mainstream believers to conform to a new federal

⁷⁰ P.L. 111-48, as amended by P.L. 111-152 (2010). The original bill, containing 910 pages in PDF format, is available from the Government Publishing Office website at <https://www.gpo.gov/fdsys/pkg/BILLS-111hr3590enr/pdf/BILLS-111hr3590enr.pdf> A HHS factsheet discussing “conscience clauses” in this and other federal health care legislation can be found at <http://www.hhs.gov/civil-rights/for-individuals/conscience-protections/factsheet/index.html> accessed on March 9, 2016. HHS speaks in terms of actively protecting consciences, but the law merely seeks to maintain the balance already struck in other federal legislation.

⁷¹ See section 1303(b) of the PPACA.

⁷² Executive Order 13535, March 24, 2010 accessed from the White House Press Office at <https://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst> on March 9, 2016.

law that they found morally repugnant.⁷³ Although individual consciences were protected and worship assemblies were exempted, institutions such as colleges, companies, and convents were not. Those are the legal disputes currently before federal courts and the Supreme Court. While fascinating, they are beyond the scope of this thesis.

⁷³ Bradley, *Challenges to Religious Liberty in the Twenty-First Century*.

CHAPTER THREE: MEDICAL CONSCIENTIOUS OBJECTION

Literature Review

The struggles over medical conscientious objection have been noted extensively in the medical and legal literature, and hardly at all in political science or sociology literature. In the medical literature, the issue is usually framed as the dictates of a medical practitioner's individual conscience and judgment vs. the patient's right of access to constitutionally or legislatively authorized care. In the legal literature, the issue is usually framed as a free exercise or liberty interest vs. the patient's constitutional right of access to care. Whose interest shall be burdened?

The issue is typically structured around three sources: legislation, including RFRAs; regulations, including those regulations implementing federal medical provision laws; and medical ethics codes, which have national models but which are adopted by individual states, often with some modifications. Bertelsen and Wurdock helpfully arrange the material and list the various federal conscience clauses which protect individual medical practitioners who object to particular medical practices, such as abortion, when there is a federal link to the funding of the medical program.⁷⁴ Kelly

⁷⁴ Bertelsen, "Conscientious Objection of Health Care Providers: Lessons from the Experience of the United States."; Stephanie M. Wurdock, "Doctors, Dioceses, and Decisions: Examining the Impact of the Catholic Hospital System and Federal Conscience Clauses on Medical Education," *Pittsburgh Journal of Environmental and Public Health Law* 6, no. 2 (2012). Most of the literature also notes the promulgation of conscience protecting regulations under the Bush Administration, and the almost immediate revocation of those regulations and the substitution of others during the Obama Administration.

takes a remarkably cool, analytical approach and notes the issues, such as the firing of non-conforming pharmacists, without taking a strident, advocacy approach.⁷⁵

The medical literature usually posits three alternatives: an approach which defers to a medical practitioner's judgment, an approach which purports to balance the interests involved, and an approach which requires conformity to law or what the proponent considers "accepted medical practice." This standard approach is used by Card, a philosophy professor and medical ethicist who rejects the first two alternatives.⁷⁶ I have found no medical practitioner who advocates for the first approach – the "anarchy" approach which is nonetheless used by its opponents for argumentative purposes, perhaps because attacking a straw man is easier than refuting a more nuanced approach. Others lean toward an approach which protects the individual more often than not.

Wicclair is a prolific author, medical ethicist, and medical school teacher who favors a balancing approach that if translated into the legal terms of "compelling interest" and "substantial burden" looks remarkably like the RFRA's balancing test.⁷⁷ Significantly, however, he concludes that most medical practices or drugs would meet the "compelling interest" standard, which would permit the overruling of individual conscientious objections. Thus, a pharmacist or physician must usually perform the practice or refer the

⁷⁵ Eileen P. Kelly, Aimee Dars Ellis, and Susan P. S. Rosenthal, "Crisis of Conscience: Pharmacist Refusal to Provide Health Care Services on Moral Grounds," *Employee Responsibilities and Rights Journal* 23, no. 1 (2011).

⁷⁶ R. F. Card, "Conscientious Objection and Emergency Contraception," *The American Journal of Bioethics* : *AJOB* 7, no. 6 (2007).

⁷⁷ M. R. Wicclair, "Conscientious Objection in Medicine," *Bioethics* 14, no. 3 (2000); Mark R. Wicclair, "Pharmacies, Pharmacists, and Conscientious Objection," *Kennedy Institute of Ethics Journal* 16, no. 3 (2006); "Is Conscientious Objection Incompatible with a Physician's Professional Obligations?," *Theoretical Medicine and Bioethics : Philosophy of Medical Research and Practice* 29, no. 3 (2008); *Conscientious Objection in Health Care : An Ethical Analysis* (Cambridge: Cambridge University Press, 2011); Mark Wicclair, "Managing Conscientious Objection in Health Care Institutions," *HEC Forum* 26, no. 3 (2014).

patient to another medical practitioner.⁷⁸ Montgomery takes a position closer to Card, and is instructive in spite of, or perhaps because of, his British perspective. Accordingly, he does not get bogged down in using thought or language structures dependent on an American judicial or legislative framework. While acknowledging the claims of individual conscience, he concludes that mere “personal moralities” must generally give way to legitimate public expectations of the delivery of lawful medications and procedures.⁷⁹ Cantor, both an attorney and a doctor, bemoans the “conscience creep,” suggests that those with sensitive consciences should not choose health care professions, and in one of the better lines in the debate, concludes that “Conscience is a burden that belongs to the individual professional; patients should not have to shoulder it.”⁸⁰

On the other hand, Antommara, another medical ethicist and medical school professor, is much more protective of the interests (if not the rights) of medical practitioners.⁸¹

The legal literature is also rather vituperative and is usually framed in terms of “rights” – rights of conscience (which, as we have seen, are incomplete and may be decreasing in number and importance) and the rights of patients. (As noted below, this “framing” is itself significant. Even the medical practitioners tend to adopt it when analyzing the competing claims.) What happens when a “free exercise” claim collides with “fundamental right to abortion” claim? In my survey of the literature there appeared

⁷⁸ Wicclair, *Conscientious Objection in Health Care: An Ethical Analysis*. Wicclair thinks that both federal and state conscience clauses are at once too generous to and too severe on the individual conscience. See Chapter 6.

⁷⁹ J. Montgomery, "Conscientious Objection: Personal and Professional Ethics in the Public Square," *Medical Law Review* 23, no. 2 (2015). Montgomery would try to accommodate individual conscience, but in an employment law context.

⁸⁰ Cantor, "Conscientious Objection Gone Awry — Restoring Selfless Professionalism in Medicine." Dr. Cantor is also an adjunct law professor at UCLA, and has represented Planned Parenthood.

⁸¹ Armand H. Matheny Antommara, "The Proper Scope of Analysis of Conscientious Objection in Healthcare Individual Rights or Professional Obligations," *Teaching Ethics* 7, no. 1 (2006).

to be a greater quantity on the “pro-patient side”, but much of it was merely argumentative and based on absolutes or the nearly absolute.⁸² Accordingly, regardless of what test is used, the patient should have access to death inducing drugs or abortion inducing drugs or sterilization practices or whatever the patient is “entitled to.” Typical of this approach are Vandewalker, who insists that individual conscience claims violate medical ethics and particularly informed consent rules,⁸³ Lee, in an uneven law review article,⁸⁴ Wurdock’s more even-handed treatment of moral conflicts in an institutional setting,⁸⁵ and Scheu’s analysis of First Amendment objections to the Affordable Care Act’s individual mandate.⁸⁶ Contrary perspectives were not as argumentative, except for Laycock and Whelen, and were fewer in number, but did at least balance interests. Whelen is vociferous in his analysis and condemnation of very aggressive Obama HHS regulations.⁸⁷

Professional Codes

Pharmacists as professional health care workers have ethics codes as do other professionals. Professionals are expected to adhere to these codes. If and when adopted by individual states, the provisions can be enforced against individual members who may

⁸² Ira C. Lupu, *The Case against Legislative Codification of Religious Liberty* ([New York, NY]: Cardozo Law Review, 1999). Lupu is in some ways refreshing because he thinks RFRA are merely inadvisable. He does not consider them unconstitutional. For example, he thinks RFRA cause atrophy in the first amendment jurisprudence of state and federal supreme courts, and that they are difficult if not impossible to craft in a form that will be functional.

⁸³ Ian Vanderwalker, "Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics," *Mich. J. Gender & L.* 19(2012). Vandewalker had been an attorney for the Center for Reproductive Rights.

⁸⁴ Andrea Lee, "Conscientious Objection and Pharmacists' Professional Obligation to Ensure Access to Legitimately Prescribed Medication," *Women's Rts. L. Rep.* 33(2011).

⁸⁵ Wurdock, "Doctors, Dioceses, and Decisions: Examining the Impact of the Catholic Hospital System and Federal Conscience Clauses on Medical Education."

⁸⁶ Jennifer B. Scheu, "A First Amendment Objection to the Affordable Care Act's Individual Mandate," *Brooklyn Law Review* 79, no. 2 (2014).

⁸⁷ E. Whelan, "The HHS Contraception Mandate Vs. The Religious Freedom Restoration Act," *Notre Dame Law Review* 87, no. 5 (2012).

be disciplined for infractions or who may even lose their professional credentials, thereby precluding their continued practice in that jurisdiction. As seen in the section on federal legislation, statutes may sometimes set the standard for care. For example, the PPACA provided that physicians could not be disciplined or discriminated against for refusing to participate in or refer for abortions. Conscience clauses, however, may protect against much more than abortion, although that remains a significant issue. And in the absence of a conscience clause in a code or statute, a RFRA may provide some basic protection, as seen in the next section. First, however, because professional codes define expected standards of practice, and because violations can lead to loss of employment, we shall examine a few professional codes.

The American Pharmacist Association has a code of ethics.⁸⁸ It has language about respecting “the autonomy and dignity” of every patient. It does not, however, contain any precise language about whether the pharmacist may ethically withhold lawful medications from the patient, such as pregnancy –preventing drugs or emergency contraception or “Plan B” drugs which the pharmacist may consider immoral. Nor does it have any requirement to refer a patient to another pharmacist when he or she has a moral objection to dispensing the drugs. Similarly, the American Society of Health-System Pharmacists has a preamble to this model code which seeks “to state publicly the principles that form the fundamental basis of the roles and responsibilities of pharmacists.”⁸⁹ The Code was reviewed in 2012 and still found to be appropriate.

⁸⁸ This 1994 model code was accessed on March 10, 2016 at <http://www.pharmacist.com/code-ethics>

⁸⁹ American Society of Health-System Pharmacists code accessed on March 10, 2016 at <https://www.ashp.org/DocLibrary/BestPractices/EthicsEndCode.aspx>

This is a model code, however, and a pharmacist practicing in Kentucky, Georgia, or California must comply with the codes of those states, not necessarily of a model code. In Kentucky physicians, dentists, pharmacists, and others are governed by provisions contained in section 201 of the Kentucky Administrative Regulations. Pharmacists are governed by chapter 2.⁹⁰ No specific provision, however, either requires a pharmacist to dispense all lawfully prescribed medication, or permits the pharmacist to refuse to fill a prescription. Nor is there any provision which requires the employer of the pharmacist to have a policy requiring the pharmacist to dispense or permitting the pharmacist not to dispense.

Other states, however, are much clearer and have adjusted the state's code to provide that patients will receive all lawful medications to which they are entitled in a timely manner, and particularly for prescribed medications. These states are referred to as "must fill" states. Although some distinctions can be made from state to state, the intent is to require all pharmacists to fill all prescriptions. One example is California. California's Business and Professional Code, section 733, covers pharmacists. The intent of the provision is to ensure that "health care professionals dispense prescription drugs and devices in a timely way or provide appropriate referrals for patients to obtain the necessary prescription drugs and devices, despite the health care professional's objection to dispensing the drugs or devices on ethical, moral, or religious grounds."⁹¹ The law provides that

No licentiate shall obstruct a patient in obtaining a prescription drug or device that has been legally prescribed or ordered for that patient. A violation of this section constitutes

⁹⁰ 201 KAR chapter 2 accessed on March 10, 2016 at <http://www.lrc.state.ky.us/kar/title201.htm>

⁹¹ The California law can be found at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=00001-01000&file=725-733> and was accessed on March 10, 2016.

unprofessional conduct by the licentiate and shall subject the licentiate to disciplinary or administrative action by his or her licensing agency. .. a licentiate shall dispense drugs and devices... pursuant to a lawful order or prescription unless one of the following circumstances exists:

(1) Based solely on the licentiate's professional training and judgment, dispensing pursuant to the order or the prescription is contrary to law ...

(2) The prescription drug or device is not in stock...

(3) The licentiate refuses on ethical, moral, or religious grounds to dispense a drug or device pursuant to an order or prescription. A licentiate may decline to dispense a prescription drug or device on this basis only if the licentiate has previously notified his or her employer, in writing, of the drug or class of drugs to which he or she objects, and the licentiate's employer can, without creating undue hardship, provide a reasonable accommodation of the licentiate's objection. The licentiate's employer shall establish protocols that ensure that the patient has timely access to the prescribed drug or device despite the licentiate's refusal to dispense the prescription or order. For purposes of this section, "reasonable accommodation" and "undue hardship" shall have the same meaning as applied to those terms.

The operating space for an objecting California pharmacist is quite limited.

Nonetheless, if the pharmacist objects beforehand in writing, and if he or she is still hired, and if he or she is still employed, and if the employer has arranged beforehand for another pharmacist on hand who has no objections to filling the prescription, and if the employer can accommodate the licensee's objection without undue hardship, then the licensee can continue to work there without disciplinary action by the California Board of Pharmacy. Although there is a balancing test here, California in its public policy has heavily weighted the scale in favor of the patient who is not to be "obstructed" in obtaining lawful medications. There is no balancing test regarding how inconvenienced or even burdened the patient is because of the time or travel involved in finding a more accommodating pharmacist. For example, it does not matter if the patient has five pharmacies within a three minute walk or is located in a remote area of the Sierras. Nor does it matter if the patient is seeking emergency contraception in a timely manner or

wants a chemically induced abortion when several weeks pregnant. The law does, however, have the benefits of clarity and simplicity.

Other states have gone in the other direction and have written either general or specific “conscience clauses” into their state codes. Georgia is an example of a state which has given pharmacists great discretion and given timely patient access to all lawful drugs and devices little weight. In its Board of Pharmacy regulations, Georgia Administrative Code Rule 480-5-.03, Georgia provides that

The Board is authorized to take disciplinary action for unprofessional conduct. .. The Board establishes a Code of Professional Conduct which shall apply to and be observed by all persons engaged in the practice of pharmacy in the State of Georgia...

(n) Refusal to fill prescription. It shall not be considered unprofessional conduct for any pharmacist to refuse to fill any prescription based on his/her professional judgment or ethical or moral beliefs...

(p) Violations of the Code of Professional Conduct. The above set out Code of Professional Conduct is expressly adopted by the Board and shall govern the conduct of all those admitted to practice pharmacy in their capacities as pharmacists.⁹²

The Code does not specifically address the issue of referrals.

As this is being written, Georgia is debating whether or not to adopt a more general RFRA. As seen above, it already has a conscience clause in its pharmacy regulations, so it may feel less compelled, as a matter of medical practice, to enact a RFRA. Other states, however, have adopted RFRA's.

State RFRA's

States responded to the *Boerne* case as Congress had responded to the *Smith* decision, but neither as quickly nor as wholeheartedly nor as uniformly. Indeed, only 22 states

⁹² Chapter 480 of the Georgia Professional Code, accessed on March 10, 2016 at <http://rules.sos.state.ga.us/gac/480-5>

have passed their own RFRA's restoring the "strict scrutiny" test for their own legislation.⁹³ Lund summarizes their main features as providing that governments may substantially burden free exercise only if the burden furthers a compelling governmental interest, and is the least restrictive means of furthering that compelling interest.⁹⁴ Lund also notes that some states have maintained their own constitutional protections for free exercise independent of any state legislation. However, in many states and for much if not most of the population, there is neither a constitutional nor a statutory bar to burdening free exercise. There is no balancing of interests regardless of how severe or limiting the legislation might be on free exercise.

RFRA's are broad. They do not cover only the conscientious objection claims made by medical professionals, but also the objection of Amish in not sending their children to public school or affixing certain safety equipment to their buggies, to parents who object to the mandatory vaccination of their children, to the provision of or withholding of life-sustaining nutrients or medications at the end of life, to the construction of a mosque minaret contrary to local building codes, to the prohibition on wearing religious attire or headgear when receiving state identification cards, and so on. But it is in the RFRA context that medical conscientious objection issues are most commonly framed.

