Protecting religion is not about exclusion

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A recent CBS News headline announced, "Bill would let Michigan doctors, EMTs refuse to treat gay patients." Incredulous readers wondered why a state legislature would design a bill specifically to let people die. Of course, the bill did not even mention emergency treatment; it protected religious freedom generally, but CBS described an opponent's theory of the bill's conceivable (over)reach.

Thirty-two states specifically protect religious freedom, either judicially or by statute. Reasonable minds may differ on what these laws will --- or should --- protect, but opinions should rest on facts, not scare tactics. With a religious freedom case on the U.S. Supreme Court docket (*Southern Nazarene University v. Burwell*), it's time to correct the misinformation.

Why do states have these statutes?

Congress passed the Religious Freedom Restoration Act (RFRA) in 1993 to revive (and expand) the pre-1990 rule that government could not restrict religious practice except for a compelling interest, through the least restrictive means. Support was so broad that the House passed it unanimously, and the Senate vote was 97-3. President Clinton's signing highlighted the need for "a space of freedom between government and people of faith that otherwise government might usurp. . . ." But RFRA could not control state law, hence the need for state analogues.

The Supreme Court has since construed RFRA to protect the ceremonial use of hallucinogenic tea and prison inmates' beards, just as it had formerly protected an employee's right to refuse to work on the Sabbath or on military projects and still receive unemployment benefits. Circumcision and kosher/halal slaughter could also enjoy protection if, as in Europe, public opinion turns against them.

Strict scrutiny does not mean the religious interest will always prevail. For example, the Supreme Court held society's compelling interest in a functioning social security system trumped religious objections to mandatory participation. State RFRA's give religious adherents more space from state dictates, but any practice deemed too unpalatable will probably fall, RFRA or not.

Why are these proposals appearing now?

Indiana Governor Mike Pence cited *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), and the changing "right" to contraception.

The Supreme Court first recognized a right to use or provide contraception in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), where the Court found the state could not bar children from receiving a religious education — or schools from providing one — *Griswold* found contraception involved a similar privacy interest, so the state could not ban married couples from using contraception, or doctors from providing it. Justice Goldberg's concurrence concluded the right was reciprocal, so there was also a right *not* to use or provide it.

The *Pierce/Griswold* model construed a constitutional right as an activity shielded from governmental interference. Religious education, contraception, and other protected activities involved a "realm of . . . life which the state cannot enter," either to forbid or require. Nor could the state compel citizens to subsidize religious education for children who could not afford it.

This live-and-let live model pervades the structure of constitutional rights. The Supreme Court has recognized a right to buy pornography or firearms, but not a corresponding duty to sell --- let alone subsidize --- them. Individuals may choose not to buy, and vendors may choose not to sell. And the state may not override these private choices.

This model is being challenged. Concerned that some individuals lacked access, state and local governments have pressured pharmacies to sell contraception, whether they wished to or not. And the Affordable Care Act imposes on private employers a duty to pay for it. Construing constitutional rights as entitling individuals to not only state noninterference but other citizens' affirmative support sets "Caesar" and "God" on a collision course.

Are these state laws just like the federal RFRA?

Some versions go further than the federal text, although these additions just make explicit what *Hobby Lobby* found was implicit in RFRA.

First, opponents note these laws may be invoked against private parties, not just the state. That's an overstatement, because it is ultimately the state, not the other party, that legally mandates conduct and enforces that mandate.

The more accurate objection, expressed by the *Hobby Lobby* dissent, notes the law may restrict the conduct of third parties (e.g. employees seeking contraception), who do not share the objector's viewpoint. The *Hobby Lobby* majority held the state could not compel conduct from religious dissenters just because it benefitted a third party, so the state could not force a Muslim market to sell alcohol or a Jewish restaurant to open on Saturday, even though a requirement could enhance customer access and/or employee income.

In fact, exemptions from general laws always impose some disadvantage on others. (If enforcing the law did not benefit others, why restrict anyone's liberty?) One of the oldest recognized exemptions allows conscientious objectors to avoid military conscription — so others must take their place. Try telling the surviving relatives of such a replacement that the exemption did not affect anyone else and was invoked against only the government.

The other supposed distinction is that not just individuals may invoke the laws' protection but also other organizations, including for-profit corporations like Hobby Lobby. Opponents mock the idea that a business is a "person." But the Supreme Court has not confined religious freedom to individual human beings. The religious school in *Pierce* successfully challenged the religious education ban, and an incorporated kosher market had standing to challenge a Sunday closing law. *Gallagher v. Crown Kosher Supermarket of Mass., Inc.*, 366 U.S. 617 (1961).

