Should Religious Exemption Laws Be Allowed?

The Supreme Court settled the legal debate over same-sex marriage in 2015, when in *Obergefell v. Hodges* it held that same sex-couples had a constitutional right to marry. As the readings in this section show, however, that decision did not resolve every dispute that has arisen over the issue, but rather shifted the debate to a new terrain. Now, a key question is whether a person who objects to same-sex marriage on religious grounds can be compelled to recognize or participate in it. Can a person object to a law by claiming that it burdens their religious belief? The theoretical dispute has concrete expression: in 2015, bakery owners in Oregon were fined $135,000 for refusing to bake a wedding cake for a gay couple. A Colorado bakery was ordered to provide cakes to same-sex couples, train its staff, and provide reports to a state agency showing it was complying with the order. A County Clerk in Kentucky claimed that issuing marriage licenses to gay couples violated her religious belief; she was jailed after refusing a federal judge's order to issue them.

These are the latest examples of longer debate over balancing individuals' religious freedom (which is a core constitutional right) with laws that individuals claim burden that freedom. Earlier disputes have involved Native Americans who claimed the right to take peyote as part of their religious celebrations, business owners who objected to federal law requiring them to offer birth control in their health plans, Amish who objected to a state law mandating education through the eighth grade, or a private university that cited a religious basis for its policy banning interracial dating. Sometimes the government wins these legal disputes, and sometimes the private actors win.

The legal doctrines are complicated, reflecting the fact that governments may not prohibit the free exercise of religion, but neither can they favor one religion over another, or even favor religion over non-religion.

The readings in this section approach the debate by examining Religious Freedom Restoration Acts (RFRAs) passed by the federal government and 21 states, many of them as it became clear that the *Obergefell* case was going to turn out as it did. These laws take many forms, but typically specify that the government must accommodate religious objections to laws unless the government has a "compelling interest" in an area, and has chosen the "least restrictive means" of enacting a policy. The first such law was enacted by the federal government in 1993, in part as a reaction to a 1990 Supreme Court decision that held an individual may not defy a law of "general applicability" because it burdens their religious belief.

Both authors wrote shortly before *Obergefell* was decided. Cole argues that the RFRAs are inconsistent with Supreme Court doctrine, but considers the question from a policy perspective. *Should* states allow religious exemptions to state anti-discrimination laws in ways that would permit a baker (or florist, or caterer) to refuse service to a same-sex wedding? While such laws are likely constitutional under current Supreme Court doctrine, Cole argues that they impose important symbolic harms by denying the dignity and equality of same-sex couples. And, in his view, they impose "a strong presumption that individual religious claims take precedence over democratically chosen collective goals," such as anti-discrimination. "The freedom to exercise one's religion," Cole concludes, "is a fundamental value, but like other values, it has its limits."

Helfman discusses the controversy of Indiana's Religious Freedom Restoration Act in March 2015. Critics insisted that the law was a thinly veiled attempt to legalize antigay discrimination (Indiana did not have a general law that prohibited discrimination on the basis of sexual orientation), and its enactment triggered widespread condemnation and boycotts.

Helfman argues that these claims are exaggerated, and that the law merely sought "to stabilize an unsteady line of judicial precedent against how judges should treat laws that impair the First Amendment right to the free exercise of religion." When religious freedom and government action conflict, she concludes that the

government *should* face a heavy burden in justifying its laws: "The right of free exercise *is* a civil right, and the First Amendment places very real demands on government."

David Cole

The Angry New Frontier: Gay Rights vs. Religious Liberty

1.

At the end of June, the Supreme Court will likely declare that the Constitution requires states to recognize same-sex marriages on the same terms that they recognize marriages between a man and a woman. If it does, the decision will mark a radical transformation in both constitutional law and public values. Twenty-five years ago, the very idea of same-sex marriage was unthinkable to most Americans; the notion that the Constitution somehow guaranteed the right to it was nothing short of delusional.