Connecticut passed the very first state RFRA in 1993. Connecticut's statute section 52-571b provides in part that

⁹³ See, e.g., Bertelsen, "Conscientious Objection of Health Care Providers: Lessons from the Experience of the United States.," D. Bridge, "Religious Freedom or Libertarianism: What Explains State Enactments of Religious Freedom Restoration Act Laws?," *Journal of Church and State* 56, no. 2 (2014); D. Claborn, "Effects of Judicial and Legislative Attempts to Increase Religious Freedom in U.S. State Courts," *ibid.* 53, no. 4 (2011).

⁹⁴ Lund, "Religious Liberty after Gonzales: A Look at State Rfras." 476

Sec. 52-571b. Action or defense authorized when state or political subdivision burdens a person's exercise of religion. (a) *The state or any political subdivision of the state shall not burden a person's exercise of religion under section 3 of article first of the Constitution of the state even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.*

(b) *The state or any political subdivision of the state may 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.*

(c) *A person whose exercise of religion has been burdened in violation of the provisions of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the state or any political subdivision of the state.*⁹⁵

This is very similar to the federal RFRA, and very similar to the Supreme Court's pre-*Smith* tests for constitutionality. It includes the balancing test of placing a burden on the free exercise of one's religion on the basis of a compelling governmental interest, and that interest must be implemented using the least restrictive means available. There is one huge difference, however. The federal RFRA and most other RFRA's use the following balancing test: In order to significantly burden the free exercise, the government's interest must be compelling and use the least restrictive means. The Connecticut statute is much more protective of free exercise, and much more demanding of the laws of general applicability of it and its localities. Connecticut does not require a substantial burden, but a mere burden on free exercise. Apparently, any burden will do.

Rhode Island was also remarkably quick out of the gate in passing its own RFRA.⁹⁶

Rhode Island Code 42-80.1 provides in part that

⁹⁵ Connecticut Statutes 52-571b, accessed on March 10, 2016 at https://www.cga.ct.gov/current/pub/chap_925.htm#sec_52-571b

⁹⁶ Rhode Island Code section 42-80.1, 1993, accessed on March 10, 2016 at <http://webserver.rilin.state.ri.us/Statutes/TITLE42/42-80.1/INDEX.HTM>

§ 42-80.1-3 Religious freedom protected. – (a) Except as provided for in subsection (b), a governmental authority may not restrict a person's free exercise of religion.

(b) A governmental authority may restrict a person's free exercise of religion only if:

(1) The restriction is in the form of a rule of general applicability, and does not intentionally discriminate against religion, or among religions; and

(2) The governmental authority proves that application of the restriction to the person is essential to further a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest.

This statute is also worded slightly differently from the federal RFRA. However, it does not refer to a “burden” or a “substantial burden” on one’s free exercise, but simply says no governmental authority shall “restrict a person’s free exercise of religion.” It is stronger of free exercise interests because it provides that the restriction on the free exercise must be “essential” to further the compelling governmental interest. Otherwise, it retains the pre-*Smith* and federal RFRA balancing tests.

Other, subsequent statutes tend not to be as strong for potential plaintiffs. While they provide protection using a strict scrutiny standard, in order to meet the threshold requiring a balancing test the aggrieved party must typically demonstrate a “significant burden” or a “substantial burden” rather than a mere “burden” on his or her free exercise. For example, the Indiana RFRA provides in part that:

*Sec. 8. (a) Except as provided in subsection (b), a governmental entity may not **substantially burden** a person's exercise of religion, even if the burden results from a rule of general applicability. (b) A governmental entity may substantially burden a person's exercise of religion only if the governmental entity 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.*⁹⁷

⁹⁷ Text is from Indiana’s RFRA as provided by the Indianapolis Star, <http://www.indystar.com/story/news/politics/2015/03/27/text-indianas-religious-freedom-law/70539772/> accessed on March 9, 2016.

As of the writing of this thesis 22 states had enacted RFRAs. Figure 2 records the states and when the RFRA was enacted.

States with RFRAs		
State	Date of Enactment	Citation
1. Connecticut	June 29, 1993	Conn Gen Stat Ann 52-571b (1993)
2. Rhode Island	July 22, 1993	R.I. Gen. Laws 42-80.1 to -4 (1993)
3. Illinois	July 1, 1998	Ill. Comp. Stat. Ann. 35/1-99 (1998)
4. Florida	June 17, 1998	Fla. Stat. Ann. 761.01-.05 (1998)
5. Alabama	November 3, 1998	Ala. Const. art. 1, 3.01 (ratified 1999)
6. Arizona	May 19, 1999	Ariz. Rev. Stat. Ann 41-1493-1493.02 (1999)
7. South Carolina	June 1, 1999	S.C. Code Ann. 1-32-10 to -60 (1999)
8. Texas	June 10, 1999	Tex. Civ. Prac. & Rem. Code Ann. 110-001-0.12 (1999)
9. Idaho	March 31, 2000	Idaho Code Ann. 73-401 to 404 (2000)
10. New Mexico	April 12, 2000	N.M. Stat. 28-22-1 to -5 (2000)
11. Oklahoma	June 1, 2000	Okla. Stat. Ann. Title 51, 251-258 (2000)
12. Pennsylvania	December 9, 2002	71 Pa. Const. Stat. Ann. 2401-2407 (2002)
13. Missouri	July 9, 2003	Mo. Ann. Stat. 1.302-307 (2003)
14. Virginia	April 4, 2007	Va. Code Ann. 57-1 to -2.02 (2007)
15. Utah	March 19, 2008	Utah Code Ann. 63L-5-101 to -403 (2008)
16. Tennessee	July 1, 2009	Tenn. Code Ann. 4-1-407 (2009)
17. Louisiana	June 30, 2010	La. Rev. Stat. 13:5231-5242 (2010)
18. Kentucky	March 26, 2013	Ky. Rev. Stat. 446.350
19. Kansas	July 1, 2013	Kan. Stat. 60-5301 et seq.
20. Mississippi	July 1, 2014	Miss. Code 11-61-1
21. Indiana	March 26, 2015 amended April 2, 2015 SB 101 and SB 50	
22. Arkansas	April 2, 2015	SB 975
(23. Georgia?)		

These citations are from Professor Hamilton's website at <http://rfraperils.com/states/>. Another list with citations and a map can be found at the National Conference of State Legislatures website <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> accessed on February 25, 2016.

Note that these statutes or constitutional provisions may be amended. Arizona, e.g., passed an amendment in the last two years which was successfully vetoed by its governor. Recent amendment attempts and even recent RFRAs may focus more on Obergefell than on Smith and the context may be "free exercise" protection but is not typically medical conscientious objection.

Although there was some geographical dispersal early, RFRAs remain rare in the Mid-Atlantic, in New England after an initial adoption in two states, in the upper Midwest, and in the West. Most recently they have been enacted only in the South and lower

Midwest, except for Indiana. Note that the first states to adopt tend to be more progressive than the other states, and no state that might be considered progressive has passed a RFRA in 20 years.

Must Fill Laws

Figure 3 records those states with “must fill” requirements.

States with “Must Fill” Pharmacy Laws

State	Applies to	Enacted	Citation
1. California	Pharmacists and Pharmacies	2009	Cal. Bus. & Prof. Code 733
2. Illinois	Pharmacy	2010	III. Admin. Code 68: 1330.500
(Note: Illinois also has a RFRA, and the “must fill” law was enjoined by an Illinois Court in 2011.)			
3. Maine	Pharmacy	2009	02-392 Me. Code R. ch. 19, section 11
4. Massachusetts	Pharmacist	2004	Pharmacy Board interpretation of Mass. Gen. Laws ch. 94C, section 19(a)
5. Nevada	Pharmacist	2008	Nevada Admin. Code section 639.753
6. New Jersey	Pharmacy	2009	N.J. Stat. Ann. section 45:14-67.1
7. Washington	Pharmacy	2009	Wash. Admin. Code section 246-869-010
(Note: this was partially enjoined against two pharmacists in 2012.)			
8. Wisconsin	Pharmacy	2009	Wis. Stat. Ann. section 450.095

This list is broader than the Guttmacher Institute list which has only five “must fill” states listed. The list above, and citations, is from the National Women’s Law Center website, accessed on March 4, 2016 at nwl.org/resources/pharmacy. The large number of 2009 enactments is likely related to the Bush Administration’s issuance of restrictive federal rules in the last days of its Administration. These rules were restrictive from the perspective of patients because they permitted pharmacists to refuse to dispense based on expanded conscientious medical objection grounds. These rules were almost immediately revoked by the Obama Administration.

These states are fairly widely dispersed and most trend toward more progressive policies. The Massachusetts must fill policy – the first in the nation - was enacted not legislatively nor by an Executive Order, but by a bureaucracy. Most of the others are clustered in 2009 and are likely a response to the Bush Administration’s enhancement of conscience protections for medical professionals via rulemaking, not legislation, in the waning days of 2008. These states considered those rules imbalanced and insufficiently

protective of important health considerations, and attempted to rebalance by eliminating or limiting any conscience provision for pharmacists.

Note also that must fill requirements are much more specific than RFRA. RFRA cover any free exercise claim, and are thus much broader than medical activities. Accordingly, there are different issues when analyzing RFRA and must fill policies as a matter of or possible reflection of public opinion or sentiment. Must fill policies are intended to affect specific consumers and specific providers. RFRA are intended to cover free exercise generally, regardless of whether the specific issue is religious attire in the workplace, a requirement to participate in an assisted suicide, or food restrictions in an institutional environment. The analysis of general opinion and policy, and specific opinion and policy, is discussed more below.

How Does Opinion Translate into Policy? Literature Review of General and Specific Public Opinion and Its Relationships to Policy

It is generally thought that public opinion translates into public policy as measured by, e.g., legislation. It may be fast or slow, efficient or inefficient, but states with liberal electorates tend to have liberal policies, and states with conservative electorates tend to have conservative policies. If this is the case, then states with electorates more sensitive to medical conscientious objection should be more likely to have their policies reflect this opinion in, e.g., RFRA or conscience clauses, than states with less sensitive electorates. Conversely, those states with electorates more focused on the delivery of lawful or even fundamentally guaranteed medical care and services to patients will be less likely to adopt policies supporting medical conscientious objection. This general idea on the responsiveness of government to electorates is confirmed in several studies which,

nonetheless, also add some significant qualifications to the simple conclusion. Also, for the first time political scientists enter the lists of scholarly debate.

Brace notes the utility of using General Social Survey data to track the responsiveness of policy (the dependent variable) to opinion (some of the independent variables) at the national level, but uses the data across nine policy areas at the state level when measuring specific attitudes rather than e.g., a general “ideology” measure. He “disaggregates” the General Social Survey data to the state level, and concludes that, with one exception (death penalty) there is a strong relationship between specific state opinion and specific state policies.⁹⁸ Norrander does a study regarding death penalty sentencing (the dependent variable in the states), examining four standard models used to explain the link between opinion and policy. Using American National Election Study data and a 1936 Gallup poll, she confirms the link and concludes that each model has explanatory power but that a combination (her “historical causal chain”) is the most rigorous.⁹⁹

Lax and Lupia both analyze the basic premise of policy responsiveness with respect to gay rights. Lax measures eight specific gay rights issues using a simulation of state opinion. He concludes that policy is responsive to specific opinion measurements, (i.e., they move in the same direction) but is not necessarily congruent, (i.e. they do not move to the same degree). His model is complex and has several key factors besides opinion, such as saliency, elite opinion, government institutions, and interest groups.¹⁰⁰ Lupia did

⁹⁸ Paul Brace et al., "Public Opinion in the American States: New Perspectives Using National Survey Data," *American Journal of Political Science* 46, no. 1 (2002).

⁹⁹ Barbara Norrander, "The Multi-Layered Impact of Public Opinion on Capital Punishment Implementation in the American States," *Political Research Quarterly* 53, no. 4 (2000).

¹⁰⁰ Jeffrey R. Lax and Justin H. Phillips, "Gay Rights in the States: Public Opinion and Policy Responsiveness," *The American Political Science Review* 103, no. 3 (2009). One major blunder may be a finding he adopted on 383 that seeking gay rights in the courts is not likely to be successful.

a similar study on state constitutional treatment of same-sex marriage. Examining those states with constitutional bars (the dependent variable), he finds a significant factor is whether states can directly translate opinion into policy via voter referenda. He uses state polling data for his analysis. Opinion is a necessary but insufficient cause absent this constitutional amendment apparatus.¹⁰¹

In a more recent study using a similar methodology Lax studied state opinion across eight policy spheres and confirmed that policy was highly responsive to specific policy opinion but that it was congruent with a majoritarianism only half the time, a phenomenon he calls “the democratic deficit”. This time his state opinion came from advocacy groups and more local research organizations.¹⁰²

Some medical professionals may perceive themselves to be under professional attack by an increasingly intolerant government or medical establishment. More generally, do U.S. citizens consider themselves to have lost liberty? Gibson concludes that this is the case, and that Americans perceive themselves to be less free and more subject to intolerance – a “dispersed intolerance” - than during the McCarthy era, when intolerance was more narrowly focused on the Left. He considers three polls from 1954, 1987, and 2005 to reach these conclusion using simple tables to record his results.¹⁰³ While Gibson studies perceived intolerance, Davidson has studied actual intolerance when pharmacists place their state licenses and jobs in jeopardy by not conforming to Nevada’s “must fill” law for dispensing five drugs. Her N=668 study, with interesting demographic factors of

¹⁰¹ Arthur Lupia, et al, "Why State Constitutions Differ in Their Treatment of Same-Sex Marriage," *The Journal of Politics* 72, no. 4 (2010).

¹⁰² Jeffrey R. Lax and Justin H. Phillips, "The Democratic Deficit in the States," *American Journal of Political Science* 56, no. 1 (2012).

¹⁰³ James L. Gibson, "Intolerance and Political Repression in the United States: A Half Century after Mccarthyism," *ibid.*52(2008).

sex, religion, and age, demonstrates how many pharmacists disobey the laws.¹⁰⁴ Her study involved mailing a questionnaire to every pharmacist in the state, with the option of returning written responses or completing the survey via Survey Monkey.

Olson retests and reconfirms the “religion gap” phenomenon in which more religious voters (the independent variables), as measured by belief, behavior, and belonging, tend to vote more conservatively (the dependent variable), although differences within religious communities might be more significant than differences between religious communities. Her study used ANES data and recorded it in simple tables, was a national study only, and had appropriate qualifications on what factors might be more fundamental than some of these measures of “religiosity”.¹⁰⁵ If “conscience clauses” are a conservative issue, then these clauses should fare better in a more conservative state if and when that particular opinion can translate into governmental policy. Putnam makes the same point, but examines data over a much longer period of time, and has a more nuanced conclusion regarding the “God Gap”. Nonetheless, he too finds such a gap exists, and has accelerated from the 1950s when it hardly seemed to exist.¹⁰⁶

In a more extensive study Olson examined the links between “belonging” (religious affiliation), “behaving” (religious commitment operationalized as church attendance), and “belief” (as measured by reverence for authoritative holy books) and found that there was a strong relationship between “belief” and Presidential approval ratings, but “belonging”

¹⁰⁴ Laura A. Davidson et al., "Religion and Conscientious Objection: A Survey of Pharmacists' Willingness to Dispense Medications," *Social Science & Medicine* 71, no. 1 (2010).

¹⁰⁵ Laura R. Olson and John C. Green, "The Religion Gap," *PS: Political Science & Politics* 39, no. 3 (2006).

¹⁰⁶ Putnam, Campbell, and Garrett, *American Grace : How Religion Divides and Unites Us*. Chapter 11, *Religion in American Politics*, is particularly useful.

was not a significant contributor to those ratings.¹⁰⁷ In a topically related study, Driskell found that mere attendance at religious services was too crude a measure for “religiosity.” Other measures, and particularly “belief” (and especially “generalized macro religious belief”) are more accurate predictors of participation in politics.¹⁰⁸

Djupe reminds us that in policy responsiveness studies, how an issue is framed is significant. Should proponents of a policy argue from a moral or religious base, or should they appeal to their “rights”? Using an experimental design, Djupe demonstrates that an appeal to “rights” does not stop discourse, but is seen as more accessible and less polarizing than an appeal to morality.¹⁰⁹ If so, that could have important implications for how proponents of conscience clauses or state RFRA frame the issue.

Translating Opinion Into RFRA and “Must Fill” Requirements

The Federal RFRA and most of the mini-state RFRA passed quickly and with great support from politicians and the public. See Figure 2. But other states failed to pass RFRA, or even passed “anti-RFRA laws” such as Nevada’s “must fill” law in which, regardless of the violation of one’s conscience, a pharmacist, doctor, or nurse is required to perform certain acts or prescribe certain drugs. What accounts for the differences? What factors or conditions lead to the adoption or the rejection of state RFRA? And how responsive are the states?

