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by ANDREW C. MCCARTHY *April 4, 2015 4:00 AM*

The federal Restoration of Freedom Act was an unfortunate response to a Supreme Court decision.

Back when there was more wisdom in the practice of law, meaning back when the profession had more humility, there developed a sage doctrine: Courts should resist ordering "specific performance" when a personal service contract is breached. The idea is that when a provider, especially one of small scale, breaks an express or implied agreement to provide a service to a consumer, it is not sensible for a judge to direct that the agreement be carried out as written.

The doctrine leapt to mind during this week of manufactured controversy over the state of Indiana's near-verbatim replication of the

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federal Religious Freedom Restoration Act (RFRA).

The "no specific performance" doctrine recognizes that, while our law is capable of many things, it cannot force people to get along. To try to do so, especially with people embroiled in a bitter disagreement, would more likely lead to additional strife, not calm resolution. What's more, there are other, better ways to make a wronged party whole.

In most instances, for example, a court can order money damages. That leads us to another quaint bit of prudence: If there are no concrete damages, there is no legal case. Of course, the lack of a clear, measurable harm that can be compensated by money does not necessarily translate into the absence of a wrong. But not all wrongs are fit for judicial resolution. Some are too trivial; others implicate social relations that, in a free society, are best left to political processes or market forces.

Why does a family pizzeria's business have to ignite a civil-rights firestorm? Why can't it be treated just like any other run-of-the-mill breach of a caterer's agreement to supply food? Indeed, in the Indiana dispute over the pizzeria's theoretical objection to catering a same-sex wedding, we don't even have an agreement except to the extent one is implied by the mere fact that the business is open to the public. And there are plainly no damages: Even

if this pizzeria does not wish to cater a same-sex wedding (assuming it were ever asked to do so), there must be scores if not hundreds of pizzerias that would welcome not only the business but the favorable publicity for taking the gig.

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If this were actually about pizza, a demand for specific performance would be frivolous. We have a controversy in Indiana, and now nationally, only because liberal fascists want a controversy. They want what a free society should never grant: License to use the law not as a protective shield but an offensive sword for extorting compliance with their own intolerant agenda — something that, as Tammy Bruce explains with moving eloquence, ought to be especially offensive to gay people who've felt the sting of condemnation over being different.

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I've felt different these last several days too, at least in conservative circles. RFRA is evidently our new favorite law, but I've never liked it. And

ADVANTAGES OF BEING ADVANTAGED

count me unimpressed by this week's ubiquitous Republican talking-point: the fact that RFRA was signed with great fanfare by a liberal Democrat, Bill Clinton, after being crafted by that "lion of the left" Ted Kennedy and his then cub, Chuck Schumer. That's supposed to be the showstopper: You've been told by the media that the Indiana law is a classic exhibition of bigotry by right-wing religious zealots, so naturally you're dumbfounded to learn that it is, just about word-for-word, the same law enacted 22 years ago by progressive icons.

It should be no surprise, though. RFRA was an unfortunate reaction, by an odd combination of conservative religious leaders and opportunistic statists, to a 1990 Supreme Court decision, *Employment Division v. Smith*, written by Justice Antonin Scalia, a brilliant conservative jurist (and, for what it's worth in this context, a devout Catholic). The statute's enactment was triggered in 1993, when the Court reaffirmed *Smith* in *Church of Lukumi Babalu Aye v. City of Hialeah*. These cases stand for the principle that the First Amendment does not provide a religion-based exemption from compliance with a law of general application that is religion-neutral — i.e., a law that applies to everyone equally and does not discriminate against adherents of a particular religion.

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Admittedly, I do not come at this issue as a pizza business with Christian scruples against the concept of gay marriage. Back in 1993, I was a terrorism prosecutor whose jihadist defendants wanted the First Amendment construed as immunity for their scripturally inspired incitements and attacks. Nonetheless, the proposition outlined by Justice Scalia is sound: If you hold that a person can flout the laws that apply to all of us because of his subjective religious beliefs, he becomes a law unto himself. That is an invitation to anarchy.

Moreover, RFRA does not provide a principled, knowable carapace of religious freedom. Rather, it transfers the power to decide what religious convictions will be respected from where it belongs, in the hands of free people through their elected representatives, to where it should not reside, in the whims of politically unaccountable judges whose sensibilities often differ widely from the community's sensibilities.

When someone claims a law burdens religion, RFRA imposes a test: The government must prove that the law serves a compelling public purpose and represents the least burdensome manner of doing so. There is no reason to believe judges are better equipped to perform that balancing than legislatures; and there is nothing about a law degree that makes a judge a

suitable arbiter of which tenets of your faith outweigh the government's interests, and which do not. Furthermore, if a legislature strikes the wrong balance, its statute can be amended with comparative ease; reversing a court's error in defining the parameters of a constitutional right is extraordinarily difficult.

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Messrs. Clinton, Kennedy, Schumer, et al., knew what they were doing: Progressives like transferring decisions to the courts, which are more likely to share their predilections than the public. They also knew their movement. As long as the RFRA was being invoked on behalf of radicals in an effort to buck the law, it would be dandy. But the moment it was relied on by traditionalists to safeguard their Judeo-Christian values, the left's shock troops would brand the traditionalists as "haters" and no one would care to remember that Democrats wrote the law.

Trumped up controversies like the one in Indiana are needlessly divisive. There would be many more Americans supportive of, or at least resigned to, the concept of gay marriage if it were just a matter of live-and-let-live tolerance. Instead, the Left's agitators have made it the leading edge in a campaign to suppress traditional religious belief. They demand not toleration but compulsory approbation — with dissenters stigmatized and subjected to the

prohibitive expense of legal fees.

We should not allow the law to be used this way. The law is supposed to be a reflection of our social consensus, not a cudgel to impose an unpopular outcome that breeds resentment.

There is fast-growing public support for the proposition that gay marriage should be permitted, but nothing close to a consensus that it must be endorsed and facilitated by people who have reservations based on millennia of teaching that, up until about five minutes ago, was society's nigh-unanimous consensus. And the vast majority of those people who still hold the view recently held by a vast majority honor the human dignity of gay people; they are perfectly willing to serve them as customers, just as they serve everyone else. Their objection is to the *forced participation in a marriage ceremony*, because they — again, based on those millennia of teaching — understand marriage as a solemn religious institution whose underpinnings gay marriage contradicts.

There is more than enough social space in America, and way more than enough pizza, to let both sides of this issue have their way. What happened to celebrating diversity? We used to understand that our law isn't capable of making people coexist cooperatively — only peacefully.

— Andrew C. McCarthy is a policy fellow at the National Review Institute. His latest book is Faithless Execution: Building the Political Case for Obama's Impeachment.