One sign of how far we have come is that the principal ground of political contention these days is not whether same-sex marriages should be recognized, but whether persons who object to such marriages on religious grounds should have the right to deny their services to couples celebrating same-sex weddings. Opponents of same-sex marriage can read the shift in public opinion as well as anyone else: a 2014 Gallup poll reported that, nationwide, 55 percent of all Americans, and nearly 80 percent of those between eighteen and twenty-nine, favor recognition of same-sex marriage. Today, same-sex couples have the right to marry in thirty-seven states and the District of Columbia. And come June, most legal experts expect the Supreme Court to require the remainder to follow suit.

Having lost that war, opponents of same-sex marriage have opened up a new battlefield—claiming that people with sincere religious objections to it should not be compelled to participate in any acts that are said to validate or celebrate same-sex marriage. There is an obvious strategic reason for this. One of the problems for opponents of same-sex marriage was that they could not credibly point to anyone who was harmed by it. Proponents, by contrast, could point to many sympathetic victims—couples who had lived in stable, committed relationships for years, but were denied the freedom to express their commitment in a state-recognized marriage, and who were therefore also denied many tangible benefits associated with marriage, including parental rights, health insurance, survivor's benefits, and hospital visitation privileges. Claims that "traditional marriage" would suffer were, by contrast, abstract and wholly unsubstantiated.

Focusing on religiously based objectors puts a human face on the opposition to same-sex marriage. Should the fundamentalist Christian florist who believes that same-sex marriage is a sin be required to sell flowers for a same-sex wedding ceremony, if she claims that to do so would violate her religious tenets? There are plenty of florists, the accommodationists argue, so surely the same-sex couple can go elsewhere, and thereby respect the florist's sincerely held religious beliefs. Should a religious nonprofit organization that makes its property available to the general public for a fee be required to rent it for a same-sex wedding? Should a religious employer be compelled to provide spousal benefits to the same-sex spouse of its employee? Should Catholic Charities' adoption service have to refer children to otherwise suitable homes of married same-sex couples? At its most general level, the question is whether religious principles justify discrimination against same-sex couples.

2.

In late March, Indiana Governor Mike Pence signed into law the Indiana Religious Freedom Restoration Act (RFRA), a state law that requires officials to exempt those with religious objections from any legal obligation that is not "essential" and the "least restrictive means" to serve "a compelling state interest." Arkansas enacted a similar law at the beginning of April. Georgia and North Carolina are considering doing so. And nineteen other states already have such laws, which could permit individuals to cite religious objections as a basis for refusing to abide by prohibitions on discrimination in public accommodations, employment, housing, and the like.

The Indiana and Arkansas laws prompted strong objections from gay rights advocates and leaders of the business community, including Apple, the NCAA, Walmart, and Eli Lilly. They see the laws as thinly veiled efforts to establish a religious excuse for discrimination against gay men and lesbians. Governor Pence initially dismissed these objections as unfounded, but as criticism mounted, Indiana legislators passed an amendment specifying that the law

> does not authorize a provider to 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 United States military service.

Most of the other state RFRAs, however, have no such anti-discrimination language. In Arkansas, Governor Asa Hutchinson responded to criticism by getting the legislature to tailor the law more closely to the federal Religious Freedom Restoration Act, but that law has no anti-discrimination language, and for reasons discussed below, it is far from clear that this revision will stop the law from being invoked to authorize religiously motivated discrimination.

In addition, still other state laws that have received far less attention specifically grant religious exemptions from a variety of legal obligations regarding same-sex marriage. In fact, to date every state except Delaware that has adopted same-sex marriage by legislation has included a religious exemption of some kind. They vary in their details, but among other things, they allow clergy to opt out of conducting marriage ceremonies; permit religiously affiliated nonprofit organizations to deny goods and services to same-sex weddings; and allow religiously affiliated adoption agencies freedom to deny child placements with same-sex married couples. Most were enacted as part of a political bargain, designed to ease passage of laws recognizing same-sex marriage.