Figure 4 States with RFRA or Some Judicial or Constitutional Protection

¹⁰⁷ Laura Olson and Adam Warber, "Belonging, Behaving, and Believing," *Political Research Quarterly* 61, no. 2 (2008).

¹⁰⁸ Robyn Driskell, Elizabeth Embry, and Larry Lyon, "Faith and Politics: The Influence of Religious Beliefs on Political Participation," *Social Science Quarterly* 89, no. 2 (2008).

¹⁰⁹ Paul A. Djupe et al., "Rights Talk: The Opinion Dynamics of Rights Framing," *Social Science Quarterly (Wiley-Blackwell)* 95, no. 3 (2014).

States with heightened protections for religious exercise

Religious Freedom Restoration Act (RFRA) laws

- State RFRA laws enacted by legislation
- RFRA-like protections provided by state court decision



Source: American Religious Freedom, The Ethics and Public Policy Center

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(This Figure is helpful but is now somewhat dated. Utah, Arkansas, Mississippi, and Indiana have added RFRA since it was produced. As of the date of writing this thesis, Georgia is debating the issue.)

Only one political science study has attempted to explain why states adopt RFRA. Bridge asked whether states pass RFRA legislation (the dependent variable) because of state opinion regarding religious freedom, or because of religious freedom?¹¹¹ That is, is it the libertarian, liberty interest which succeeds in RFRA legislation, or because of the

¹¹⁰ Accessed on February 25, 2016 from the Washington Post at <https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/> Georgia's governor is currently considering what to do with a bill passed in both houses of its legislature. This chart distinguishes between those states with legislative RFRA, and those states which have at least some constitutional protection of the state's first amendment or of conscience, similar to federal Supreme Court jurisprudence prior to the 1990 *Smith* case.

¹¹¹ Bridge, "Religious Freedom or Libertarianism: What Explains State Enactments of Religious Freedom Restoration Act Laws?."

religious interest? He relies on data from Ruger¹¹² and Pew (Religious Landscape Survey of 2007) to measure partisanship, libertarian scores for the state, and religion as measured by “belonging, believing, and behaving” criteria to conclude that it is the religious impulse of a state, not its generic love of liberty, that leads to RFRA protection. His conclusion is consistent with Lax, Brace, and Lupia’s conclusion that specific opinion and not general ideology or opinion has the greater relationship to policy, and this approach explained fifteen of the sixteen states that had RFRA. As a matter of methodology, however, I note that other scholars are reluctant to use national survey data for state opinion because the data is intended to duplicate national opinion rather than state opinion. Bridge used national data nonetheless, contending that the Pew research data was sufficiently large (N = 35,556) so that each state had a large enough sample.

Although only one study has specifically examined how and why states adopts RFRA, other models might help to explain how and why one state’s RFRA adoption or rejection is influenced by the federal RFRA or by other state RFRA. How do states learn from or influence one another? A glance at Figure 1 demonstrates that state RFRA have tended to prevail more in the South and Midwest. Is that geographical clustering largely coincidental, or is it suggestive? What, if anything, have these states learned from their perceptions of their own and other states?¹¹³ In their research of policy diffusion and the death penalty, Mooney and Lee found that “morality policy” – policy which involves fundamental questions of first principles – may be “learned” less from other states, but may be more sensitive to public opinion, than other policies. In these

¹¹² William Ruger and Jason Sorens, *Freedom in the 50 States : An Index of Personal and Economic Freedom*, 2013 edition. ed. (Arlington, Virginia :: Mercatus Center at George Mason University, 2013).

¹¹³ C. R. Shipan and C. Volden, "Policy Diffusion: Seven Lessons for Scholars and Practitioners," *Public Administration Review* 72, no. 6 (2012).

cases, “democracy supersedes learning.”¹¹⁴ Conscience clauses, of course, are by their nature about “morality policy”.

Distinct but related to the issue of how opinion is translated into the enactment of policy is the issue of policy effectiveness. Have state RFRAAs accomplished their intended purpose of protecting free exercise? There are serious questions about whether they do so.

Both Claborn¹¹⁵ and Lund¹¹⁶ examine legal cases after the federal and state RFRAAs passed and conclude that this legislation did not in the main have the intended effect of protecting conscience at the state level. Claborn’s study, based on his dissertation, is more crude and does not take into account that most cases are settled, not litigated. Accordingly, merely measuring litigation is not necessarily an accurate way of determining the effectiveness of legislation. Less litigation, and fewer trial victories, does not mean less protection. Lund notes this, as does Laycock. Nonetheless, Lund also concludes that state RFRAAs, in particular, have largely failed if their purpose was to protect religious conduct.¹¹⁷ He cites cases from several states to show state judges are, in many cases, following the post-*Smith* Supreme Court rather than their own state RFRA law.

¹¹⁴ Christopher Z. Mooney and Mei-Hsien Lee, "The Temporal Diffusion of Morality Policy: The Case of Death Penalty Legislation in the American States," *Policy Studies Journal* 27, no. 4 (1999).

¹¹⁵ Claborn, "Effects of Judicial and Legislative Attempts to Increase Religious Freedom in U.S. State Courts."

¹¹⁶ Lund, "Religious Liberty after Gonzales: A Look at State RFRAAs." Laycock also thinks state RFRAAs have promised more than they have delivered. Laycock Douglas, "The Campaign against Religious Liberty," in *The Rise of Corporate Religious Liberty* (Oxford University Press, 2016).

¹¹⁷ See also the state emphasis in *Elizabeth Shaw, Religious Liberty : Proceedings from the 35th Annual Convention of the Fellowship of Catholic Scholars, September 28-30, 2012, Washington, D.C, Fellowship of Catholic Scholars Convention ([Notre Dame, IN]: Fellowship of Catholic Scholars, 2014)*. See also William Saunders’s chapter on *Protecting Conscience at the State Level*.

Notwithstanding Lund and Claborn's specific studies, in a cross national study Finke concludes that an independent judiciary is one of the key ingredients to religious liberty and is a greater predictor of religious freedom than are other measures.¹¹⁸ Richardson's conclusion regarding the "judicialization of politics" in general and of religion in particular, by which he means major political decisions are rendered by the courts rather than the executive or legislature, is consistent with both.¹¹⁹ Courts can override legislation. This conclusion can also be consistent with Fisher in that a court may restrain or limit the liberty that a legislature purportedly grants.

¹¹⁸ Roger Finke and Robert R. Martin, "Ensuring Liberties: Understanding State Restrictions on Religious Freedoms," *Journal for the Scientific Study of Religion* 53, no. 4 (2014).

¹¹⁹ James T. Richardson, "Managing Religion and the Judicialization of Religious Freedom," *ibid.* 54, no. 1 (2015).

CHAPTER FOUR: DATA, RESULTS, AND ANALYSIS

Gaps and Methodology

There is a tremendous amount of work on the constitutional and legal background to free exercise and conscience exemptions. There is also a large literature on medical ethics and the legal justification for or rejection of RFRA and conscience clauses for medical practitioners. However, very little has been done by political scientists. What political scientists have contributed is study of whether, how, and to what degree some policy spheres – gay rights, environmental protection, capital punishment, welfare reform, etc. – have been affected by and been responsive to both general (ideological) opinion and more specific public opinion in those jurisdictions. They have contributed to an understanding of how opinion translates into policy. Tracing the public opinion support for or opposition to RFRA or conscience clauses is, however, with the exception of Bridge, largely uncharted territory. Thus, we do not know which factors are necessary or sufficient or influential or even merely correlated or relational to conscience protecting legislation.

My hypotheses are that, generally, the opinion and perspective of religiously oriented people will be reflected in public policy protecting or recognizing religious perspectives, such as free exercise. Conversely, the more secularly minded the populace, the less public policy will protect free exercise, and the more policy outcomes will protect or recognize other interests. More specifically, the more “religious” the jurisdiction’s

citizens, the more likely a RFRA will be enacted. The more “secular” the jurisdiction’s citizens, the less likely a RFRA will be enacted and the more likely there will be policy outcomes reflecting other interests, such as must fill requirements. Accordingly, a state’s policy will bear a relationship to and be responsive to its religious complexion. The hypotheses are set out more formally in Chapter One under the Section “Methods, Data, and Theories.”

I have two dependent variables. The first is the enactment at the state level of a RFRA. The second is the enactment at the state level of a “must fill” pharmacy requirement. All 50 states are analyzed.¹²⁰ These are coded as dichotomous measurements.

To study relationships with the two dependent variables I have eleven independent variables. Seven are “religious” variables of a given state. Following the “believing, belonging, behaving” approach, I have three variables for “belonging” – whether the respondent self-identified as evangelical, Roman Catholic, or “unaffiliated” with any religion. I use one variable for “behaving” – whether the respondent prays daily. I use three variables for “believing” – whether religion is “very important” in the respondent’s life, whether the respondent considers the Bible to be the word of God, and whether the respondent considers religion to be the most important source for guidance in determining what is right or wrong. This data is recorded as a percentage of the population.

¹²⁰ The state data from the Pew 2014 study was released on February 29, 2016. This is the source of my state data.

Finally, four other control variables are used to measure other plausible contributors to the enactment of or failure to enact a RFRA and of a “must fill” pharmacy law. Two measure the relationships between interest group expenditures in a given jurisdiction and the existence of a RFRA or “must fill” requirement. I selected Planned Parenthood affiliate expenditures per state. I also selected National Right to Life affiliates and other pro-life groups’ (i.e., IRS “R62” groups) expenditures per state. In each case I utilized data extracted from the group’s IRS Form 990 and recorded at Guidestar.org. I simply added the expenditures (not counting any groups that spent less than \$100,000) and divided by the number of state residents using 2014 estimated census information, giving expenditure per resident. I did not include national headquarters expenditures.

These independent variables are summarized in Figure 5, below.

Figure 5 Table of Independent Variables

Independent Variable	Measurement
1. Religiosity – Belonging (Identification as Evangelical)	% of adult population
2. Religiosity – Belonging (Identification as Roman Catholic)	% of adult population
3. Religiosity – Belonging (Identification as Unaffiliated)	% of adult population
4. Religiosity – Behaving (Prayer)	% of adults who pray daily
5. Religiosity – Believing (Religion is the Most Important Source of Guidance for Right and Wrong)	% of adult population
6. Religiosity – Believing (Religion is Important in My Life)	% of adult population
7. Religiosity – Believing (Bible is the Word of God)	% of adult population
8. Interest Group Expenditure (Planned Parenthood)	Dollars per resident
9. Interest Group Expenditure (Right to Life)	Dollars per resident
10. Governor at RFRA Enactment	0 is Democrat, 1 is Republican
11. Governor at Must Fill Enactment	0 is Democrat, 1 is Republican

This methodology may underestimate expenditures of opponents of RFRA because I focus only on one group – Planned Parenthood affiliates. Many other allied groups also

oppose RFRA and support must fill requirements. On the other hand, this methodology may overestimate expenditures of “Right to Life” groups because I have added groups with that title in their name in addition to any group listed under the “R62” code, which has, as a major purpose, prolife activities. Of course, expenditures of these groups are not limited to advocacy or lobbying or educational purposes. Much of their expenditures are in the areas of customer or patient care. I included these, nonetheless, because they would tend to generate a customer base or patient goodwill toward the organization that is providing such care.

The last control variables I used were partisan measures - the party of the governor when the RFRA or “must fill” requirement was passed. These results are coded as Democrat is 0, and 1 is Republican.

After an overview of national level data and trends using American National Election Study (ANES) and Pew data to show national trends of religious opinion over 60 years, I used Pew data for each state from its 2014 Religious Landscape Survey. The ANES data was obtained from the University of California, Berkeley, SDA website. In analyzing national trends I also used the “believing, belonging, behaving” approach and tried to use questions that were identical to or very similar to those used in the Pew Study. Accordingly, I have three “belonging”, one “behaving”, and three “believing” responses. In the “National Trend” section below, I also use some Pew data showing how its national responses to these questions changed from its 2007 study to its 2014 study.

Finally, note the timing for data on the independent variables. For the state data on religious variables, I rely primarily on PEW data from its 2014 Religious Landscape Survey, even though the state may have considered its RFRA or must fill requirement

some years earlier. For the state data on interest group expenditures, I rely on data submitted to the IRS for the 2014 tax year, reported in 2015, regardless of the year in which the RFRA or must fill requirement was considered. For the state data on the party affiliation of the governor, I use the year in which the RFRA or must fill requirement was enacted.

National Trends

Figure 6 reflects the “belonging” criterion over 20 years. Respondents were grouped by self-identification. Although there may be some uncertainty over how precisely one measures religious self-identification, what is both clear and significant is that both the Evangelical and Roman Catholic group are decreasing in numbers, while the Unaffiliated Group is substantially increasing in numbers. Note, however, that the Unaffiliated are not necessarily nonreligious. This group includes both those who consider themselves nonreligious and those who consider themselves not to be part of any religious group or tradition. Each figure measures according to the percentage of the national population.

Figure 6 National religious trends “Belonging” obtained from ANES data via the Berkeley SDA website.

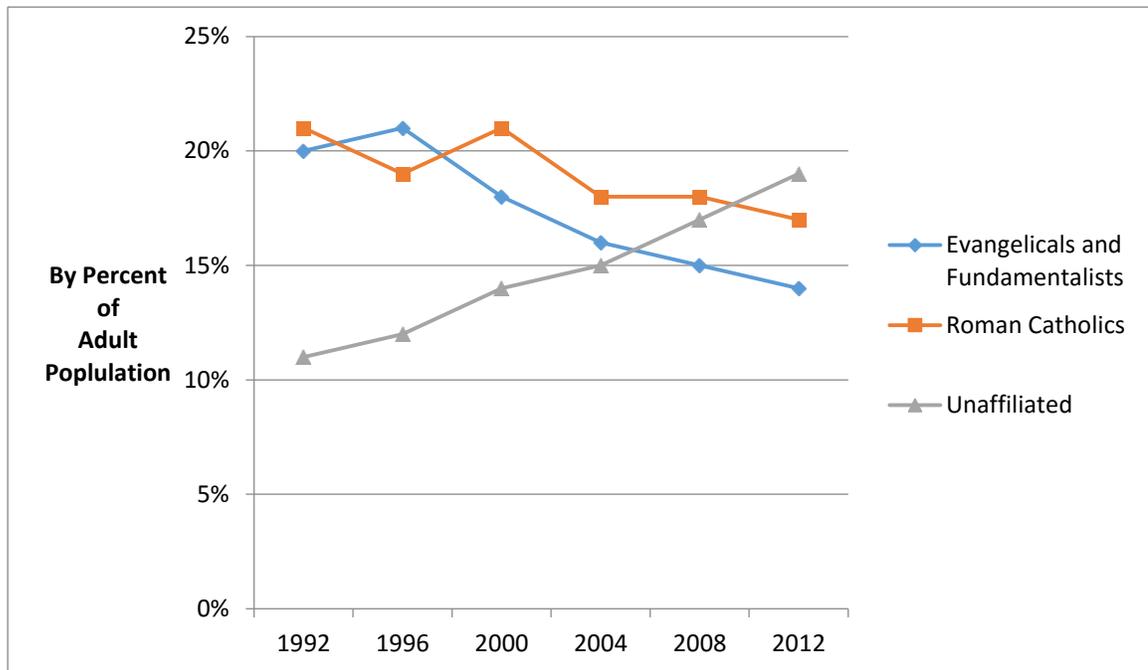


Figure 7 illustrates the national trend regarding four independent variables – the “belief” and “behaving” variables. These variables were available for study for a longer period of time in the ANES data, and thus I start with a cumulative 1952-1992 period. Of the four variables measuring religiosity, two have slowly but clearly declined over time. The percentages of respondents who state that “The Bible is the Word of God” and “Religion is Important in My Life” are decreasing. The percentage of those who state that “My Religion Provides Guidance for My Life” and who “Pray Daily” have been holding fairly steady for decades. What is significant from Figure 6 is that not a single measure of religious practice has increased over this time period. Also, there are fairly precipitate and unprecedented declines from 2008-2012 in every category. It will be

interesting to see when the 2016 ANES data are released whether this four year drop represents an anomaly or may be the beginning of a sea change in the American public.¹²¹

Figure 7 National religious trends “Believing and Behaving” obtained from ANES data via the Berkeley SDA website.

