Continued from page 1

GUEST COLUMN

Protecting religion is not about exclusion

By Mitchell Keiter

A recent CBS News headline announced, "Bill would let Michigan doctors, EMTs refuse to treat gay patients." Incredulous readers wondered why lawmakers would design a bill to let people die. Of course, the bill did not 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. Reasonable minds may differ on these laws, 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.

See Page 7 — RELIGIOUS

With near unanimity, Congress passed the Religious Freedom Restoration Act 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. But RFRA could not control state law, hence the need for state analogues.

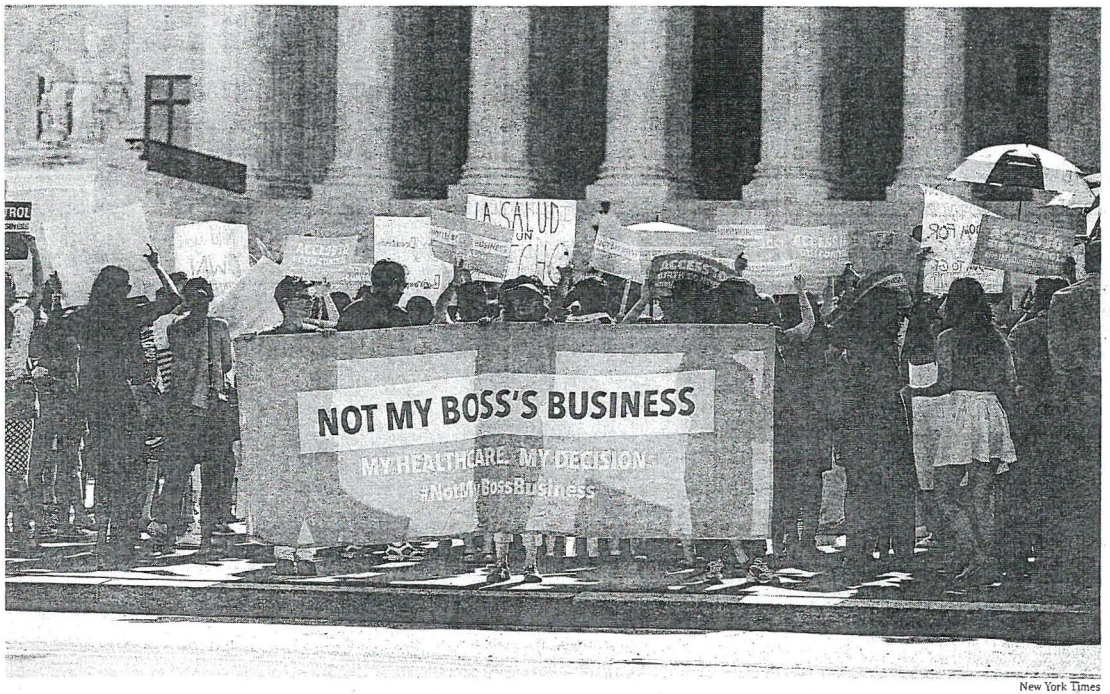
RFRA has protected prison beards, as the court formerly protected Sabbath observers' right to unemployment benefits. These protections distinguish America from Europe, where intolerant majorities have restricted circumcision and kosher/halal meat.

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

Indiana's governor justified RFRA by citing *Burwell v. Hobby Lobby Stores Inc.* (2014), and the changing "right" to contraception. The Supreme Court first recognized a right to use or provide contraception in *Griswold v. Connecticut* (1965). Citing *Pierce v. Society of Sisters* (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. A concurrence said 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. These activities involve a "realm of ... life which the state cannot enter," either to forbid or require.

This live-and-let live model pervades the structure of constitutional rights. The Supreme Court has recognized a right to buy pornography and firearms, but not a corresponding duty to sell or subsidize them. But the model is being challenged. Concerned about insufficient 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 rights to entitle not only state noninterference but other citizens' affirmative support sets "Caesar" and "God" on a collision course.



New York Times

Activists gather outside the Supreme Court building Monday morning in Washington, June 30, 2014, the day of the *Hobby Lobby* decision.

Some versions go further than the federal text, although these additions just confirm RFRA's reach as defined by *Hobby Lobby*.

First, opponents note these laws may be invoked against individuals, not just the state. That's an overstatement, because it is ultimately the state that 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). The *Hobby Lobby* majority countered 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, even though a requirement could enhance customer access.

In fact, exemptions from general laws always impose some disadvantage on others. 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 the replacement the exemption did not affect anyone else.

The other supposed distinction is that not just individuals may invoke the laws' protection but also other organizations, including for-profit corporations. Opponents deny a business is a "person." But religious freedom is not confined to individuals. The school in *Pierce* challenged the education ban, and a kosher market challenged a Sunday closing law in *Gallagher v. Crown Kosher Market* (1961).

Even without RFRA, the First Amendment applies to not just 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* (1974). The very phrase "freedom of assembly" recognizes *individuals may combine* to exercise their rights. Far from demanding isolation, *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. 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 deserve respect.

Opponents contended Indiana and Arkansas businesses could use RFRA to exclude gay people, but neither state has a law barring sexual orientation discrimination, so no subterfuge is needed. If there were a widespread goal to exclude, it would already be happening. It is not, for several reasons. Few are eager to lose business, whether the instant customer or others through bad publicity.

More 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.

Most conflicts concern weddings. The argument for same-sex weddings always concerned civil law; 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.

Wedding concerns go beyond same-sex issues. For example, Jewish customs of wedding contracts and canopies 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.* (1981).

After some bakers were prosecuted 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 to any buyer, insofar as the product is just flour. But the law does not compel a vendor to express on it a message the vendor finds distasteful. A baker need not decorate 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).

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. 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* (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 protect religious freedom.

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