At bottom, all of these laws pose the same question: How should we balance the rights of gay and lesbian couples to equal treatment with the free exercise rights of religious objectors?

Under the U.S. Constitution, the answer to this question is clear. The state violates no constitutionally protected religious liberty by imposing laws of general applicability—such as anti-discrimination mandates—on the religious and nonreligious alike. In 1990, the Supreme Court ruled, in a decision written by Justice Antonin Scalia, that being subjected to a general rule, neutrally applied to all, does not raise a valid claim under the First Amendment's free exercise of religion clause, even if the rule burdens the exercise of one's religion.

The case, *Employment Division v. Smith*, involved a Native American tribe that sought an exemption from a criminal law banning the possession and distribution of peyote; the tribe argued that the drug was an integral part of its religious ceremonies. The Court rejected the claim. Justice Scalia reasoned that to allow religious objectors to opt out of generally applicable laws would, quoting an 1878 Supreme Court precedent, "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself." The Court accordingly ruled that laws implicate the free exercise clause only if they specifically target or disfavor religion, not if they merely impose general obligations on all that some religiously scrupled individuals find burdensome.

Even before the Court in *Employment Division v. Smith* adopted this general rule, it rejected a claim that religious convictions should trump anti-discrimination laws. The IRS had denied tax-exempt status to Bob Jones University, a religious institution that banned interracial dating, and to Goldsboro Christian Schools, Inc., which interpreted the Bible as compelling it to admit only white students. The religious schools sued, asserting that the IRS's denial violated their free exercise rights. In *Bob Jones University v. United States*, the Court in 1983 summarily rejected that contention, asserting that the state's compelling interest in eradicating racial discrimination "outweigh[ed] whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." If the state seeks to eradicate discrimination, the reasoning goes, it cannot simultaneously tolerate discrimination.

Under these precedents, the Constitution plainly does not compel states to grant religious exemptions to laws requiring the equal treatment of same-sex marriages. Laws recognizing same-sex marriages impose a general obligation, do not single out any religion for disfavored treatment, and in any event further the state's compelling interest in eradicating discrimination against gay men and lesbians.

But can or should states adopt such exemptions as a policy matter? In some instances, to be sure, it seems appropriate to accommodate religious scruples. Everyone agrees, for example, that a priest should not be required to perform a wedding that violates his religious tenets. But it is not at all clear that those who otherwise provide goods and services to the general public should be able to cite religion as an excuse to discriminate.

Take the fundamentalist florist. Proponents of an exemption insist that the same-sex couple denied flowers can find another florist, while the florist would either have to violate her religious tenets or lose some of her business. But this argument fails to take seriously the commitment to equality that underlies the recognition of same-sex marriage—and the harm to personal dignity inflicted by unequal treatment. Just as the eradication of race discrimination in education could not tolerate the granting of tax-exempt status to Bob Jones University, even

though plenty of nondiscriminatory schools remained available, so the eradication of discrimination in the recognition of marriage cannot tolerate discrimination against same-sex marriages.

Justice Robert Jackson got the balance right when he stated, in 1944, that limits on religious freedom "begin to operate whenever [religious] activities begin to affect or collide with liberties of others or of the public." James Madison struck the same balance, noting that religion should be free of regulation only "where it does not trespass on private rights or the public peace." When a religious principle is cited to deny same-sex couples equal treatment, it collides with the liberties of others and trespasses on private rights, and should not prevail.

The fact that many of the state laws specifically single out religious objections to same-sex marriage for favorable treatment may itself pose constitutional issues under the First Amendment's clause prohibiting the establishment of religion. While states are permitted some leeway to accommodate religion, the establishment clause forbids states from favoring specific religions over others, or religion over nonreligion. And when states accommodate a religious believer by simply shifting burdens to third parties, such as when religiously motivated employers are permitted to deny benefits to same-sex spouses of their employees, the state impermissibly takes sides, favoring religion. In *Estate of Thornton v. Calder* (1984), for example, the Supreme Court held that the establishment clause invalidated a state requirement that businesses accommodate all employees' observations of the Sabbath, regardless of the impact on other workers or the business itself. State laws granting exemptions for religious objectors to same-sex marriage both give preference to religious over other conscientious objections and shift burdens to same-sex couples. Such favoritism is not only not warranted by the free exercise clause, but may be prohibited by the establishment clause.