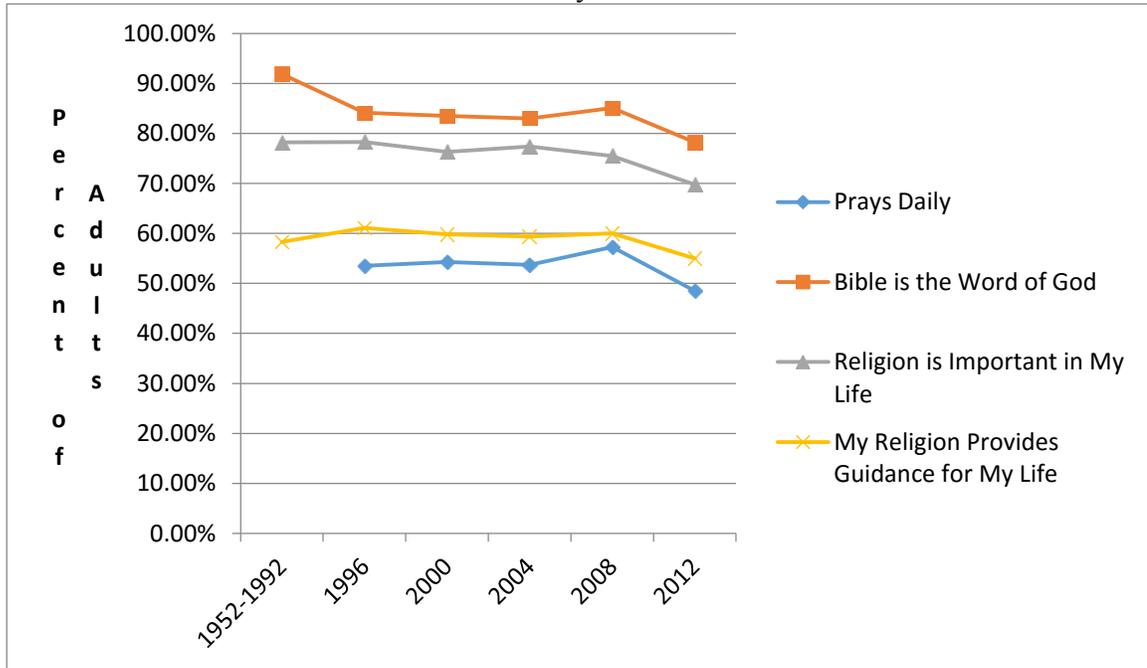


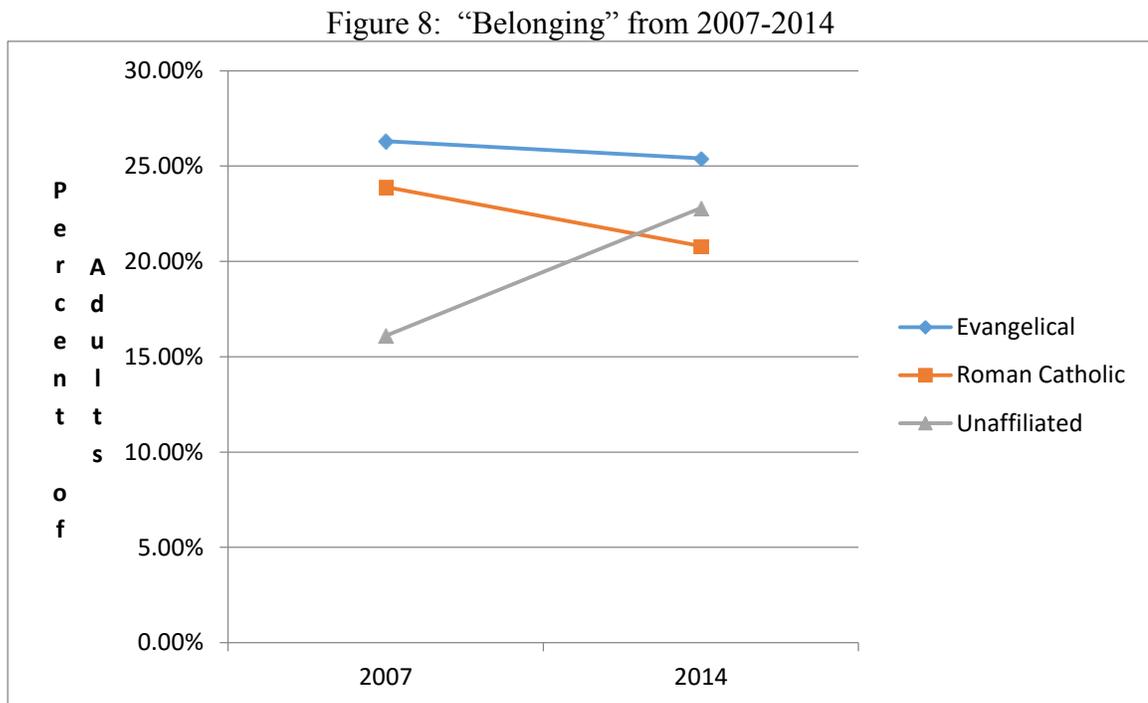
Figure 8 records the results from Pew’s National Religious Landscape Study of 2014. It charts national trends of the “belonging” criterion from its first Study in 2007. Unlike the ANES data, Pew’s Study identifies religious group identification by asking the respondent to state which religious group he or she belongs to, and then categorizing that group (if any is identified) as “mainline Protestant”, “Jewish”, “evangelical”, “Roman Catholic”, and so on. Thus, its methodology is different from the ANES Studies, and

¹²¹ Catharine Cookson, *Regulating Religion : The Courts and the Free Exercise Clause* (Oxford: Oxford University Press, 2001). Cookson posits a typology of four Western and American approaches to conscience protection or suppression. Her approach is complementary to but distinct from a more common analysis of “aggressive secularism” in, e.g., France, or “passive secularism” or even “accommodationist” in, e.g., the United States. The Oxford Handbook’s chapter on “*Religion and Voting Behavior*” makes a similar point, while observing on p. 482 that for most of the world – 55% - these categories may make little sense because “religion is more important than politics.” Russell J. Dalton and Hans-Dieter Klingemann, *Oxford Handbook of Political Behavior*, (Oxford: Oxford University Press, 2007).

will likely result in different findings. My intent is not to compare the ANES categories with the Pew categories, but simply to note broad trends within each study.

Figures 8 and 9 use the same seven religious independent variables for national trends that I use later in the thesis to analyze state religious complexion and policy outcomes.

Figure 8 notes the slight but perceptible decrease in the number of Evangelicals, the more significant decrease in the number of Roman Catholics, and the very significant increase in those Americans who are Unaffiliated.

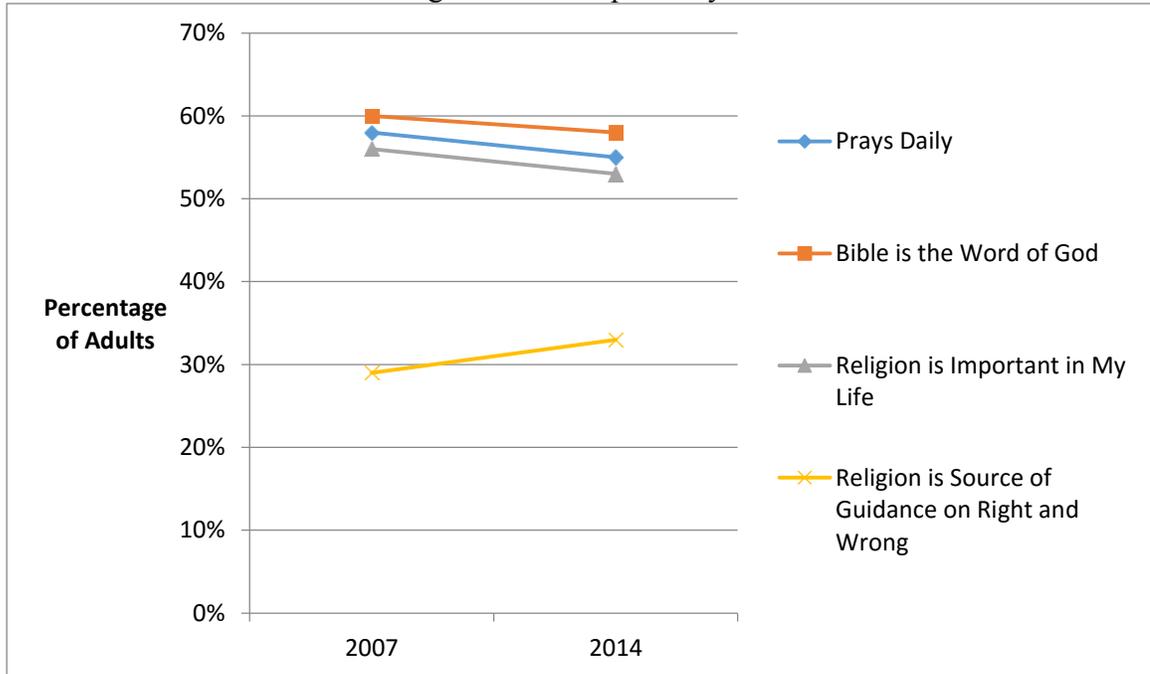


<http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> Accessed March 7, 2014. Pew 2014 Religious Landscape Survey. Reported May 12, 2015.

Figure 9 illustrates trends in the four “believing and behaving” independent variables. Unlike the “belonging” variable immediately above, these variables show only a very slight change, with one exception. The exception is that those Americans who believe that “Religion is the Most Important Source of Guidance in Determining Right and

Wrong” increased from 2007-2014. Like the “belonging” variable above, the other three variables all show decreases.

Figure 9 National religious trends “Believing and Behaving” 2007-2014 from Pew Religious Landscape Study data



Both the ANES and the Pew data indicate that, with one exception, every nationally measured religious variable examined here has decreased over time. Some are significant decreases, while others are only slight. One – the “Religion as a Source of Guidance” variable - has increased in the last several years, according to the Pew data. Yet it only counts for one third of Americans. The most noteworthy finding is the very significant rise in the percentage of Americans who consider themselves to be Unaffiliated – those either having no religion at all, or who are not part of any formal or recognized religious

group. This group is either the largest or second largest of any single category of respondents in the United States.¹²²

State Results

The two dependent variables in this study are the presence or absence of a state RFRA, and the presence or absence of a state “must fill” requirement for pharmacists. States can fit into six broad categories: Those with a RFRA; those without a RFRA; those with judicially created and recognized freedom of exercise protection, probably based on a state constitutional provision (such as the U.S. had before *Smith*); those states that fit within none of these categories; those with “must fill” requirements; and those states that fit into more than one of these categories.

Figure 10 summarizes these categories. Currently there are 22 states with RFRA legislation. Of these, one, Illinois, has a specific exception with a ‘must fill’ requirement, although its enforcement has been enjoined. There are nine states with RFRA-like judicial protection of varying degrees. Of these, three have statutory exceptions with “must fill” requirements. A total of eight states have “must fill” requirements. Fifteen states have no particular statute or legally recognized protection or exemption or exception.

¹²² And of course, those trends have consequences. The Pew Research Center has some excellent interactive tools by which to gauge the political beliefs and behavior of these various groups. Unfortunately, none of the questions used was specific enough to cover RFRA or “must fill” requirements. Nonetheless, it is clear that the Unaffiliated group identifies much more strongly with generally progressive policies and the Democratic Party.

Figure 10 Status of state law regarding RFRA's, at least some semblance of judicially protected free exercise, and "must fill" requirements as of February 29, 2016. Compiled from various web sources including Professor Hamilton's webpage, the National Conference of State Legislatures, the National Women's Law Project, and the Guttmacher Institute.

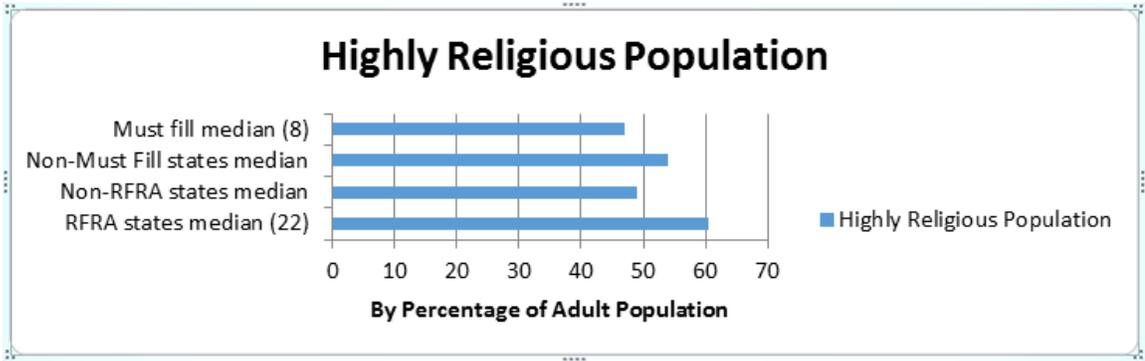
States with RFRA's (Legislation)	States with "Judicial" RFRA's	States with "Must Fill" Requirements	Other States Having No Laws
1. Alabama	Alaska	California	Colorado
2. Arizona	Maine*	Illinois*	Delaware
3. Arkansas	Massachusetts*	Maine*	(Georgia)
4. Connecticut	Michigan	Massachusetts*	Hawaii
5. Florida	Minnesota	New Jersey	Iowa
6. Idaho	Montana	Nevada	Maryland
7. Illinois*	North Carolina	Washington	Nebraska
8. Indiana	Ohio	Wisconsin*	New Hampshire
9. Kansas	Wisconsin*	* Note: There is no medical conscientious objection (pharmacy) in these states because a general judicial recognition of conscientious objection has been limited by state law. Also note that the Illinois "must fill" law has been enjoined.	New York
10. Kentucky			North Dakota
11. Louisiana			Oregon
12. Mississippi			South Dakota
13. Missouri			Vermont
14. New Mexico			West Virginia
15. Oklahoma			Wyoming
16. Pennsylvania			
17. Rhode Island			
18. South Carolina			
19. Tennessee			
20. Texas			
21. Utah			
22. Virginia			

How does the religious composition of a state translate into the policy outcomes of having a RFRA or a “must fill” requirement? This subsection addresses that question using Pew data available for each state.

The methodology of this section is to examine several independent variables and their relationship to two dependent variables. First, however, Figure 11 below indicates a very broad analysis of the issue. It is very crude, but very suggestive. Pew uses several criteria to measure religiosity. I will use several of those variables. But Pew also does a composite rating measuring “overall religiosity” and measures states from “most religious” – Alabama and Mississippi (both of which have RFRA) – to “least religious” – Maine, Vermont, New Hampshire, and Massachusetts (none of which have RFRA and two of which have “must fill” requirements). I entered the scores for all RFRA states, all non-RFRA states, all non-Must Fill states, and all Must Fill states, and determined their median levels of religiosity. The results are in Figure 11 below.¹²³

¹²³ For the overall list of states, and for the methodology and definitions used by Pew in arriving at this measure, see its “overall combined index of state religiosity” under the “How Religious Is Your State” section of the 2014 Religious Landscape Study. <http://www.pewresearch.org/fact-tank/2016/02/29/how-religious-is-your-state/?state=alabama>

Figure 11 Highly Religious Populations, RFRA's, and Must Fill Requirements



	RFRA states	Non-RFRA States	Non-Must Fill States	Must Fill States
Median	60.5 %	49%	54%	47%

This introductory Figure is notable for the stark contrast between the religious nature of the populations in “must fill” and RFRA states. It suggests that the more religious a population, the more likely that state will have a RFRA. Conversely, the less religious or more secular a state, the more likely it will have a “must fill” requirement.

Here is the information arranged by each state. Every state which reaches the 60% mark has a RFRA with the exceptions of Georgia and West Virginia. No state at or below the 50% mark has a RFRA with the exception of Connecticut and Rhode Island, which were the first states to pass RFRA's nearly 25 years ago.

Figure 11 illustrated the states categorized into groups. Figures 12 and 13 record data for each individual state on the Pew “Highly Religious Population” scale.

