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The Enduring Achievement and Relevance of the Religious Freedom Restoration Act



Members of the Little Sisters of the Poor outside the Supreme Court in 2016. (Joshua Roberts/Reuters)

By **MARK RIENZI**
November 17, 2023 6:30 AM

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Thirty years after its passage, RFRA continues to show how we can respectfully accommodate America's pluralism.

We live in tense and divided times. Virtually every aspect of our public life feels increasingly polarized. The gap between left and right continues to widen, social unrest abounds, and trust in our institutions nears an [all-time low](#). Our nation is failing to get along. That makes this week's 30th anniversary of the Religious Freedom Restoration Act timely, and a lesson for our current moment on how Americans can learn to live in peace, despite strong disagreements.

Our country has been wrestling with religious differences since before the Founding. Migrants of many different faiths came to America to escape the persecution and religious conflict of Europe. Sometimes their past mistreatment prompted an enlightened belief in religious liberty for others, allowing people with different beliefs to coexist in peace. Often, though, they fell into old-world habits and persecuted their neighbors who had what they viewed as the "wrong" religious views.

Despite these missteps, one of the great achievements of the American founding is that we eventually embraced the more enlightened approach to religious liberty in the First Amendment. Rather than having a single government-sponsored religion, we would have none; and every person would be free to exercise her religious beliefs — even unpopular ones.

Of course, we have often fallen short of that live-and-let-live approach to religious differences. Americans at different times failed to respect the religious liberty of virtually everyone — Catholics, Jews, Muslims, atheists, Jehovah's Witnesses, Seventh-day Adventists, Sikhs, Baptists, Latter-day Saints, Native Americans, and more. But after these failures we often see course corrections that replace intolerance with a healthy respect for the freedom of people with different religious beliefs.

The passage of the Religious Freedom Restoration Act (RFRA) in 1993 is an important example. RFRA's story begins with a failure to respect the religious rights of Native Americans. In the Supreme Court's 1990 decision in *Employment Division v. Smith*, the Court ruled against two Native Americans who were denied unemployment benefits because they had been fired for using peyote during a religious ritual. In a majority opinion authored by Justice Antonin Scalia, the Court reasoned that laws that appear neutral and apply to everyone equally are constitutionally sound. This approach threatened to gut religious rights for minority religious groups, whose forms of religious worship are typically less understood and accepted by American society. Justice Scalia and the Court's conservatives admitted as much in the *Smith* opinion, but argued that disadvantaging minorities in this way was just the cost of majority-rules democracy.

The left wing of the court, then occupied by liberal civil-rights giants such as Thurgood Marshall and William Brennan, was heavily critical of the decision, arguing that our society can accommodate religious differences rather than punishing them. And voices from across the spectrum — politicians, scholars, and advocacy organizations — agreed, and set to work crafting a legislative solution that would be an antidote to the Court's misguided approach in *Smith*. Groups as disparate as the American Civil Liberties Union and the United States Conference of Catholic Bishops came together to pursue the common goal of protecting the religious freedom of all Americans, especially minority faith groups.

The result was RFRA, a new federal civil-rights law that won near unanimous support in both houses. The push for RFRA was spearheaded by Democrat Chuck Schumer in the House and Democrat Ted Kennedy and Republican Orrin Hatch in the Senate. President Clinton, before its signing, reflected on RFRA's significance: "What (RFRA) basically says is that the Government should be held to a very high level of proof before it interferes with someone's free exercise of religion. . . . We believe strongly that we can never . . . be too vigilant in this work." He would later call signing the legislation the proudest moment of his first term.

To an observer of today's politics and division, RFRA's origin story may sound like it's from a different planet. In an era fraught with political polarization and strained civil discourse, it seems unlikely that the right and left could find common ground on any major issue — let alone one of cultural import. It's tempting, then, to think that RFRA's story has no bearing on our own political moment, that it is simply a relic from a bygone era. But in important ways, RFRA's triumph has much to teach us today, both from in its bipartisan beginnings to its legal longevity.

The law has helped foster a more pluralistic religious society built on tolerance — even when people disagree. My firm, the Becket Fund for Religious Liberty, has successfully employed RFRA to defend an array of minority faiths including Muslims, Sikhs, Native Americans, Jews, and Santeros. We represented [Captain Simmer Singh](#), a devout Sikh and dedicated Army Captain who was faced with the choice between serving his country or maintaining the articles of his faith: unshorn hair, a beard, and turban. We defended [Pastor Robert Soto](#), an award-winning feather dancer and Lipan Apache who faced fines and imprisonment for using eagle feathers as part of his religious ritual. It was RFRA that allowed both men to continue practicing their faith without fear of government punishment.

We also helped the [Little Sisters of the Poor](#) and the [Green family](#), the latter of whom started the arts and craft store Hobby Lobby, receive exemptions from the Obama administration's [mandate](#) forcing religious nonprofits and family-owned companies to provide contraceptives in their health-insurance plans. The federal bureaucracy, we argued, does not need the Little Sisters' or the Green family's help to provide contraceptives through the Affordable Care Act (ACA). And after over a decade of fighting us on that position, the Biden administration seems to finally agree that we were right. In recently proposed rules under the ACA, the government opted to "leave in place the existing religious exemption for entities and individuals with objection" while also creating a way for Americans whose employers have a religious exemption under the rule to receive contraceptives for free. The government's about-face signals that RFRA is working, and our society is operating more peacefully because of it.

Some have feared that respecting religious differences would inflame public debate or stoke anarchy. This type of argument is common from those who have an election to win or something else to gain from denying religious liberty. It is the same argument school boards once used to force Jehovah's Witness children to salute the flag and it has been deployed by federal governments of both parties seeking to restrict religious practice in the military or by Native Americans on federal lands.

Long experience with RFRA and the First Amendment show that neither is true. Remember all the fretting during the Obama administration about how awful religious exemptions to the contraceptive mandate would be? We've now lived with those exemptions for a full decade, and the Biden administration plans to keep them — and there's not even a peep of public criticism of Biden's approach. It turns out, even on contentious issues, that religious exemptions can work just fine. We can certainly have a society in which contraception is broadly popular and broadly available without forcing nuns to give it out. And yes we can have same-sex weddings without having to force unwilling people to participate. RFRA reminds us — and requires us — to recognize that our policy disagreements can just be policy disagreements; they do not need to go so far as forcing the participation of our neighbors with different beliefs.

At a time when America is so rife with policy disagreements, that is a good thing. Building consensus across party lines and tribal affiliations is possible. And so too is living in peace with others, even when we disagree. Looking ahead, we would do well to use RFRA's story as a blueprint in building a more tolerant, free, and peaceful America.

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MARK RIENZI is the president and CEO of the Becket Fund for Religious Liberty and a professor of law at the Catholic University of America Columbus School of Law.

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