3.

The "religious freedom restoration" laws that Indiana, Arkansas, and nineteen other states have adopted do not single out same-sex marriage as such, but they also have serious flaws. These statutes are almost certainly constitutional under existing doctrine, since they are modeled on the federal Religious Freedom Restoration Act, enacted in 1993 in response to the *Smith* decision. That's the statute the Supreme Court relied upon last year in *Burwell v. Hobby Lobby* to rule that the Department of Health and Human Services must accommodate for-profit corporations that object on religious grounds to providing insurance coverage to their employees for certain kinds of contraception. (Significantly, the Court in *Hobby Lobby* found that the religious corporations' objections could be accommodated without imposing any cost on their female employees, by extending to those for-profit businesses an existing HHS accommodation that required insurance providers to provide contraception at no cost to the employees of objecting nonprofit organizations).

The federal and state RFRAs provide, as a statutory matter, what the Court refused to provide as a matter of constitutional law in the *Smith* decision. They require the government to meet a very demanding standard to justify any law, no matter how neutral and generally applicable, that imposes a "substantial burden" on anyone's exercise of religion. Because the courts are reluctant to second-guess individual religious commitments, the "substantial burden" threshold is often easily met: an individual need only articulate a plausible claim that the law requires him to do something that violates his religious principles. Religious objections could be raised to anti-discrimination laws, criminal laws, taxes, environmental and business regulations, you name it; the only limit is the creativity of religious objectors.

Once a religious objection is raised, the RFRA laws require the state to show not only that it has a "compelling" reason for denying a religious exemption, but that no more narrowly tailored way to achieve its ends is possible. This language appears to direct courts to apply the same skeptical standard—called "strict scrutiny"—applied to laws that explicitly discriminate on the basis of race, or that censor speech because of its content. This standard is so difficult to satisfy that it has been described as "strict in theory, but fatal in fact." If the RFRAs were literally enforced, many state laws would not survive that standard of review. They appear to give religious objectors what the Court in *Smith* properly refused—"a private right to ignore generally applicable laws."

Perhaps for this reason, courts have not interpreted state RFRAs literally, but have instead generally construed them to uphold laws that impose a burden on religion as long as the state has a reasonable justification for doing so. They have looked to the purpose of the RFRAs rather than to their literal language; the laws were designed, after all, to "restore" the constitutional protection of religious free exercise that existed prior to the *Smith* decision, and while the Supreme Court before *Smith* sometimes spoke in terms of compelling interests and least restrictive means, its actual application of the free exercise clause was much more measured.

Thus, there have been relatively few successful RFRA lawsuits in the state or federal courts.

The courts have resisted applying strict scrutiny to religious freedom claims for good reason. Strict scrutiny is triggered by regulations of speech only where the state censors speech because of its content, such as when a state bans labor picketing or regulates political campaign advocacy. In equal protection cases, the Court applies strict scrutiny only to those rare laws that intentionally draw distinctions based on race, ethnicity, national origin, or religion, such as race-based affirmative action. By contrast, as Justice Scalia noted in *Smith*, a religious objection can be raised to virtually any law. Applying the same scrutiny to claims of religious freedom would therefore have few meaningful limits, and would give religious objectors a presumptive veto over any law they claimed infringed their religious views.

But there is reason to believe that judicial interpretation of RFRAs may change. The Supreme Court in *Hobby Lobby* interpreted the federal RFRA to impose a much more demanding, pro-religion standard of review than had ever been imposed before. Encouraged by this development, over one hundred lawsuits have been filed under the federal RFRA challenging the Affordable Care Act's requirement that health insurance plans cover contraception. Some state courts may well follow the Supreme Court's lead and apply their state RFRAs more aggressively. And now that many states have been required by federal courts to recognize same-sex marriage, some state judges may be inclined to push back through interpretation of state RFRAs permitting religious exemptions.