Figure 12 States Alabama to Missouri

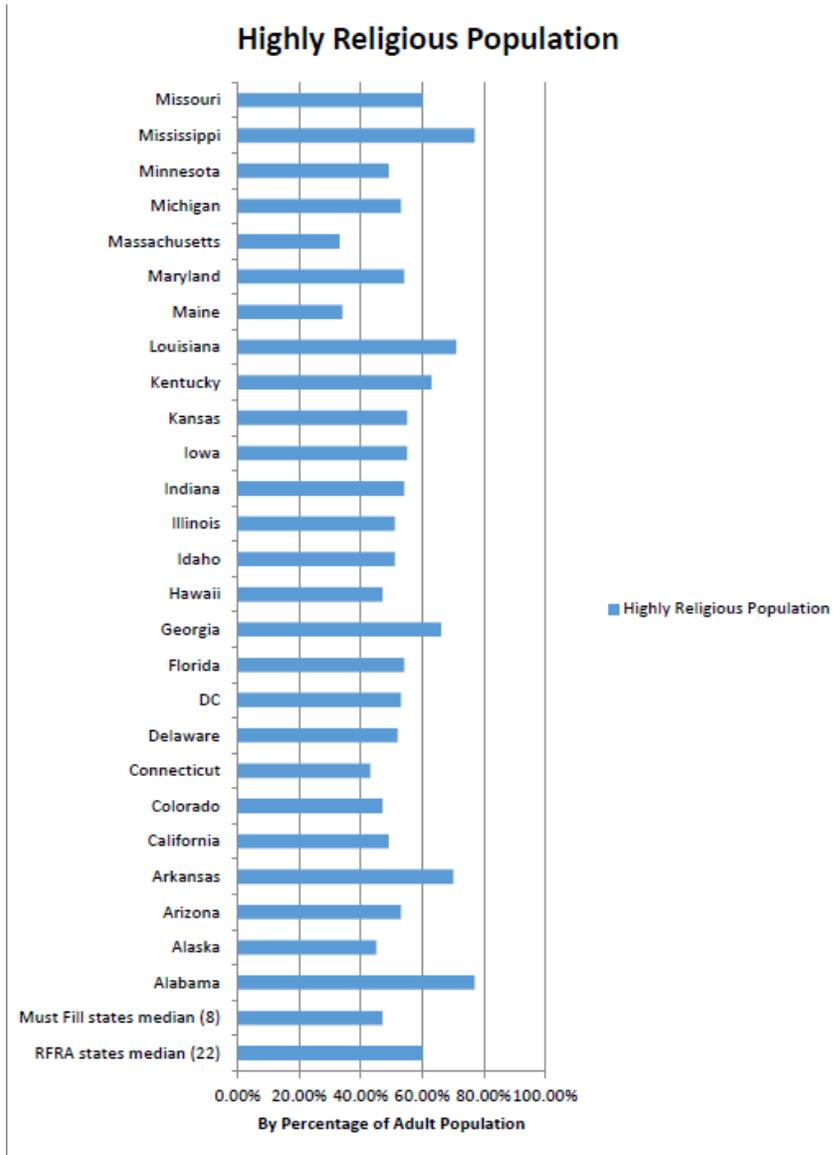
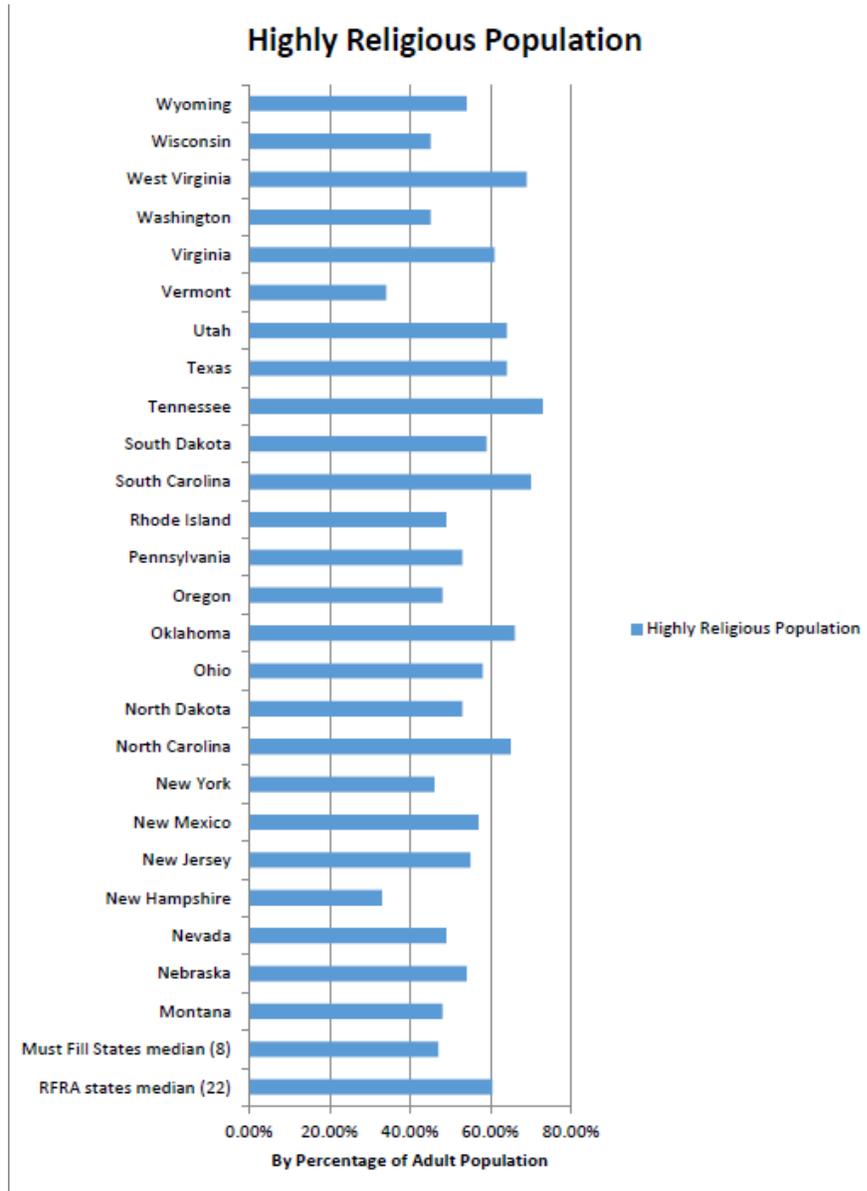


Figure 13 States Montana to Wyoming



According to this rough composite measure “must fill” states tend to rank at the low end of the religiosity scale. States with RFRA’s tend to rank at the high end of the religiosity scale. There is certainly a relationship. But “highly religious” is very broad. I will break this overall rating into groups of independent variable components to test the relationship in a more rigorous manner and to see what it is about “highly religious

states” that might make enactment of a RFRA more likely and a must fill requirement less likely.

Figures 14 and 15 below record in bar chart form the first religious independent variable – “belonging” - by state. This measures the religious identity of the respondent from those groups I posit as possibly significant for purposes of RFRA and must fill analysis. I did not examine “mainline Protestant” as a separate category in this analysis. I examined some characteristics of this group in the Pew study and concluded that, while it is a more coherent analytical group than the Unaffiliated, it is less interesting for some social and political purposes. As a class it does not appear to demonstrate the distinctiveness I was seeking in my selection of independent variables. Other possible classes may be distinctive, but are rather small. The mean and median of the RFRA states, all states, and the must fill states are also noted.

Figure 14 “Belonging” from Alabama to Missouri

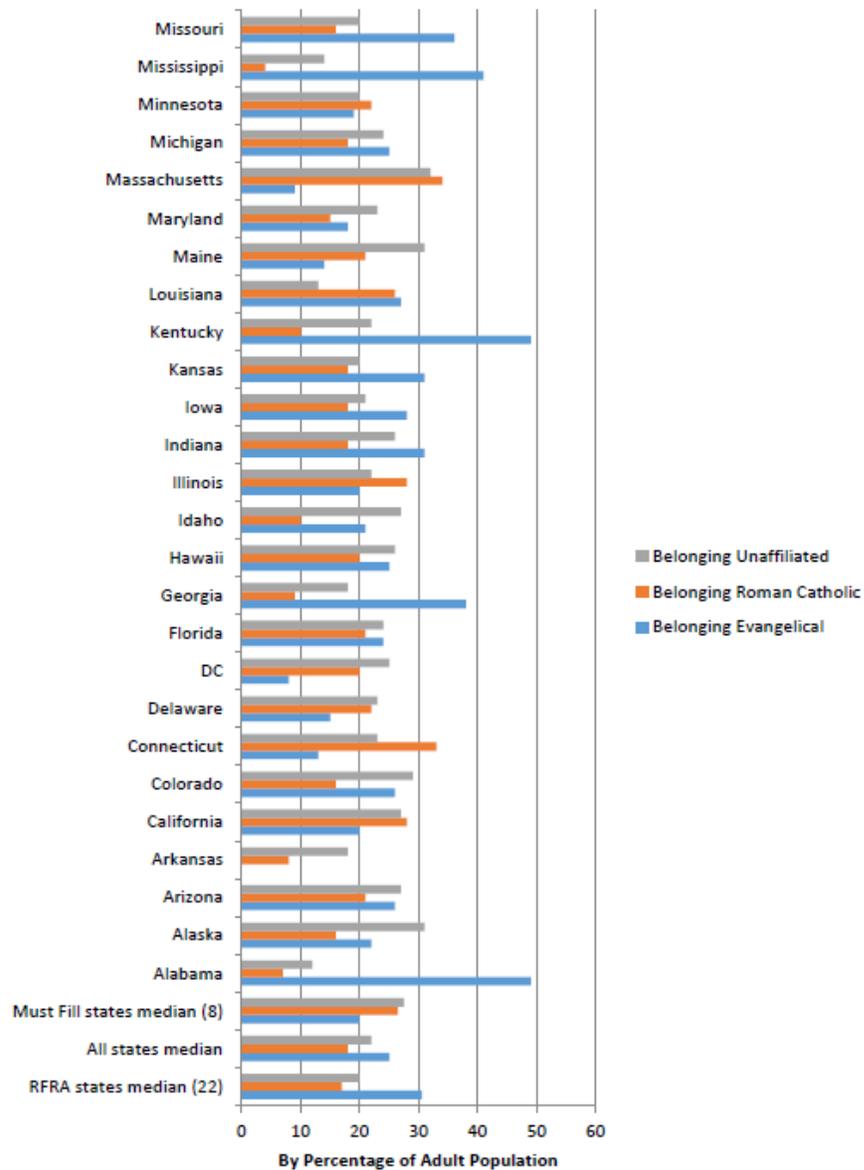
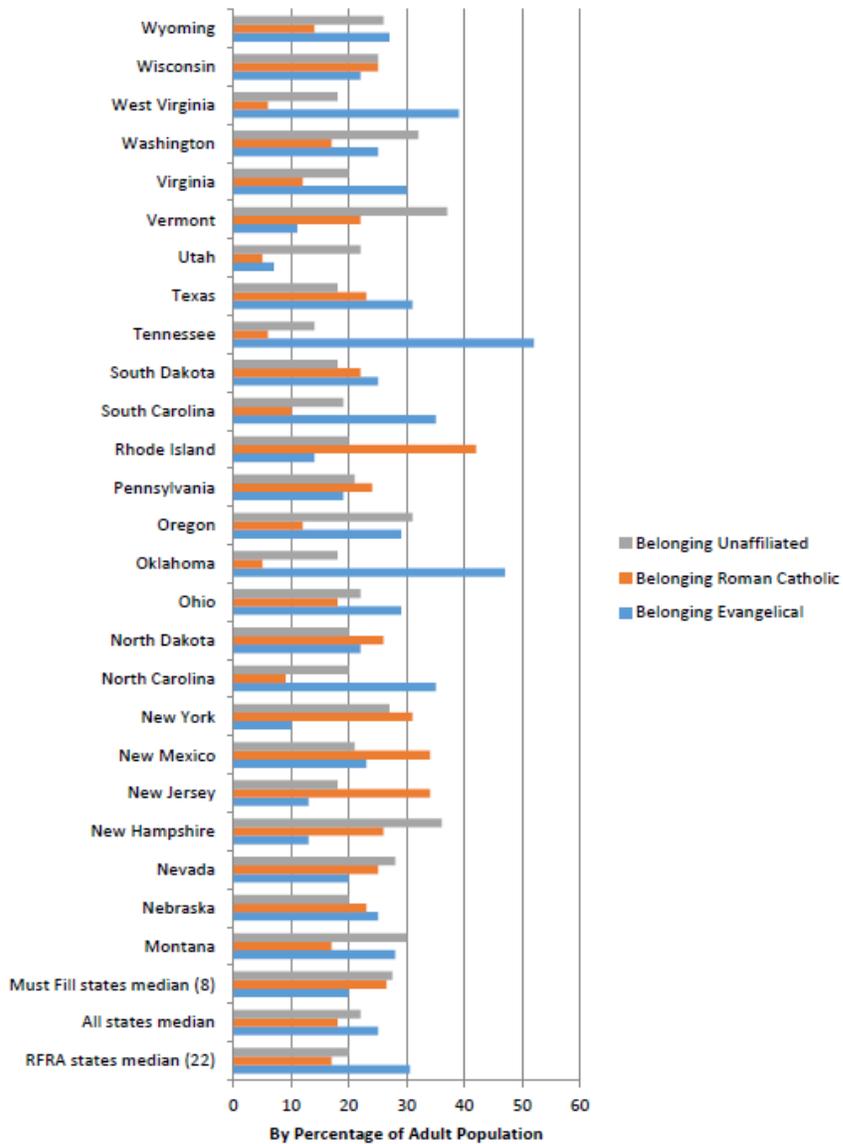


Figure 15 “Belonging” States from Montana to Wyoming



Again, the general trend is quite clear, and two of the three trends were predicted. Looking at the median scores, RFRA scores for evangelicals are significantly higher than for all states, and their score for all states is higher than for must fill states. States with

higher percentages of evangelicals are more likely to have RFRA. Conversely, the scores for the Unaffiliated move in the opposite direction from evangelicals. States with a higher percentage of Unaffiliated respondents are more likely to have must fill requirements and less likely to have RFRA. These two trends were predictable. What I did not foresee was that Roman Catholics have the same relationship as the Unaffiliated. I would have thought they would bear a similar relationship to evangelicals. In part this might be explained by the relative scarcity of Roman Catholics in the South, where evangelicals are rather well represented, and almost all states have RFRA.

There are at least three glaring outliers. Two states – Connecticut and Rhode Island – do not match the general evangelical pattern, yet have RFRA. One state – West Virginia – seems to meet the tentative religious “prerequisites” for membership in the RFRA club, with a very high percentage of evangelicals, yet it does not have one. Other explanations must be sought. In West Virginia, these might be the less professional nature of the legislature, which might render policy outcomes less responsive to general opinion. Yet this possibility seems weaker when all the states have had 25 years to repudiate or correct, if they wished, the *Smith* decision. In the New England states, these other factors might include the states’ history of religious accommodation or persecution, or even a simple reaction against a perceived unjust and unpopular Supreme Court case. Clearly, however, although these religious markers may be significant factors and are related to the dependent variables, they are not necessary although they may be sufficient for a RFRA.¹²⁴

¹²⁴ For purposes of discussion I did not include Georgia, which according to these criteria would seem to fit within the RFRA camp and yet does not have one. Georgia is currently debating its RFRA and the outcome was not determined as of the time of writing.

The “must fill” states are different, and that is not surprising in a very small class. Nonetheless, the common pattern remains consistent. Yet there are states with high percentages of Unaffiliated respondents which do not have must fill requirements, and states with must fill laws that do not have exceptionally high numbers of Unaffiliated respondents. Therefore, other factors besides these religious criteria must be present.

Figures 16 and 17 note in bar chart form the second set of religious independent variables – “believing and behaving” - by state. These measure the degree of daily prayer, one’s view of the Bible as the Word of God, whether religion is important in one’s life, and whether religion provides the most important source of guidance for determining right and wrong. The mean and median of the respondents in the RFRA states, all states, and the must fill states are also noted.

