What Are the Limits of ‘Religious Liberty’? by Emily Bazelon NYT July 10

‘I can’t. It’s against my religion.’’ Americans tend to handle religious objections with care, personally and politically. When a guest says, for example, that he can’t eat the food being served because it’s not kosher or halal, the host usually hastens to find an alternative. And when people resist following a law on the basis of faith, the government and the courts may try to accommodate them. It’s an American legacy that dates back to before the founding, when some of the original colonies were set up as havens for religious dissenters. Under the banner of belief, Quakers and Mennonites in the 18th century won the right not to join state militias. The first conscientious objectors were religious objectors, and from there, the category [expanded](https://www.law.cornell.edu/supremecourt/text/398/333) to include moral opponents of war. The same pattern holds for home-schoolers. It was an Amish father, not a hippie mother, who first got the Supreme Court’s [permission](https://www.law.cornell.edu/supremecourt/text/406/205) to take his children out of school in 1972, based on his religious commitment to ‘‘life aloof from the world,’’ as the justices respectfully put it.

Making exceptions to the law for people of faith has become part of the American definition of religious tolerance, part of our ethos of live and let live. It has also helped keep the peace in a polyglot nation. In France, it’s [illegal](http://www.nytimes.com/2015/05/27/world/europe/muslim-frenchwomen-struggle-with-discrimination-as-bans-on-veils-expand.html) for a Muslim woman to wear a head scarf at a public school. In the United States, it’s illegal for a clothing store to refuse to hire a Muslim woman because she wore a head scarf to her job interview. When the Supreme Court issued that ruling last month, eight of nine justices agreed that Samantha Elauf, who lost out on a job at Abercrombie Kids because of a companywide policy banning head coverings, was asking for ‘‘favored treatment’’ — to which she was entitled by federal employment law. ‘‘This is really easy,’’ Justice Antonin Scalia [said](http://www.supremecourt.gov/opinions/14pdf/14-86_p86b.pdf), announcing the decision from the bench.

And yet we’ve arrived at an unfortunate impasse over the meaning of religious liberty. Unlike in earlier eras, when religious objections let the faithful separate themselves from institutions they felt they could not support, many conservatives now deploy the phrase as a way of excluding other people. Take the furious outcry that erupted in response to the Supreme Court’s 5-to-4 [decision](http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html) to make same-sex marriage legal in every state. Conservative pushback began with the dissenting justices: Clarence Thomas warned of ‘‘potentially ruinous consequences for religious liberty.’’ Some Republican officeholders rushed to throw up whatever shield they could for people of faith. [Two states](http://www.usnews.com/news/articles/2015/06/11/north-carolina-religious-objection-protection-for-magistrates-now-law) have declared that county clerks may refrain from issuing marriage licenses if they don’t want to give them to gay couples as a matter of conscience. Bakers, photographers and florists — and adoption agencies and landlords — who cite their religion when refusing to serve gay couples won assurances like this one from Greg Abbott, governor of Texas: ‘‘No Texan is required by the Supreme Court’s decision to act contrary to his or her religious beliefs regarding marriage.’’

The same-sex-marriage resisters hope to capitalize on a recent expansion of religious liberties, in another big case about modern-day sexual norms. In a divisive 5-to-4 [ruling](http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf) last year, the Supreme Court extended to a company, and not just to individuals, the right to mount a religious objection to a law. The craft-store chain Hobby Lobby, which is owned by evangelicals, refused to pay for certain forms of birth control for its female employees, as the Affordable Care Act requires. The owners argued that providing health insurance that covered emergency contraception and IUDs offended their evangelical beliefs, saying these methods induce abortions (by taking effect after fertilization). Hobby Lobby had little scientific support for that assertion. By contrast, in defending the contraception mandate, the Obama administration could cite the consensus medical view that providing a variety of birth-control methods benefits women’s health. Nonetheless, the court sided with Hobby Lobby and its sense of conscience.

The court’s decision led to a burst of feminist outrage, but Hobby Lobby didn’t face a sustained boycott. And so it was surprising when another push for religious objection crashed into a wall of public condemnation earlier this year. Legislators in Indiana and Arkansas expected a smooth ride for their versions of a bill called the Religious Freedom Restoration Act. The first law by that name was passed by Congress in 1993 by huge, bipartisan margins. R.F.R.A. established a balancing test that remains in effect: When someone complains that a federal law substantially burdens his or her free exercise of religion, the government must show that it has a compelling interest in applying that law.

