

## So-Called Religious Freedom Restoration Acts (RFRAs) Protect Gender and Sexual Orientation Discrimination, Not Religious Freedom

*More than two decades after the Clinton administration passed the federal Religious Freedom Restoration Act (RFRA), religious freedom bills are once again in the news. **Leslie C. Griffin** writes that the new RFRA legislation coming from Arkansas and Indiana has originated from fears over same-sex marriage rather than any real desire to protect religious freedoms. She argues that through RFRAs, those against LGBT rights are seeking a legal method of discrimination and that these laws can have unintended consequences which can cause harm to other groups as well.*



Religious discrimination in the United States hasn't suddenly increased. What have increased are the efforts of religious corporations, organizations and individuals to block progress on LGBT and women's equality.

### Federal Religious Freedom Restoration Act (RFRA)

In 1993, in response to intensive lobbying by most of the nation's churches, Congress passed a [RFRA](#) that was supposed to apply broadly not only to the federal government but also to all state and local governments. That RFRA allowed believers who argued their religions were "substantially burdened" to challenge every law in the country. Under the statute, whenever a believer alleged a substantial burden on their religion, the government had to pass the hardest test in constitutional law; it had to prove that it used the "least restrictive means" of reaching a "compelling government interest." That heavy burden had [never](#) been put on the government in prior First Amendment cases. It opened all the nation's laws to legal attack.

In [City of Boerne v. Flores](#) (1996), the Supreme Court ruled that Congress had exceeded its powers in imposing RFRA on state and local governments. One of the Court's most telling findings was that Congress hadn't compiled any evidence of widespread religious discrimination before passing the statute. As the Court explained, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." That same factual situation applies to state RFRAs today.

RFRA continues to apply to the federal government. The [contraceptive mandate](#) of Congress's Affordable Care Act, which requires that preventive health care services be provided to all women employees without co-pay, was developed to support women's equality and liberty, not as an act of religious bigotry. Nonetheless, Hobby Lobby and other corporations argued that their religious freedom was violated by being required to do what all other employers must do, namely comply with the neutral insurance laws that are supposed to apply to all employers and employees equally.

Hobby Lobby lost its case under the [First Amendment](#), which holds that every citizen must obey neutral laws. But RFRA handed it a victory. When the Supreme Court upheld Hobby Lobby's RFRA claim against the contraceptive mandate in [Burwell v. Hobby Lobby](#), it [confirmed](#) that RFRA protects a right to discriminate against women rather than a right to religious freedom. There is no First Amendment right to refuse to follow laws you don't like, especially laws protecting women's rights. Federal RFRA protects gender discrimination, not religious freedom.



RFRA Protests in Indianapolis on March 28, 2015 Credit: Justin Eagan [CC BY-SA 3.0 (<http://creativecommons.org/licenses/by-sa/3.0>)], via Wikimedia Commons

## State RFRAs

States have the power to impose RFRAs on themselves, even though *City of Boerne* did not allow Congress to impose a RFRA on the states. Emboldened by *Hobby Lobby*, state opponents of LGBT rights have been doing their best to use the federal RFRA model to discriminate on the basis of sexual orientation. The LGBT opponents have urged the passage of state RFRAs that are even more religion-protective than the federal RFRA. Federal RFRA applies only to government actions, and *Hobby Lobby* involved only closely-held corporations. The proposed state RFRAs apply to lawsuits involving private parties and to all corporations, thus expanding the reach of potential discrimination beyond what federal RFRA allows.

The new state RFRAs in [Indiana](#) and [Arkansas](#) were not the product of a sudden rise in religious bigotry and discrimination that needed to be addressed by state legislators. As with Congress's RFRA, there was no legislative record of religious discrimination. Instead, the RFRAs were a reaction to the Supreme Court's invalidation of federal laws discriminating against same-sex marriage in *United States v. Windsor* (2013) and the Court's possible future invalidation of all same-sex marriage bans this Term in *Obergefell v. Hodges*.

Fear of same-sex marriage is the only reason for the new RFRAs' existence. Some Christian business owners—[bakers](#), [dressmakers](#), and [photographers](#), for example,—believe that religious freedom entitles them to chase LGBT customers from their stores because they believe same-sex marriage is immoral. These owners sound exactly like the proprietors of the “[whites-only](#)” [lunch counters](#) who thought they were entitled to refuse African American customers.

Wedding businesses are using RFRA language to make it sound as if they are good-hearted defenders of religious freedom. They are not. In the United States, there is no constitutional right of religious freedom to disobey the laws and to discriminate against one's fellow citizens. Through RFRAs, the LGBT rights opponents seek a legal tool for discrimination.

If the states were really concerned about discrimination, they would be much better served by passing statutes banning sexual orientation discrimination. Fewer than [half the states](#) have anti-sexual orientation discrimination statutes. Anti-discrimination statutes protecting women and LGBTs should be much preferred to pro-discrimination statutes like the RFRAs.

## Unintended Consequences

RFRAs aren't harmless statutes that positively protect religious freedom. They have [unintended consequences](#).

For example, when the Department of Labor [investigated](#) a contractor for possible child labor law violations, Vernon Steed, a witness from the Fundamentalist Church of Jesus Christ of Latter Day Saints, [successfully argued](#) that RFRA protected his religious freedom not to testify about church affairs—even though child safety was at stake. [Military judges continue to debate](#) whether they should uphold the Muslim [Guantanamo](#) prisoners' RFRA argument that their religion does not allow them to be accompanied to hearings by female prison guards.

The list of possible lawsuits is endless. Despite their rights-protecting names, RFRA's are dangerous statutes that authorize discrimination instead of protecting liberty.

[Please read our comments policy before commenting.](#)

*Note: This article gives the views of the author, and not the position of USApp— American Politics and Policy, nor of the London School of Economics.*

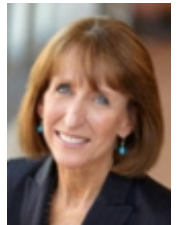
Shortened URL for this post: <http://bit.ly/1yosdFI>

---

## About the author

**Leslie C. Griffin** – *University of Nevada*

[Leslie C. Griffin](#) is the William S. Boyd Professor of law at the University of Nevada, Las Vegas, Boyd School of Law. She is author of *Law and Religion: Cases and Materials* as well as numerous articles and book chapters about constitutional law, law and religion, politics and ethics. She blogs about religious liberty at Hamilton and Griffin on Rights, [www.hamilton-griffin.com](http://www.hamilton-griffin.com).



- CC BY-NC-ND 3.0 2014 LSE USAPP