Figure 16 State Religious Opinion “Believing and Behaving” from Pew Religious Landscape Survey, 2014, states Alabama – Missouri

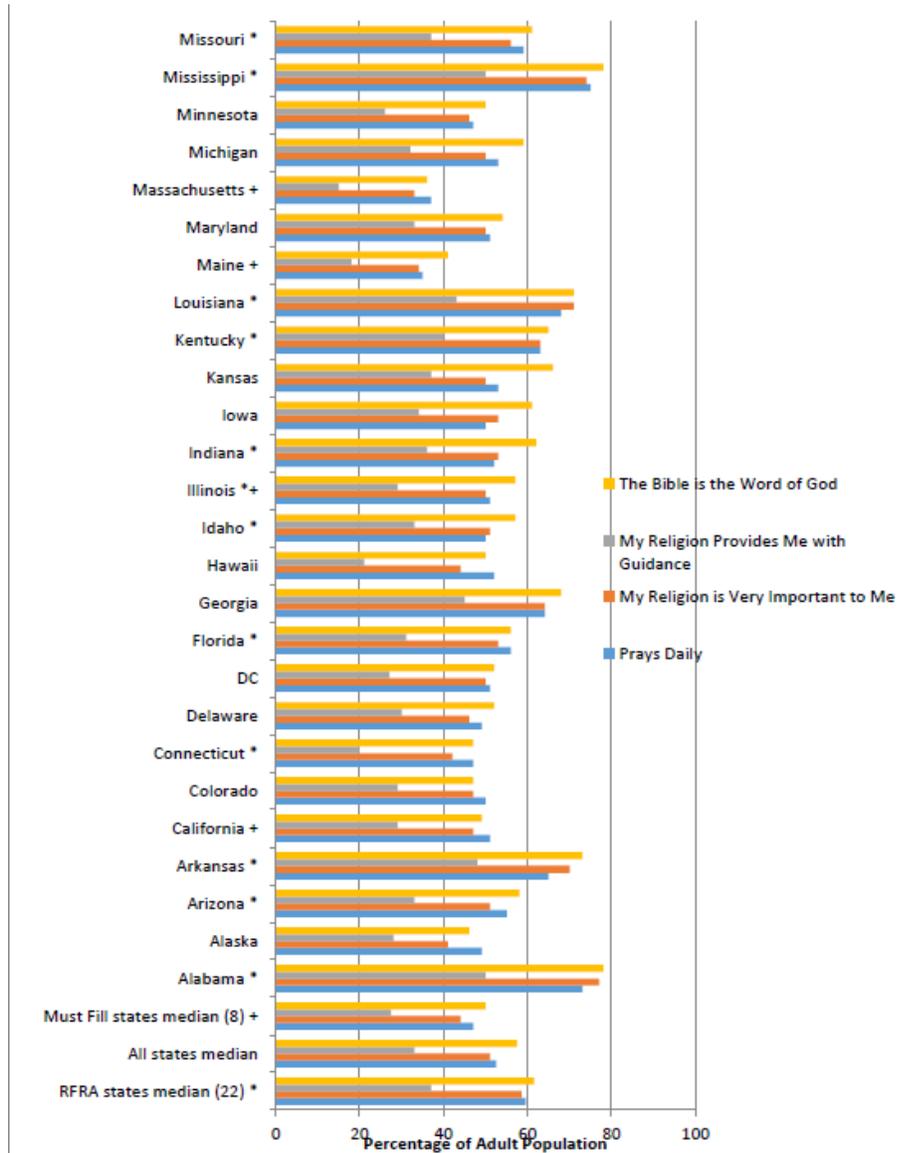
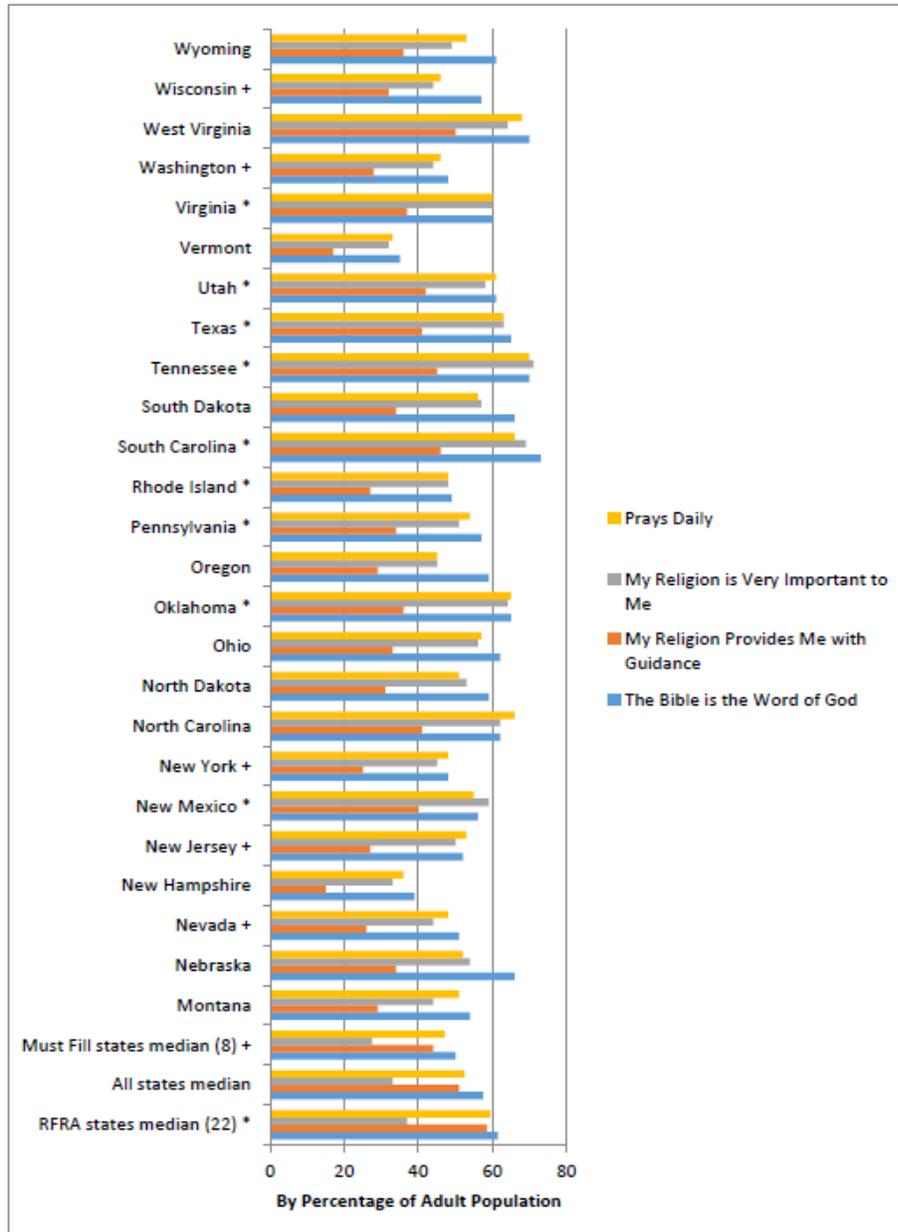


Figure 17 State Religious Opinion “Believing and Behaving” from Pew Religious Landscape Survey, 2014, states Montana – Wyoming.



Measured by median, every religious variable is stronger in RFRA states than in all states. Every variable is stronger in the all states category than in the must fill category. The relationship is consistent, positive, and appears rather strong. Without knowing which states are RFRA states one can make a fairly confident prediction based on the charted responses alone.

But that prediction would not always be correct. As noted above, there are states and outcomes which do not fit the expected pattern. One might expect West Virginia, again, to have a RFRA. But with these criteria West Virginia only exceeds the RFRA median in two of the four categories. Perhaps those two are the more important. Or perhaps there are other factors at play. And, although some “religious” states do not have RFRA, some states high in Unaffiliated respondents do not have must fill laws. And some states with must fill laws do not have high numbers of Unaffiliated respondents. Clearly, the match of very general opinion (religious judgments) with general policy (RFRA), and the match of very general opinion with specific policy (must fill) is not exact. Therefore, there must be other explanations at play that are not captured by these religious factors.

Figure 18 is a summary of all the states and the religion variables categorized by RFRA states, all states, and must fill states.

Figure 18 Summary of the Seven Religious Independent Variables

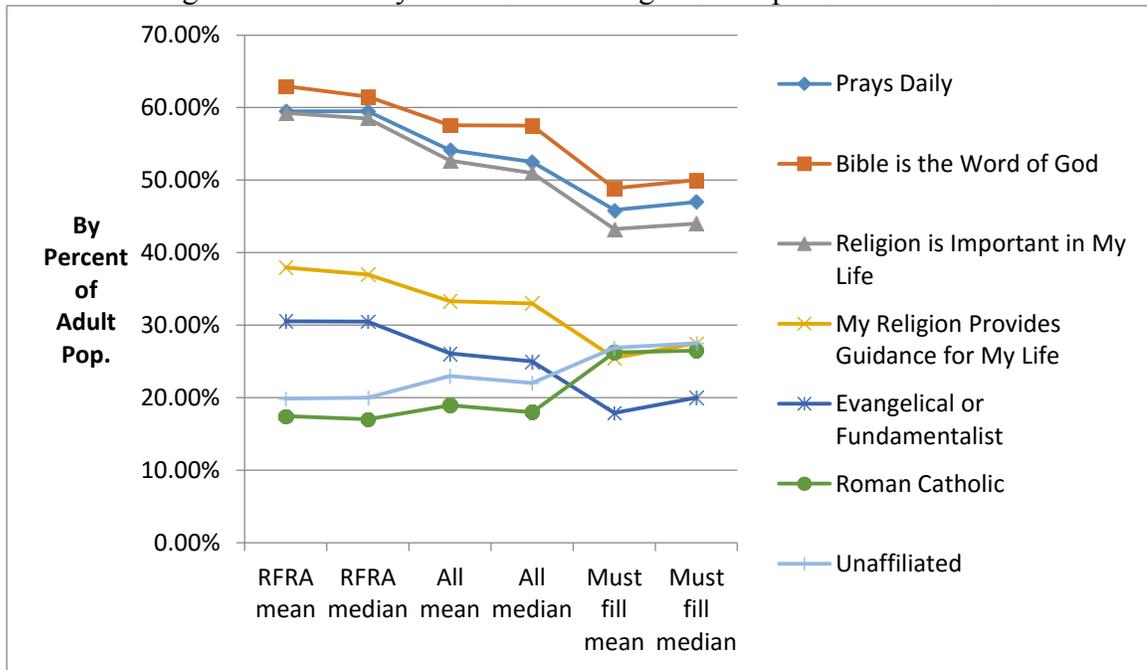


Figure 18 illustrates that every single religious independent variable decreases from “RFRA states” to “all states” and from “all states” to “must fill” states. There is one exception, however, and that is self-identified Roman Catholics. The percentage of Roman Catholics in a state actually increases in the “must fill” states. On the other hand, the percentage of Unaffiliated respondents increases from about 20% in RFRA states to 22% in all states to 28% in must fill states.

To summarize, the “belonging” variable, measured by self-identification with a particular religious tradition, appears to be a fairly accurate measure of the relationship between the size (relative or absolute) of a religious constituency and the outcome of a RFRA or must fill law. Roman Catholics also fit this pattern but the relationship is opposite to what I expected. Unaffiliated respondents also fit this pattern and move in an opposite direction from evangelicals. The pattern is less clear with must fill states. I suspect that is because the class is so small. While evangelicals are the largest religious

group by a wide margin in RFRA states, and are the largest group in all states by a modest margin, Unaffiliated respondents are the largest group in the must fill states, barely beating out Roman Catholics, with evangelicals finishing a distant third.

The “behaving” variable, measured by the frequency the respondent engaged in prayer, also appears to be a fairly accurate measure of the relationship between the size of a religious constituency and the outcome of a RFRA or must fill law. The higher the percentage of prayers, the more likely that state is to have a RFRA law and the less likely it is to have a must fill law.

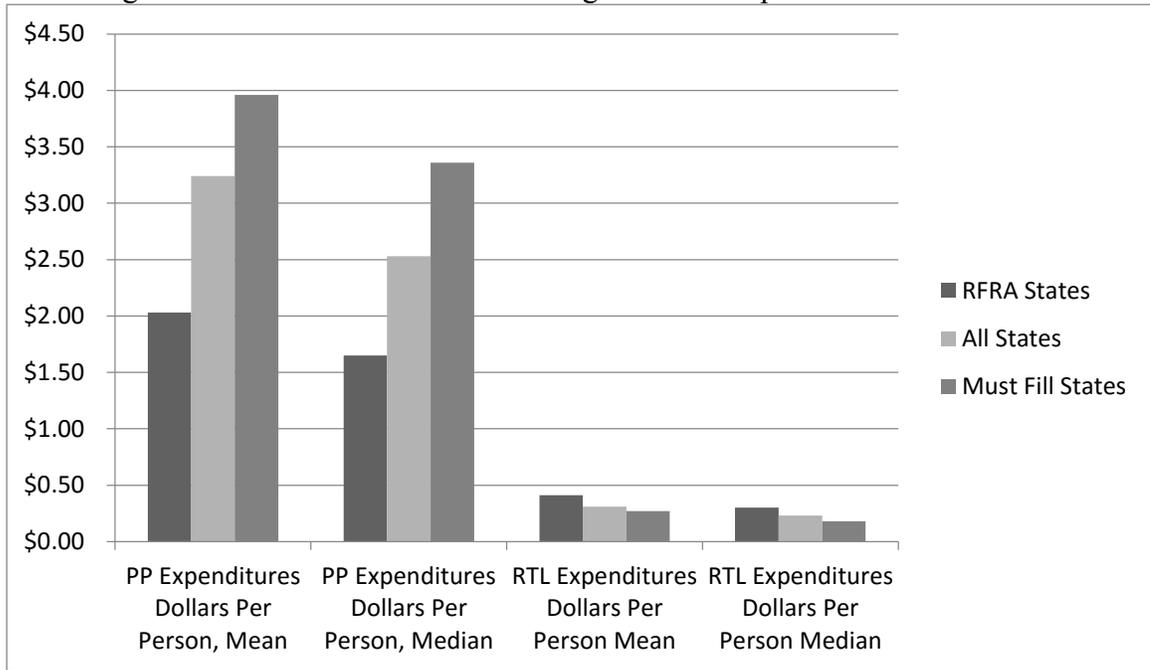
The three “believing” variables, measured by one’s interpretation of the Bible, whether religion is important, and whether religion was the most important source for determining right from wrong, sustained the common pattern. The more respondents believed these things, the more likely it was that state would have a RFRA. Must fill states had lower percentages for all three variables.

I find these religious criteria very revealing. Clearly, however, other factors are at work which are not captured by these independent variables and which cause outcomes contrary to expectations. As noted above, West Virginia is not a RFRA state, but very little in these particular variables might explain why it is not. New England states measure very low on most religious criteria, but not all are must fill states, and two even have RFRA. Little in these variables explains that.

Figure 19 reflects the last set of independent variables recorded in a chart. These are interest group expenditures of Planned Parenthood and Right to Life organizations within states. Special interest group expenditures may reflect the amount of work done in a

jurisdiction, the number of employees or clients affected, the amount of political influence an organization has, or the amount of good will an organization has generated. The mean and median of the RFRA states, all states, and the must fill states are recorded.

Figure 19 Planned Parenthood and Right to Life Expenditures Per Resident



Note the positive relationships. Planned Parenthood and Right to Life expenditures move in opposite and predictable directions, with Planned Parenthood spending more funds in the eight must fill states than in all states, and more in all states than in the 22 RFRA states. Right to Life expenditures move exactly in the opposite direction. Also note the relatively wide discrepancy between mean and median because of the small class sizes. Finally, I should note that for both groups, expenditures in a number of states was \$0.

The last independent variable to be examined is the party of the governor when the RFRA or must fill requirement was enacted. The party of the governor may be an important measure of how partisan an issue is, or how closely parties are identified with

one side of an issue, or how effectively one party or the other implements the policy objectives of its constituents. The basic story line bears this out. Nonetheless, this analysis probably requires the greatest caution because the numbers are so low, and because there are so many other possible factors at play. There does appear to be at least a rough symmetry, however.

In the 22 RFRA states, 15 or 68% were passed with Republican governors. (I include Governor Lowell Weicker of Connecticut as a “Republican.” He was a Republican as Senator and an Independent as Governor.) This percentage would be even higher when one considers that in Kentucky the RFRA was passed over a Democratic governor’s veto, but it nonetheless is counted in the “Democratic” column. In the eight must fill states, the requirement occurred while the sitting governor was a Democrat five times, or 63% of the time. Similarly, the number is somewhat skewed when one considers that in Massachusetts the must fill requirement was enacted by a state board independent of legislature or gubernatorial action, but it is nonetheless counted in the “Republican” column.¹²⁵

Accordingly, RFRA’s appear to be more likely to be passed in states with Republican governors, and must fill requirements are more likely to be passed or imposed in states with Democratic governors.

The Figures above indicate relationships between the independent variables and the outcomes of a RFRA or must fill law. The only surprise so far is that it seems that the

¹²⁵ These numbers and percentages were derived from an examination of the dates of passage of the RFRA or must fill requirement with information available from the National Governors Association, accessed on March 10, 2016 at <http://www.nga.org/cms/FormerGovBios>

more Roman Catholics as a percentage of population in a given state, the less likely it is that state will have a RFRA, and the more likely it is that state will have a must fill requirement.¹²⁶ The other independent variables have a positive or a negative relationship in the direction I would expect. For example, I expected that if a greater proportion of the population thought religion was the primary guide to matters of right and wrong, then that state would be more likely to have a RFRA. Negatively, I expected that if a greater proportion of the population was Unaffiliated in religious thought or practice, then that state would be less likely to have a RFRA and more likely to have a must fill requirement.