When *Smith* was decided, the prohibition of the peyote ceremony seemed to many an unfair deprivation of the religious rights of Native Americans. Religious groups across the spectrum condemned the decision, and a coalition of liberals and conservatives joined together to endorse the enactment of the federal RFRA. The law was supported by the ACLU, the American Jewish Congress, and the National Association of Evangelicals, among many others; it passed the House unanimously, and passed 97–3 in the Senate. Many argued, with justification, that the Court's approach in *Smith* was insensitive to religious minorities. As the peyote case illustrated, minority religions are unlikely to have their concerns taken seriously by the majority through the ordinary democratic process. And if a generally applicable law does interfere with the exercise of religion, the bill's proponents asked, shouldn't the state bear a burden of justification?

The problem is not so much that RFRAs create a presumption in favor of religious accommodation, but that the presumption is at once so easily triggered and so difficult to overcome. Advocates for religious liberty and marriage equality might find common ground were they to support modified RFRAs that would impose a less demanding standard of justification, requiring states to show that permitting a religious exemption would undermine important collective interests or impose harm on others.

The stringent standard imposed by RFRAs, by contrast, means that anytime anyone objects on religious grounds to any law, he or she is entitled to an exemption unless the state can show that it is absolutely necessary to deny the exemption in order to further a compelling end. Because these laws impose such a heavy burden of justification, they effectively transfer a great deal of decision-making authority from the democratic process to religious objectors and the courts.

Instead of the polity deciding when to grant particular religious exemptions from a specific law, RFRAs transfer to courts the power to decide that question—subject to a strong presumption that individual religious claims take precedence over democratically chosen collective goals. Religious liberty has an important place in American society, to be sure. Accommodation of religious practices is a sign of a tolerant multicultural society—so long as the accommodation does not simply shift burdens from one minority to another. The freedom to exercise one's religion is a fundamental value, but like other values, it has its limits. It is not a right to ignore collective obligations, nor is it a right to discriminate. Those who oppose same-sex marriage should be free to express their opposition in speech to their heart's (and religion's) content, but not to engage in acts of discrimination. As Oliver Wendell Holmes Jr. is said to have remarked: "The right to swing my fist ends where the other man's nose begins."

Tara Helfman

The Religious-Liberty War

When the curtain opens on Sophocles's *Antigone*, Thebes is reeling from a fratricidal war. The rivals for the crown have killed each other in battle, and the new king has ordered that no one may bury the body of the rebel leader. The play's heroine confronts a tragic choice: Should she obey divine commandment and offer her slain brother funeral rites? Or should she obey the king's command and defy the will of the gods?

The Religious Freedom Restoration Act, which became law at the federal level in 1993 and has been followed by 20 state-level versions in the decades since, attempts to shield Americans from the sort of choice Antigone had to make between the state's command and her faith's calling. In general, the RFRA statutes ensure that government cannot compel an individual to act against her faith unless (1) a compelling government interest demands it, and (2) the measure is narrowly tailored to serve those interests. But when Indiana Governor Mike Pence became the 20th governor to sign a state-level RFRA into law in March, legal tragedy degenerated into political farce as the statute became the latest staging ground in the ongoing national debate on gay rights.

Gay-rights activists charged that the Indiana law amounted to a license to discriminate on religious pretexts. The American Civil Liberties Union, originally one of the key supporters of the federal RFRA, denounced the statute as "a terrible and dangerous mistake," and Hillary Clinton, whose husband signed the original act into law in 1993, lamented on Twitter: "Sad this new Indiana law can happen in America today. We shouldn't discriminate against [people because] of who they love." Everyone from the CEO of Angie's List to the president of the NCAA had something to say about the Indiana statute, and none of it was good. When a similar backlash arose in response to the Arkansas religious-freedom bill, that state's governor, Asa Hutchinson, quickly withdrew his support, musing that his own son had signed a petition against it and stating his concerns that it would have "a negative impact on our state's image."