Even without RFRA, the First Amendment applies to not just individual human beings but any nongovernmental actor. A state may not regulate the content of a newspaper even though it's published by a for-profit company. *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241 (1974). Nor may the state compel an association to disclose its membership lists. *NAACP v. Alabama*, 357 U.S. 449 (1958). The very phrase "freedom of assembly" recognizes *individuals may combine* to exercise their rights. Far from demanding isolation as a condition for expression, *Griswold* observed the First Amendment protects "the right to express one's attitudes or philosophies by membership in a group."

Contrary to the *Hobby Lobby* dissent, no sharp distinction separates organizations pursuing profit from those expressing values. CVS is a for-profit business but it opted to forego revenue and cease selling tobacco, believing society would benefit if fewer people smoked. Hobby Lobby likewise sacrifices revenues by closing on Sundays, believing we would be better off if fewer people engaged in commerce once a week. Both decisions to temper business with conscience deserve respect.

Are state RFRA's a subterfuge to evade antidiscrimination laws?

Opponents contended Indiana and Arkansas businesses could use RFRA to deny goods and services to gay people, but neither state even has a law barring sexual orientation discrimination, so no subterfuge is needed. If there were a widespread goal to deny services, it would already be happening.

It is not, for several reasons. First, the profit motive: the natural disinclination to forfeit business, whether the direct customer, or others lost through bad publicity. Second, businesses do not always discern each customer's sexual background.

Most importantly, religious freedom laws protect adherents against forced participation in what they deem immoral activity, and businesses rarely perceive selling their own product as immoral. Hobby Lobby thus objected to *subsidizing contraception*, not to *selling its merchandise* to women on the pill.

What about weddings?

Most of the conflicts concern weddings. These often involve religious ceremonies, which the state may not regulate. The argument for same-sex weddings has always been a civil one, and it has long been recognized the government may not force clergy to conduct one. Arranging flowers or baking a cake seems less central to the religious event, but there is no bright line. What about playing religious music during the ceremony, or printing the program? Would it matter if the program includes hymns?

Wedding concerns go beyond same-sex issues. For example, Jewish customs of wedding contracts (*ketubot*) and canopies (*chuppot*) have become so popular that many non-Jewish couples want them. Some Jews who create them will do so for non-Jewish weddings, but others find that problematic. The Supreme Court has prudently observed "the judicial process is singularly ill equipped to resolve such [intrafaith] differences." *Thomas v. Review Bd.*, 450 U.S. 707 (1981). It's better to decide these questions by private conscience than state coercion.

What are the cake wars?

After some bakers were penalized for refusing to bake for same-sex weddings, their supporters attempted to show a double standard by asking other bakers to prepare cakes with messages critical of same-sex marriage. Those bakers correctly asserted they could refuse, because the law bars discrimination based on *status*, not *message*. A vendor must provide a cake (or T-shirt) to any buyer, insofar as the product is just flour

(or cotton). But the law does not compel a vendor to express on it a message the vendor finds distasteful. A baker has no obligation to create a cake with the flag of the Confederacy or ISIS.

But the status-message distinction applies more broadly. Many bakers charged with discrimination have long baked for gay clients, and objected not to the customer's status but the requested message. A cake with two groom figurines or a rainbow-colored cross expresses a message, as would an upside-down cross or hammer and sickle. These symbols all convey an idea, whose expression, however benign or malignant, the state may not compel. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Has RFRA changed?

Some supporters of the 1993 legislation now oppose it, claiming it has been cited in unexpected ways. True, no one then anticipated religious freedom would be invoked to evade compelled facilitation of same-sex weddings. As state demands change, so will religious exemptions.

In excluding the government from the question of contraception (for married couples), *Griswold* did not anticipate the state would later compel private actors to pay for it. Population and cost concerns likewise might someday transform a "right" to suicide or abortion into a physician "duty" to participate. We cannot know what the majority will demand in a generation. But we do know the majority should be cautious in coercing the minority.

Barnette's liberal view is under attack (especially on campus) by those who want authorities to suppress "wrong" speech, and "prescribe what shall be orthodox." Likewise, whereas liberalism long celebrated religious freedom as a bulwark against a "hydraulic insistence on conformity to majoritarian standards" (*Wisconsin v. Yoder*, 406 U.S. 205 (1972)), many today demand conformity to majoritarian standards they substantively favor. But California has long been a haven for noncomformists of all stripes. The state should follow federal law, and that of 32 states, and protect religious freedom.