But are these relationships statistically significant? Yes. The number of must fill states is too small to measure meaningfully with this data. Based on a two sample t-test, in the RFRA states every independent variable measured was statistically significant except for the Roman Catholic “belonging” variable and the Right to Life variable which barely missed the cut. I was somewhat surprised by this because the Pew definition of “evangelical” was so broad and because I did not expect such predictability with Planned Parenthood or Right to Life expenditures. Any measure less than 0.05 is statistically significant to the 95th percentile. The p values for the independent variables are as follows:

“Belonging”	
Evangelical	0.01224
Roman Catholic	0.1709
Unaffiliated	0.009935

¹²⁶ Corwin E. Smidt, *American Evangelicals Today* (Lanham: Rowman & Littlefield, 2013). I should have looked at Smidt earlier. He assembles a good bit of data indicating that on some points at least – such as a belief in absolute standards of right and wrong, which may be very influential in policy matters – Roman Catholics increasingly look like mainline Protestants. That is, they are not very distinctive on some issues. See, e.g., the tables on pages 142 and 189.

“Behaving” Daily Prayer	0.002214
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“Believing” Bible as Word of God	0.000978
Religion is Important	0.000762
Religion is Source of Guidance	0.000673

Expenditures by Interest Groups Planned Parenthood	0.007167
Right to Life	0.0548

I also tried various variables in combination using a logistical regression analysis but little seemed meaningful. I had hypothesized that the most important factor might be the “Religion provides guidance in determining right and wrong” factor because it would tend to concentrate the adherents of this position into a more absolutistic group (eliminating some mainline Protestants and other faith groups who might say that religion is important but does not really provide moral standards). This was not always the case, however.

For example, when the “Importance”, “Guidance”, “Planned Parenthood” and “Right to Life” variables were combined, “Importance” was the only significant variable with a value of 0.0333. When “Roman Catholic”, “Guidance”, “Planned Parenthood”, and “Right to Life” were combined, “Guidance” was the only significant variable with a value of 0.0268.

In sum, I found that five of my seven hypotheses were supported. I did not find that the percentage of Roman Catholics was positively related to the presence of a RFRA. Nor did I find that “Religion is the primary source of guidance for determining right from

wrong” was the most significant religious independent variable, although it was significant. My conclusions are discussed more fully below.

Comparison with Bridge

As noted above, Dave Bridge is the only scholar to examine state RFRA and try to determine why states pass them.¹²⁷ His specific research issue in 2012 was whether state RFRA protecting religious liberty are passed because the state values liberty interests, or because the state values religious interests, and he concluded that they are passed because states value religious interests. My research is complementary. Like Bridge, I use the “belief, belong, behave” approach, but I operationalize these factors using different and more criteria. I also use different data, using ANES data for national trends and Pew data from both 2014 and 2007, whereas Bridge only had 2007 data available. Like Bridge, I find positive relationships between my independent variables and my dependent variable of a RFRA. Bridge did not study must fill laws.

But there are also significant differences in research and result. For his “belief” independent variable, Bridge used a formulation that asked the respondent if his religion was the one true religion that led to eternal life. The more people who held that position, the more likely it was that state would have a RFRA. Similarly, the more Catholics in a state, the more likely that state would have a RFRA. My research with respect to Roman Catholic populations reaches a different conclusion. While he found the percentage of evangelicals to be insignificant, I find it to have a significant relationship. In Bridge’s

¹²⁷ Bridge, "Religious Freedom or Libertarianism: What Explains State Enactments of Religious Freedom Restoration Act Laws?."

study, Missouri was the outlier because it did not have many Roman Catholics and yet had a RFRA. I have no problem explaining why Missouri has a RFRA when, according to the Pew combined “religiosity” index, it ranks 15th in the country. I have my own outlier with West Virginia. With my independent variables, I cannot explain why it does not have a RFRA. (It is the highest ranking “religious” state without a RFRA, at number seven.) Finally, some of our differences may be explained because I have 22 RFRA states to study while Bridge only had 16 for his research.

CHAPTER FIVE: DISCUSSION AND CONCLUSION

Conclusions

I conclude that more religious states, as measured by traditional and commonly accepted measures of religiosity, tend to protect free exercise more using RFRA as the policy outcome to do so. I conclude that less religious and more secular states, as measured by traditional and commonly accepted measures of religiosity, tend to protect free exercise less with RFRA, and also tend to have a greater likelihood of having a must fill requirement. That is, I find that general policy outcomes are reflective of general public opinion.

Medical conscientious objection is a subset of the conscientious objection which may be protected by RFRA, and conscientious objection is itself only a subset of the universe of free exercise claims that might be made under RFRA. That is, a pharmacist refusing to dispense an abortion pill, a parent objecting to a vaccination of a child using a weakened virus, a student objecting to the Pledge of Allegiance, an employee keeping inspirational sayings on her desk calendar at work, and a government employment applicant wearing certain attire for identification photographs may all invoke the balancing act required by a RFRA with respect to otherwise facially neutral, generally applicable requirements to the contrary. All of these are free exercise claims. But only the first three are conscientious objection claims, and only the first is a conscientious objection claim made by a medical professional. Accordingly, I cannot measure or evaluate any specific and direct link

between general opinion as measured by, e.g., general questions in the Pew Study, and intermediate outcomes such as the passage of a RFRA, or even more specific outcomes such as effects on medical professionals. Instead, I have evaluated the less precise link between general opinion and a more specific policy outcome. Nonetheless, the relationship between this general opinion and specific outcome is apparent and meaningful. The effect – requiring a balancing test – is caused by the adoption of a RFRA which had that intended and predictable effect. And the adoption of a RFRA is clearly related to the size of the religious constituency in that jurisdiction.

The case is different with must fill states. Here the link is much more specific. A specific act is required of a particular segment of the population. That is, it is a very specific policy outcome – much more specific than the outcome of a RFRA. A major difficulty in evaluating it, however, is that the class size is so small.¹²⁸ Yet here, too, the data indicate a relationship between the religious complexion of a state and its adoption of a must fill requirement. These states are much different than the RFRA states, and those differences are meaningful. The less religious a state, the more likely it is to have a must fill requirement.

But it is also clear that other factors are at work. Some states that, according to my model, should be RFRA states, are not. Some states that should be must fill states are not. On the other hand, states that have RFRA's do not always have the same religious

¹²⁸ That disadvantage has a corresponding advantage as well. With only eight states, a comparative study of the states using specific opinion to study the relationship with the specific policy outcome in those states might be possible, leading to a generalized conclusion about the relationship of specific opinion to a specific policy outcome. Most of these states are of sufficient size so that statewide opinion might be available.

characteristics. Nor do states that have must fill requirements. But there is still a family resemblance.

I make the following conclusions. The more religious a state is, as measured by my selected “belonging, belief, and behavior” characteristics of its constituency (frequency of prayer, belief in the Bible as the Word of God, belief that religion is important, and belief that religion is the primary source of guidance in determining right and wrong), the greater the likelihood of there being a RFRA in that state. Conversely, the less these characteristics are present, the more likely the state will have a “must fill” requirement. Contrary to my expectations, the greatest single indicator of a state having a RFRA is not the belief that religion is the primary source of determining right from wrong, but a more generalized notion that religion is important. The greater the percentage of evangelicals in a constituency, the greater the likelihood of there being a RFRA, but the percentage of Roman Catholics does not seem to enhance the likelihood of there being a RFRA. The greater the number of Unaffiliated in a constituency, the less likely it is the state will have a RFRA, but the more likely there will be a must fill requirement. I also found that there is a relationship between the expenditure of funds by Planned Parenthood in a given state and whether that state has a “must fill” requirement or a RFRA.

Qualifications

There are a number of significant qualifications to the findings of this study.

First, for state analysis I relied on Pew data from its 2014 Religious Landscape Study. Yet I was studying RFRA's from 1993. The religious characteristics of a given state, or other variables or demographic factors that I did not consider, may have changed

considerably from the time the RFRA was considered or enacted. It may be somewhat or even grossly inaccurate to use 2014 data when analyzing a 1993 or even a 2000 law.

Second, but less significant, the Pew Study is primarily a national study. Fortunately, it was also designed to provide good state data. Although the numbers of respondents is much higher than some other studies, both nationally and for each state, its number of respondents is rather low in some states. Pew acknowledges this and has its own qualifications built into its findings.

Third, at its largest I was evaluating N=50 for the 50 states. My subsets were 22 for RFRA states and only eight for must fill states. As the numbers become lower, my confidence in the findings becomes less.¹²⁹ I may be able to point toward suggestive relationships, but not more. Similarly, with respect to the relationship between the passage of a RFRA or must fill requirement, I counted the governors, but made no allowance, e.g., for how strong an executive a particular state has. Also, these very small classes of states exaggerate results when a RFRA is passed over a Democratic governor's veto, or when a must fill law is implemented with no input from any of the political branches.

Fourth, as noted in my Conclusions subsection, I have a built in research design issue if not problem in relating general opinion (Pew responses to general questions) to a specific policy outcome (RFRA or must fill requirements), and compound the issue by then focusing on a subset of that specific policy outcome (medical conscientious objection.) The relationships are not tightly linked. They are closer with respect to the must fill requirement, but then the N is quite small for much statistical analysis. Thus,

¹²⁹ I note that both Bridge and Brace studied data with low N numbers and their research passed muster.

although I can conclude relationships exist, I must be cautious in making very precise findings.

Fifth, I limited my thesis to individual medical conscientious objectors. Analyzing institutional objectors would be a different undertaking. Yet in not addressing the matter I missed the links between the two. The demands placed on institutional objectors are unprecedented in some ways, and the ways in which enforced conformity are similar to and different from individuals could have been helpful in my study.

Sixth, I used a dichotomous outcome for both RFRA and must fills. This is helpful for analysis, but tends to artificially group dissimilar outcomes together. There are differences in state RFRA and differences in must fill requirements. These differences, if studied and coded for, could result in more nuanced and accurate findings and a better understanding of how opinion translates into policy. A qualitative study might be productive. Another productive avenue would be to code the states with ordinal variables for political analysis. A state passing a RFRA or must fill law in the normal way, with two legislative chambers and a governor's approval would receive more points than a requirement or exemption passing over a gubernatorial veto, which itself would be coded differently than a requirement that had been imposed pursuant to an executive order or regulation. Such an approach would help in understanding the interaction between a broader array of political actors in obtaining specific policy outcomes.

Seventh, I used too many variables that I think actually influence the outcome. I should have picked some commonly used demographic variables of populations – income, geography, race, education, urbanization - if only to be able to exclude them as causal factors. In addition, I might try to find other variables that would explain, e.g.,

why West Virginia does not have a RFRA, whether demographic, institutional, governmental, or other.¹³⁰

Eighth, I used the Pew definitions of evangelical, Roman Catholic, and Unaffiliated in the “belonging” independent variable. Generally, Pew asked respondents to identify with a particular religious group, and then coded that group into evangelical, Roman Catholic, mainline Protestant, and other religious groups. Thus, an evangelical in a mainline Protestant denomination counts as a mainline Protestant. And respondents who identify as “Baptist” or “Roman Catholic” are classed into the evangelical or Roman Catholic categories even if they have not attended church in years. I think these categories are useful but are imprecise and may overstate the group allegiance or identity of many respondents. This weakness is largely but not completely remedied by including other independent variables for behavior and believing.

Ninth and discussed more fully below, I did not analyze how support for and opposition to RFRA has evolved over time. I think this is a significant and fascinating evolution which is not captured in my research.

Evolution of Support for and Opposition to RFRA

Although the federal RFRA passed overwhelmingly in 1993 and included support both from the National Conference of Bishops and the ACLU, it would no longer enjoy such support, and in fact support has flagged at the state level, or even turned to

¹³⁰ Bridge did this in his study of RFRA, however. He examined socioeconomic controls such as race, household income, and population. None had an effect on the substantive results. Still, I would like to be able to confirm or deny a relationship based on my own research.

opposition. One major qualification of my state RFRA findings is that the interests and arguments have shifted. In 1993 RFRA was perceived as a shield, an attempt to restore a balancing test to protect religious minorities. RFRAs were intended to protect the religious from the consequences of the *Smith* Court. Now RFRAs at the federal or state level are frequently perceived as a sword, an attempt to preserve the power of religious majorities vis a vis any others. The perception is that RFRAs are intended to protect the religious from the *Obergefell* Court. The debates about the more recently enacted state RFRAs have been about gay rights perhaps even more than the right of free exercise. The consensus that existed in 1993 no longer exists.¹³¹ The dynamics, interests, and allies in the policy debates have shifted, and the window is likely closing for any more RFRAs.

The future research possibility is, however, intriguing. In 1993 the ACLU was a strong supporter of the federal RFRA and the Roman Catholic Church was a reluctant supporter. The ACLU's website now calls that support a mistake. In my research on Planned Parenthood I noted the many coalition allies it has in the "must fill" struggle, including the Human Rights Campaign and the ACLU. It would be interesting to trace the shifting policy coalitions for must fill legislation and in opposing any additional

¹³¹ This was made explicit by the ACLU, a supporter of RFRAs in 1993 and an ardent opponent now. The "shield" and "sword" language is common in the law, but was also used by the ACLU in its announcement of opposition to RFRAs in the June 25, 2015 Washington Post. https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html Accessed March 9, 2016. The purpose of RFRAs, to much of the public, is not to require a balancing test when religious exercise is burdened, but to permit discrimination against gays. "The goal is to give business owners a stronger legal defense if they refuse to serve lesbian, gay, bisexual and transgender customers and want to cite their faith as justification for their actions." Jonathan Cohn, Huffington Post, April 1, 2015, accessed on March 9, 2015 at http://www.huffingtonpost.com/2015/04/01/indiana-religious-freedom_n_6984156.html A very similar statement and analysis were used by CNN's online news on March 24, 2016 in discussing the Georgia RFRA and the huge amount of opposition to it articulated by large companies. There was almost no mention of free exercise.

RFRA over time as the perceived need for and purpose of state RFRA has shifted. Such coalition shifting has been studied in other contexts but not for state RFRA.

Similarly, for supporters of RFRA, the evolution of free exercise coalitions from peyote to sacrificial chickens to archbishops would provide some fascinating analysis as well as the best article title of the year.

The differences in coalitions, support, and opposition can be illustrated by the experiences of Connecticut and Indiana. Connecticut passed a RFRA in 1993, soon after *Smith*, and it provides much stronger protection for free exercise than does Indiana's 2015 RFRA because Connecticut requires a balancing test with respect to any burden on free exercise. Indiana, on the other hand, passed its RFRA in the age not of *Smith* but of *Obergefell*, and its law requires a "significant burden" on free exercise before any balancing test is conducted. Even though his state provides greater statutory protection for free exercise, Connecticut Governor Malloy immediately banned state employee travel to the more restrictive Indiana.¹³² One difference, of course, and perhaps the main reason, is that Connecticut has another statute protective of gay interests, whereas Indiana did not at the time its RFRA was originally passed. Another is simply how values evolve, and how those changing values are translated into policy outcomes over time. In many jurisdictions, what is more fundamental and perhaps more popular is protecting LGBT interests rather than free exercise. Yet a third is the reverse of one of my research problems. I examined general opinion data (religiosity) to make some findings about a specific policy outcome – medical conscientious objection via a more general policy

¹³² And almost immediately reinstated it. I am not aware of any discussion by Governor Malloy about his own state's RFRA. See the Hartford Courant article of April 4, 2015, accessed on March 10, 2016 at <http://www.courant.com/politics/hc-hartford-malloy-lifts-indiana-travel-ban-20150404-story.html>

outcome, enactment of RFRA. RFRA, of course, is much broader than conscientious objection, and has proponents and detractors independently of medical conscientious objector. The loudest argument (if not the strongest argument) about RFRA today, however, is as a possible *Obergefell* limitation, not accommodation of medical objections to certain practices and procedures.

Constitutional law professor Gerard Bradley is blunt: “The most urgent challenges to religious freedom in the United States today involve conscience protection. There are two contexts in which the challenge is especially grave. One is healthcare... The second conscience-protection context pivots upon the remarkable, and remarkably swift, turnaround in legal attitudes towards homosexual and lesbian behavior.”¹³³

Indiana’s RFRA law, already noted above, is standard in all respects and provides that:

Sec. 8. (a) Except as provided in subsection (b), a governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability. (b) A governmental entity may substantially burden a person's exercise of religion only if the governmental entity 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.¹³⁴

Indiana’s RFRA, as amended, specifically carves out an exception providing that “a provider may not refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing ... on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or

¹³³ Gerard V. Bradley, *Essays on Law, Morality, and Religion* (South Bend, Indiana :: St. Augustine's Press, 2014). P. 62

¹³⁴ Text is from Indiana’s RFRA as provided by the Indianapolis Star, <http://www.indystar.com/story/news/politics/2015/03/27/text-indianas-religious-freedom-law/70539772/> accessed on March 9, 2016.

United States military service.”¹³⁵ That is, free exercise interests will be balanced against state interests, but not when these old or new categories are implicated. There is no balancing test when one of these acts is coupled with one of these categories of protected persons. Otherwise, the statute remains fairly standard and straightforward.¹³⁶ Indiana residents will have their free exercise interests balanced against a compelling and narrowly drawn state interest unless it implicates one of these groups, in which case there is no free exercise protected by the law.