Lost in all this fury was the simple purpose of these RFRAs: They are designed to stabilize an unsteady line of judicial precedent regarding how judges should treat laws that impair the First Amendment right to the free exercise of religion.

The tension between the public interest and private faith is written into the very text of the Constitution, which safeguards religious liberty and guarantees the equal protection of laws. The First Amendment provides that Congress shall make no law prohibiting the free exercise of religion. But sometimes laws of general application—laws that are designed to apply equally to *all* Americans—impair the religious practice of *some* Americans.

Justice William Brennan, celebrated as a liberal lion of the Supreme Court, first formulated the test later codified by the federal RFRA in *Sherbert v. Verner*. The 1963 case involved a claim by a Seventh-Day Adventist who had been denied unemployment benefits by the state of South Carolina because she refused to work on the Sabbath. The Court held that forcing the claimant to choose between abandoning a precept of her faith and forgoing her unemployment benefits was tantamount to fining her for practicing her religion. The government would henceforth have to show that any law impairing the free exercise of religion was narrowly tailored to serve a compelling government interest. This came to be known as the Sherbert Test.

In *Wisconsin v. Yoder* (1972), the Court reaffirmed the Sherbert Test, striking down a state statute establishing compulsory eighth-grade education on the ground that it violated the First Amendment rights of Wisconsin's Amish community. In so doing, the Court was mindful of the potential danger that religious exemptions posed to the equal protection of laws. It explained:

> Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

In short, the Court found, faith enjoys a higher degree of protection under the Constitution than philosophy, and that is by constitutional design.

Then, in the 1989 case *Employment Division v. Smith*, the Court revisited the Sherbert Test. At issue was whether two Native Americans had been unlawfully denied unemployment benefits under Oregon law because they took peyote as part of a religious sacrament. The claimants argued they should be granted a religious exemption because state drug law placed an undue burden on their First Amendment right to free exercise of religion. Writing for the Court, Justice Antonin Scalia rejected the argument: "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense." The majority ruled that the answer to the problem of generally applicable laws that encroach upon religious liberty is not to carve out constitutional exemptions but for legislative bodies to carve out *statutory* exemptions.

Congress stepped into the breach. In 1993, it enacted the Religious Freedom Restoration Act, whose stated purpose was "to restore the compelling interest test as set forth in [*Sherbert* and *Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened." As initially enacted, the RFRA prohibited *any* government—federal, state, or local—from substantially burdening a person's exercise of religion unless the government could demonstrate that the burden furthered a compelling government interest. In a 1997 case, the Supreme Court invalidated the statute's applicability to state and local law. Congress then revised the RFRA to apply only to federal measures.

Since there were no longer protections below the federal level, states began passing their own versions of the federal RFRA, to ensure that religious liberty enjoyed the same standard of protection from state and local law as it did from federal law.

In many respects, the problems underlying the RFRA are representative of the broader challenge that the growth of government poses to the liberties enshrined in the Bill of Rights. As public regulation grows increasingly pervasive, the risk that it will encroach upon individual liberty grows correspondingly greater.

States are not passing RFRAs to protect the faithful from laws that specifically target the practices of religious groups or institutions. Such statutes are few and far between, and have been dispensed with in short order by the courts under existing First Amendment jurisprudence. Rather, RFRAs seek to protect First Amendment rights from the sort of ubiquitous regulatory creep that has come to define American government in the twenty-first century. For example, state laws requiring autopsies might conflict with the religious beliefs of the deceased and their survivors. Local zoning regulations might prevent homeowners from displaying emblems of their faith on private property. Rules establishing dress and uniform requirements might exclude Jews who wear yarmulkes from military service. And prison regulations may bar observant Muslims from having beards. It would be wrong to suggest that government lacks a compelling interest in any of these cases, all of which have been argued before courts; to take one example, the demand that there be exceptions to military dress creates a potential disciplinary hazard for the armed forces. Rather, the injury that such measures might cause to the individual's right of free exercise is all the *more* reason to require that the government show that a law's means are narrowly tailored to compelling government ends.