The R.F.R.A.s proposed in Indiana and Arkansas were more expansive: They would have allowed people and corporations to bring religious-liberty claims against one another, as well as the government. But that change didn’t really explain why Indiana and Arkansas found themselves on the wrong side of the culture wars; the context did. The new religious-liberty bills appeared to be shielding businesses that didn’t want to serve gay couples, who had recently won the right to marry in Indiana. ‘‘If a gay couple came in and wanted us to provide pizzas for their wedding, we would have to say no,’’ Crystal O’Connor, an owner of Memories Pizza in Walkerton, Ind., [told](http://www.abc57.com/story/28681598/rfra-first-business-to-publicly-deny-same-sex-service) a local news station. This time, the boycott materialized, and Memories Pizza temporarily shut its doors (supporters also raised more than $800,000 on the owners’ behalf). When major companies threatened to pull up stakes in Indiana and Arkansas, the states retreated, altering their religious-freedom bills.

Following the Supreme Court’s marriage ruling, religious objections to serving gay couples are mounting in more states. Invoking religious liberty in this way presents ‘‘special concerns’’ by prolonging social conflict, according to a recent [article](http://www.yalelawjournal.org/pdf/j.2516.NeJaime-Siegel.2591_r4r9q2au.pdf) by two law professors, Reva B. Siegel of Yale and Douglas NeJaime of the University of California, Irvine. They point to the aftermath of Roe v. Wade: After the Supreme Court ruling legalized abortion throughout the country, Congress and state legislatures ensured that a doctor, nurse or other health care professional could refuse to participate in providing an abortion as a matter of conscience. Over the decades, these ‘‘conscience clauses’’ expanded in some states to include counseling, referral and pharmaceutical services, allowing people who fill prescriptions, for example, to exert a form of social control in the name of their own religious freedom.

The [muscle](http://www.nytimes.com/2009/11/20/us/politics/20alliance.html?_r=2&) of the conservative Christian movement, Siegel and NeJaime argue, enhances its ‘‘power to demean.’’ Women who have been refused abortion services report feeling judged and mortified. Gay couples turned away by wedding vendors say the same. ‘‘The phrase ‘religious liberty’ has become an overused talisman,’’ the Indiana University law professor Steve Sanders told me. ‘‘Most of the invocations lately have nothing to do with actual infringements of free exercise. They’re about political and cultural dissent from gay rights.’’

All of this is making longtime proponents of religious liberty nervous. Douglas Laycock, a law professor at the University of Virginia, has helped write state religious freedom bills and supported the ones that foundered in Indiana and Arkansas. But in an [article](http://illinoislawreview.org/wp-content/ilr-content/articles/2014/3/Laycock.pdf) last year, he issued a warning to evangelical leaders. ‘‘It is a risky step to interfere with the most intimate details of other people’s lives while loudly claiming liberty for yourself,’’ Laycock wrote. ‘‘If you stand in the way of a revolution and lose, there will be consequences.’’

Refusing to serve customers has an ugly history. A half-century ago, the civil rights movement held lunch-counter sit-ins to protest Jim Crow. No one succeeded then in claiming a God-given right to refuse to serve black customers. Throughout the South, businesses open to the public became open to all. Today, in the name of religious liberty, there is robust Southern opposition to same-sex marriage. But supporters say the analogy to the exclusions of Jim Crow is inapt, because racial segregation was never central to Christian teaching the way traditional marriage has been. They also correctly point out that strong national laws protect against discrimination on the basis of race, but not against discrimination on the basis of sexual orientation. In [many states](http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html), in the South and elsewhere, a business or a landlord doesn’t need a special faith-based reason for turning away a gay client or tenant. They’re simply free to do so.

Given the speed with which public support for same-sex marriage is growing, gay people may win other rights against discrimination. But what about private religious schools and social-service organizations? ‘‘Hard questions’’ will arise, Chief Justice John Roberts predicted in his dissent from the same-sex marriage ruling, when, ‘‘for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex couples.’’

In the Senate and the House of Representatives, dozens of Republicans quickly [signed on](http://www.nationaljournal.com/congress/this-is-the-bill-same-sex-marriage-foes-want-congress-to-pass-now-20150626) to a [bill](https://www.congress.gov/bill/114th-congress/house-bill/2802/text?q=%7B%22search%22%3A%5B%22First+Amendment+Defense+Act%22%5D%7D) that would protect the tax-exempt status of a religious organization in such a situation and prevent any government action against a business that refused to serve a gay couple. On both sides of this fight, tolerance no longer seems to be the word of the day. ‘‘The religious resisters say, ‘It doesn’t matter if you can have the wedding you want, because you shouldn’t be getting married anyway,’ ’’ Laycock said over the phone last week. ‘‘The gay rights people answer, ‘It doesn’t matter if you violate your conscience, because you’re just talking to your imaginary friend.’ ’’ When basic values and rights collide, usually somebody wins and somebody loses. It becomes difficult to find mutual compassion, even if that would be the godly thing to do.