Future studies could measure and analyze this recent trend using specific opinion. For example, would respondents support state RFRA if an exception was made for gay interests? That would tend to require a balancing of interests in all the medical examples used in this paper. Or is a lukewarm attitude or even hostility toward free exercise so dominant that even with this exception constituencies would oppose a RFRA? If so, that would mark a sea change in American opinion since the 1990s.

Future Research

As noted above, the evolution of support for and opposition to state RFRA provides a research rich environment. It could be used to study coalitions in the formation of public policy outcomes. It could test how responsive and congruent specific opinion is in forming policy outcomes. Other research areas are also apparent.

The limitations of my own study indicate that this would be a good area to conduct an experiment using specific opinion. In the alternative, in some of the larger states, specific

¹³⁵ The additional RFRA language was enacted just a few days after the basic RFRA was enacted, and affects Indiana Code 3-13-9, effective July 1, 2015.

¹³⁶ The Indiana RFRA is otherwise unremarkable, and mirrors the federal RFRA in enacting a “strict scrutiny” standard of review in section 8.

opinion in the form of newspaper or TV news polling might shed light on the “specific opinion translating into specific policy outcomes” issue. “Should pharmacists be permitted to refuse to fill prescriptions they have moral objections to?” “Should they lose their license?” Does the answer depend on the burden placed on the patient? Does it depend on the moral position of the respondent? Or on the religion of the respondent?

Specific opinion and a long list of demographic, political, and social factors could be used in a case study of two or three states which have similar independent variable data characteristics but different dependent variable outcomes in an effort to isolate the causes for enactment or rejection of a RFRA or must fill requirement. Why does state A have a RFRA, but state B with very similar characteristics, does not? An in depth study of West Virginia might reveal the factors that cause it not to have a RFRA notwithstanding the presence of many criteria that suggest it “should” have one.

Another possible study pertains to religious groups and their adaptation to or resistance to change, especially changed imposed by the government under penalty of sanctions. In modern times in the West and especially the U.S. few religious groups have been subjected to enforced conformity, or severe sanctions for nonconformity, let alone persecution. These groups tended to be on the fringes, and some have built (in some quarters) a (grudging) respect from others who admire their integrity and courage if nothing else. Christian Scientists and Jehovah’s Witnesses may have done more for the First Amendment than most groups. This may be changing as the state demands conformity in matters long objected to by large numbers of Americans and institutions. In her typology of the relationship between conscience and the state, Cookson posits four types of responses which may challenge, transform, conform to, or reject the demands of

the state.¹³⁷ Some religious groups and some individuals are conformists. They may object and lobby and litigate, but ultimately they obey and conform. Other groups are nonconformists and will pay a high price in refusing the demands of the state. It would be interesting to use her typology to analyze the conscience objections of individuals and institutions in must fill states, or of those willing to assist in the death of others as a matter of compassion in states without “death with dignity” laws, or in rejecting the requirements of the PPACA, or in a great many other contexts where balancing is rejected in favor of an absolutist position by the state. How do such demands and such resistance affect the perceived legitimacy of the state?

Further research could be made about the nature of the quantitative measures used to gauge religiosity. How can the responses of respondents be made more useful and accurate? How can we adjust the quantitative measures of “religiosity” to more accurately parallel what we want to study, rendering greater confidence in findings about religious belief and practice?

Finally, and from a macro perspective, what are the implications for democracies or for our understanding of how democracies work regarding the degree of protection a liberty interest has in law or society independent of its own narrow ideological interest group? If RFRA's are at least in part related to the percentage of a constituency that is religiously oriented, do other liberty interests operate in the same way? Is a limitation on freedom of speech or freedom to assemble peaceably dependent on the percentage or strength of a constituency that personally adheres to these interests as personal interests, or are there other important factors? Does it matter that these interests are non-

¹³⁷ Cookson, *Regulating Religion*. See her typology in Chapter 3, “Law and Dis-orderly Religion” pp 48ff.

threatening to the interests of the state or society? That is, can we tolerate only those uninfluential people and institutions on the fringes? Does it matter that these interests to be imposed are considered to be fundamental to the interests of the state or society? It may be that simple interest group identity or affinity tends to trump more generalized ideological ideas such as “liberty”. If so, this has profound implications for our understanding of the formation, preservation, fragmentation, and dissolution of democracies.

REFERENCES

- Amar, Akhil Reed. *The Bill of Rights: Creation and Reconstruction*. New Haven: Yale University Press, 1998.
- Antommaria, Armand H. Matheny. "The Proper Scope of Analysis of Conscientious Objection in Healthcare Individual Rights or Professional Obligations." *Teaching Ethics* 7, no. 1 (2006): 127-31.
- Bertelsen, Soledad. "Conscientious Objection : Lessons from the Experience of the United States." 2011.
- . "Conscientious Objection of Health Care Providers: Lessons from the Experience of the United States." *Notre Dame J. Int'l & Comp. L.* 3 (2013): 121.
- Brace, Paul, Kellie Sims-Butler, Kevin Arceneaux, and Martin Johnson. "Public Opinion in the American States: New Perspectives Using National Survey Data." *American Journal of Political Science* 46, no. 1 (2002): 173-89.
- Bradley, Gerard V. *Challenges to Religious Liberty in the Twenty-First Century*. Cambridge; Cambridge University Press, 2012.
- . *Essays on Law, Morality, and Religion*. South Bend, Indiana: St. Augustine's Press, 2014.
- Bridge, D. "Religious Freedom or Libertarianism: What Explains State Enactments of Religious Freedom Restoration Act Laws?". *Journal of Church and State* 56, no. 2 (2014): 347-69.
- Brock, Peter. "Liberty and Conscience.": Oxford University Press, 2002.
- Cantor, Julie D. "Conscientious Objection Gone Awry — Restoring Selfless Professionalism in Medicine." *New England Journal of Medicine* 360, no. 15 (2009): 1484-85.
- Card, R. F. "Conscientious Objection and Emergency Contraception." *The American Journal of Bioethics: AJOB* 7, no. 6 (2007): 8-14.
- Claborn, D. "Effects of Judicial and Legislative Attempts to Increase Religious Freedom in U.S. State Courts." *Journal of Church and State* 53, no. 4 (2011): 615-34.
- Cookson, Catharine. *Regulating Religion: The Courts and the Free Exercise Clause*. Oxford; Oxford University Press, 2001.
- Dalton, Russell J., and Hans-Dieter Klingemann. *Oxford Handbook of Political Behavior*. Oxford Handbooks of Political Science. Oxford; Oxford University Press, 2007.
- Davidson, Laura A., Clare T. Pettis, Amber J. Joiner, Daniel M. Cook, and Craig M. Klugman. "Religion and Conscientious Objection: A Survey of Pharmacists' Willingness to Dispense Medications." *Social Science & Medicine* 71, no. 1 (2010): 161-65.
- Djupe, Paul A., Andrew R. Lewis, Ted G. Jelen, and Charles D. Dahan. "Rights Talk: The Opinion Dynamics of Rights Framing." *Social Science Quarterly (Wiley-Blackwell)* 95, no. 3 (2014).

- Douglas, Laycock. "The Campaign against Religious Liberty." In *The Rise of Corporate Religious Liberty*, 2016-02-01: Oxford University Press, 2016.
- Drinan, Robert F., and Jennifer I. Huffman. "The Religious Freedom Restoration Act: A Legislative History." *Journal of Law and Religion* 10, no. 2 (1993): 531-41.
- Driskell, Robyn, Elizabeth Embry, and Larry Lyon. "Faith and Politics: The Influence of Religious Beliefs on Political Participation." *Social Science Quarterly* 89, no. 2 (2008): 294-314.
- Epstein, Lee, and Thomas G. Walker. *Constitutional Law for a Changing America. Institutional Powers and Constraints*. 5th ed. ed. Washington, D.C: CQ Press, 2004.
- . *Constitutional Law for a Changing America. Rights, Liberties, and Justice*. Ninth Edition. Thousand Oaks, California: CQ Press, 2016.
- Finke, Roger, and Robert R. Martin. "Ensuring Liberties: Understanding State Restrictions on Religious Freedoms." *Journal for the Scientific Study of Religion* 53, no. 4 (2014): 687-705.
- Fisher, Louis. *Religious Liberty in America : Political Safeguards*. Lawrence, Kan.: University Press of Kansas, 2002.
- Gibson, James L. "Intolerance and Political Repression in the United States: A Half Century after McCarthyism." *American Journal of Political Science* 52, no. 1 (2008): 96-108.
- Gill, Anthony James. *The Political Origins of Religious Liberty*. Cambridge Studies in Social Theory, Religion, and Politics. Cambridge: Cambridge University Press, 2008.
- Greenawalt, Kent. *Religion and the Constitution*. Princeton, N.J.: Princeton University Press, 2006.
- Hamilton, Annie. "Birth Control." *Meade County Messenger*, July 31, 2014 (July 31, 2014): 1.
- Hamilton, Marci. *God vs. The Gavel : Religion and the Rule of Law*. Cambridge: Cambridge University Press, 2005.
- Hamilton, Marci A. "The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy." *Harvard Law & Policy Review* 9, no. 1 (2015).
- Kelly, Eileen P., Aimee Dars Ellis, and Susan P. S. Rosenthal. "Crisis of Conscience: Pharmacist Refusal to Provide Health Care Services on Moral Grounds." *Employee Responsibilities and Rights Journal* 23, no. 1 (2011): 37-54.
- Lax, Jeffrey R., and Justin H. Phillips. "The Democratic Deficit in the States." *American Journal of Political Science* 56, no. 1 (2012).
- . "Gay Rights in the States: Public Opinion and Policy Responsiveness." *The American Political Science Review* 103, no. 3 (2009): 367-86.
- Laycock, Douglas. "The Religious Freedom Restoration Act." *Brigham Young University Law Review* 1993, no. 1 (1993).
- . "The Remnants of Free Exercise." *The Supreme Court Review* 1990 (1990): 1-68.
- . "A Syllabus of Errors." *Michigan Law Review* 105, no. 6 (2007).

- Lee, Andrea. "Conscientious Objection and Pharmacists' Professional Obligation to Ensure Access to Legitimately Prescribed Medication." *Women's Rts. L. Rep.* 33 (2011): 150.
- Levine, Carol. *Taking Sides. Clashing Views on Bioethical Issues*. McGraw-Hill Contemporary Learning Series. 12th ed. Guilford, Conn.: McGraw Hill/Dushkin, 2008.
- Lund, C. C. "Religious Liberty after Gonzales: A Look at State RFRAs." *South Dakota Law Review*. 55, no. 3 (2010): 466-97.
- Lupia, Arthur, et al. "Why State Constitutions Differ in Their Treatment of Same-Sex Marriage." *The Journal of Politics* 72, no. 4 (2010): 1222-35.
- Lupu, Ira C. *The Case against Legislative Codification of Religious Liberty*. New York, NY: Cardozo Law Review, 1999.
- Montgomery, J. "Conscientious Objection: Personal and Professional Ethics in the Public Square." *Medical Law Review* 23, no. 2 (2015): 200-220.
- Mooney, Christopher Z., and Mei-Hsien Lee. "The Temporal Diffusion of Morality Policy: The Case of Death Penalty Legislation in the American States." *Policy Studies Journal* 27, no. 4 (1999): 766-80.
- Norrander, Barbara. "The Multi-Layered Impact of Public Opinion on Capital Punishment Implementation in the American States." *Political Research Quarterly* 53, no. 4 (2000): 771-93.
- Nowak, John. *Constitutional Law*. St. Paul, MN: West Publishing Company, 1978.
- Obama, Barack. "Notre Dame Commencement Address." (May 17, 2009).
- Olson, Laura R., and John C. Green. "The Religion Gap." *Political Science & Politics* 39, no. 3 (2006): 455-59.
- Olson, Laura, and Adam Warber. "Belonging, Behaving, and Believing." *Political Research Quarterly* 61, no. 2 (2008): 192-204.
- Peppin, John F., Mark J. Cherry, Ana Smith Iltis, and Ana Smith Iltis. *Religious Perspectives in Bioethics*. Annals of Bioethics. London: Taylor & Francis, 2004.
- Putnam, Robert D., David E. Campbell, and Shaylyn Romney Garrett. *American Grace: How Religion Divides and Unites Us*. 1st edition, Simon & Schuster hardcover ed. New York: Simon & Schuster, 2010.
- Richardson, James T. "Managing Religion and the Judicialization of Religious Freedom." *Journal for the Scientific Study of Religion* 54, no. 1 (2015): 1-19.
- Ruger, William, and Jason Sorens. *Freedom in the 50 States : An Index of Personal and Economic Freedom*. 2013 edition. Arlington, Virginia: Mercatus Center at George Mason University, 2013.
- Scheu, Jennifer B. "A First Amendment Objection to the Affordable Care Act's Individual Mandate." *Brooklyn Law Review* 79, no. 2 (2014).
- Shaw, Elizabeth. *Religious Liberty: Proceedings from the 35th Annual Convention of the Fellowship of Catholic Scholars, September 28-30, 2012, Washington, D.C.* Fellowship of Catholic Scholars Convention. Notre Dame, IN: Fellowship of Catholic Scholars, 2014.
- Shipan, C. R., and C. Volden. "Policy Diffusion: Seven Lessons for Scholars and Practitioners." *Public Administration Review* 72, no. 6 (2012): 788-96.
- Smidt, Corwin E. *American Evangelicals Today*. Lanham: Rowman & Littlefield, 2013.

- Stephens, Otis H., Jr., John M. Scheb, II, and Kara Elizabeth Stooksbury. *Encyclopedia of American Civil Rights and Liberties*. Westport, Conn.: Greenwood Press, 2006.
- Tatalovich, Raymond, and Byron W. Daynes. *Moral Controversies in American Politics*. 3rd ed. Armonk, N.Y.: M.E. Sharpe, 2005.
- Vanderwalker, Ian. "Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics." *Mich. J. Gender & L.* 19 (2012): 1.
- Whelan, E. "The HHS Contraception Mandate vs. The Religious Freedom Restoration Act." *Notre Dame Law Review* 87, no. 5 (2012): 2179-90.
- Wicclair, M. R. "Conscientious Objection in Medicine." *Bioethics* 14, no. 3 (2000): 205-27.
- . *Encyclopedia of Global Bioethics, Chapter on "Conscientious Objection"* Springer, 2016.
- Wicclair, Mark. "Managing Conscientious Objection in Health Care Institutions." *HEC Forum* 26, no. 3 (2014).
- Wicclair, Mark R. *Conscientious Objection in Health Care : An Ethical Analysis*. Cambridge: Cambridge University Press, 2011.
- . "Is Conscientious Objection Incompatible with a Physician's Professional Obligations?". *Theoretical Medicine and Bioethics: Philosophy of Medical Research and Practice* 29, no. 3 (2008): 171-85.
- . "Pharmacies, Pharmacists, and Conscientious Objection." *Kennedy Institute of Ethics Journal* 16, no. 3 (2006): 225-50.
- Witte, John. *Religion and the American Constitutional Experiment: Essential Rights and Liberties*. Boulder, Colo.: Westview Press, 2000.
- Wurdock, Stephanie M. "Doctors, Dioceses, and Decisions: Examining the Impact of the Catholic Hospital System and Federal Conscience Clauses on Medical Education." *Pittsburgh Journal of Environmental and Public Health Law* 6, no. 2 (2012).

APPENDIX: TABLE OF SUPREME COURT CASES

Reynolds v. United States, 98 U.S. 145 (1879). The Mormon polygamy case.

Cantwell v. Connecticut, 310 U.S. 296 (1940). The Jehovah Witness permit to distribute literature case.

Braunfeld v. Brown, 366 U.S. 599 (1961). The Jewish Sabbatarian case.

Sherbert v. Verner, 374 U.S. 398 (1963). The state Seventh Day Adventist unemployment compensation case.

United States v. Seeger, 380 U.S. 163 (1965). The Selective Service moral objection case.

Wisconsin v. Yoder, 406 U.S. 205 (1972). The Amish education case.

Johnson v. Robison, 415 U.S. 361 (1974). The VA Benefits for conscientious objectors case.

Oregon v. Smith, 494 U.S. 872 (1990). The Indian religious peyote use case.

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993). The Santeria animal sacrifice case.

City of Boerne v. Flores, 521 U.S. 507 (1997). The Federal RFRA does not apply to states case.

Gonzales v. O Centro Espirita Beneficente Uniao do Vegatal, 546 U.S. 418 (2006). The Federal RFRA applies to federal criminal drug laws case.

EEOC v. Abercrombie and Fitch, U.S. Supreme Court (2015). The Title VII requires reasonable accommodation of a hijab in the workplace case.

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