The judicial standards established by RFRAs are moderate and measured; the debate provoked by the Indiana law has been anything but. Presented a matter of weeks before the Supreme Court was due to hear oral arguments on the constitutionality of state bans on gay marriage, the statute unleashed a frenzy of public outcry and political posturing that has bordered at times on the surreal. Critics from Al Sharpton to the CEO of Apple Computers have denounced the Indiana law as a modern-day Jim Crow measure designed to relegate gays to a constitutional underclass. A *#boycottIndiana* campaign sprang up on social media, and Angie's List announced that it was canceling a $40-million expansion project in the state on account of the law.

The governors of Connecticut, Washington, and New York banned state-funded travel to Indiana. Connecticut Governor Dannel P. Malloy went so far as to call Indiana's law "disturbing, disgraceful, and outright discriminatory," notwithstanding the fact that his state was the first to pass its own RFRA in 1993. (In fact, the Connecticut RFRA establishes a less exacting standard for religious exemptions than Indiana's: A law must "burden" rather than "substantially burden" a person's free exercise of religion.) And New York State lawmakers denounced the law as "legalized discrimination and injustice against LGBT people."

Then, amid all the histrionics and hyperbole, a small-town pizzeria became Ground Zero in the broader culture war. When the owner of Memories Pizza in Walkerton told a local news reporter she would not cater a gay wedding because doing so would violate her religious beliefs, social media exploded with outrage. The business's Yelp page was inundated with slurs, and threats poured in via social media. The pizzeria had to shut its doors temporarily because of the outcry.

Neither the federal RFRA nor its state counterparts sanction discrimination. The Indiana RFRA, like the federal statute, requires that courts apply the very same standard to laws that impair free exercise as they do to laws that discriminate against racial minorities. What is more, RFRAs stand against a broad backdrop of federal and state anti-discrimination law, not least of which is the Civil Rights Act of 1964. Its Title II prohibits discrimination in public accommodation on the basis of race, color, religion, or national origin. Thus a restaurant owner may not invoke his religious beliefs in refusing service to an interracial couple. Nor, for that matter, could he refuse to cater an interracial wedding.

Same-sex weddings are a different matter, but this has less to do with the RFRAs than it does with the unsettled position of gay rights under state and federal law. Some states, such as New Mexico and Connecticut, have passed local variants on Title II that require businesses offering their services to the general public to do so without regard to the sex or sexual orientation of patrons. In fact, in response to the backlash over the Indiana law, that state's statute was amended

to prohibit providers of public accommodations from denying goods and services to individuals on the basis of sexual orientation. Where such local anti-discrimination laws serve a compelling interest by the least restrictive means, gay rights must prevail over First Amendment claims under state RFRAs.

But where such protections are not in place, the right of free exercise of religion must prevail. The Supreme Court may well bring this debate to a close next summer, when it decides whether state prohibitions of same-sex marriage are constitutional. Whatever the outcome of that case, both state and federal courts will be bound to apply RFRAs accordingly. In the meantime, it is at best a benign mistake—at worst, cynical opportunism—to condemn RFRAs as mere pretexts for the violation of civil rights.

The right of free exercise *is* a civil right, and the First Amendment places very real demands on government. Not only do the Establishment and Free Exercise clauses require that government not interfere in religious *belief*, they also limit the government's power to burden religious *practice*. RFRAs establish a clear test against which to balance the rights of the individual and the interests of the state. If the history of religious practice in this nation is anything to go by, the constitutional debate on faith will continue long after the constitutional debate on gay marriage is settled. And for as long as that is the case, these Religious Freedom Restoration Acts are likely to be the most reliable shield individuals have against government encroachments on religious liberty. It is the shield Antigone needed.