

FACTS & OPINIONS

On Public Interest Issues

Quotes

“I cannot and will not recant anything, for to go against conscience is neither right nor safe. Here I stand. I can do no other.” — Martin Luther, German Theologian, Leader of the Protestant Reformation, October 31, 1517

“Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports... And let us with caution indulge the supposition that morality can be maintained without religion.... reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.”
— President George Washington, Farewell Address, 1796

“- What is a Socialist?
- That’s when all are equal and all have property in common, there are no marriages, and everyone has any religion and laws he likes best.”
— *The Brothers Karamazov*, Fyodor Dostoyevsky, Russian author (1821-1881)

The Battle of Indiana and the Promise of Battles to Come

By David French, *Imprimis*, Hillsdale College

The dust is clearing, the people of Indiana are out from under the white-hot glare of the national media, and both sides are taking stock. Who won the Battle of Indiana? Who lost? What’s next for religious liberty in America?

While conservative pessimists looked at Indiana, watched its politicians immediately compromise, and saw defeat, a closer look shows something else: a cultural stalemate. Nobody truly won in Indiana. From the grassroots to the intellectual elite, conservatives are girding themselves for the long war.

Four truths are emerging: First, the battle is not between gay rights and religious liberty — although religious liberty is certainly at stake — but between the sexual revolution and Christianity itself. This means that Christians are faced not with allegedly “minor” or “insignificant” theological

changes to gain leftist acceptance, but with wholesale changes to the historical doctrines of the church.

Second, not a single orthodox denomination is making or even contemplating such changes. Tens of millions of Americans will remain — indefinitely — opposed to the continued expansion of the sexual revolution.

Third, rather than going quietly, cultural conservatism is showing increasing strength at the grassroots — opposing leftist campaigns at the ground level, bypassing politics to support those most embattled by radical hate campaigns.



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And fourth, the conservative grassroots and conservative public intellectuals are united — from Ross Douthat at his lonely perch at the *New York Times* to the *National Review* and the *Weekly Standard*, from *First Things* to the Ethics and Religious Liberty Commission of the Southern Baptist Convention, there is no wavering among America's most influential conservative writers and thinkers.

If the cultural Left is hoping to dominate the culture — it is overreaching, extending beyond the limits of its power. It is exposing itself to embarrassing cultural defeats and succeeding mainly in hardening conservative resolve. In the fight over religious freedom, the Left will not prevail.

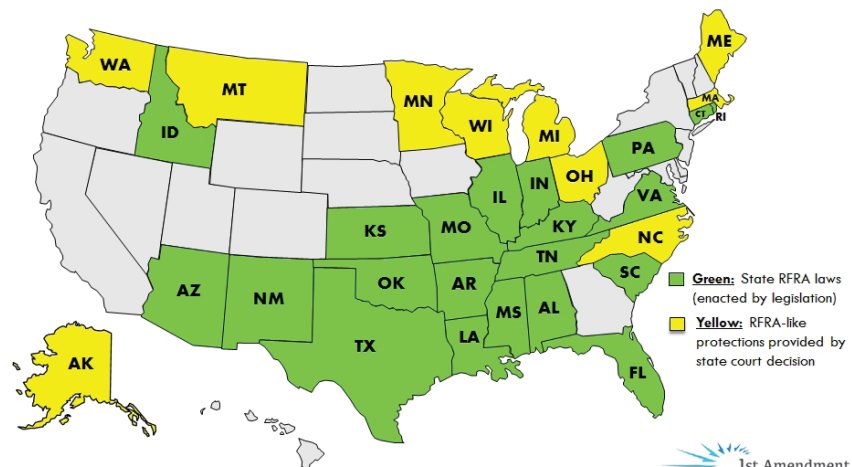
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First, a bit of history. The battle of Indiana began when Indiana's legislature passed the Religious Freedom Restoration Act (RFRA), an act that provided, simply enough, that any state action that substantially burdens

religious exercise is lawful only if it is the least restrictive means of furthering a compelling governmental interest. In other words — when you can, you should avoid compelling people to act against their consciences.

This legal standard was common enough. It's the same general legal standard in the federal RFRA and RFRAs in 19 other states. There were, however, two differences from the norm. First, the statute explicitly allowed for-profit businesses to assert religious liberty rights (something the Supreme Court allowed Hobby Lobby to do in its challenge to the Obamacare contraception mandate). Second, the statute allowed a religious individual to utilize RFRA in defense against a lawsuit brought by a private party. If a person believed that his religious liberty could be substantially burdened by a court order resulting from private litigation, that person could assert that the court order would be lawful only if it met the RFRA test.

State Religious Freedom Restoration Acts (RFRA)



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Neither provision is particularly groundbreaking. The Supreme Court allowed Hobby Lobby and others to assert RFRA claims. Multiple federal circuits provide for the use of federal RFRA as a defense against a private right of action.

RFRA and the compelling interest standard have long existed in American law. The compelling interest standard was not something invented by Congress when it passed RFRA in 1993. RFRA was passed to restore religious liberty to the same level of protection it received prior to the Supreme Court's controversial decision in *Employment Division v. Smith* (1990), which rejected decades of precedent to hold essentially that religious liberty claims are inferior to rules of general applicability. *Smith* caused a bipartisan outcry, and Congress moved quickly to overturn the decision, passing RFRA with overwhelming majorities. President Clinton proudly signed it into law.

Conservatives saw *Smith* as a threat to the constitutional order, a dangerous derogation of our nation's "first liberty." Liberals saw *Smith* as a threat to smaller, minority religions. The dispute in the case arose over the use of peyote in Native American



religious rituals. There was no sense at the time that RFRA was a threat to civil liberties or civil rights. Indeed, RFRA was seen as necessary — again, by liberals and conservatives alike — to *protect* civil rights.

There was good reason for this belief. For decades, the compelling interest standard in religious liberty claims had existed side by side with the explosive growth of nondiscrimination laws, and religious liberty claims had never been successfully used to strike down nondiscrimination statutes. In fact, in *Newman v. Piggie Park Enterprises* (1968), the pre-*Smith* Supreme Court called a business owner's argument that he had a free exercise right to deny service to black customers "patently frivolous."

This comes as no surprise to religious liberty attorneys. It's a historical fact that religious liberty claims did not protect or legally enable Jim Crow. The Civil Rights Acts were passed and prospered under the pre-*Smith* religious liberty regime. Regardless, the sexual revolution marches on and the Left's definition of "civil rights" has expanded — not only does it prohibit class-based discrimination in places of public accommodation, it now requires conscription into the revolution itself.

It's no longer enough for employees to have access to low-cost contraceptives and abortifacients. Employers must provide them free of charge. It's no longer enough for bakers, florists, and photographers to provide service to everyone. They must participate in and

facilitate any kind of action or ceremony their customers desire — no matter how offensive to their beliefs — so long as those ceremonies further the ideals of the sexual revolutionaries.

So, when Indiana passed its RFRA, the bipartisan consensus of years past was long gone. The mainstream media exploded. Twitter exploded. Major corporations like Apple and Cummins — and Wal-Mart — condemned RFRA. The NCAA followed suit. Deep-blue city governments, including those whose states had RFRA laws on the books for years, banned official travel to Indiana.

When reporters went searching for an Indiana business — anywhere in the state — that wouldn't cater a gay wedding, it found Memories Pizza, a small-town pizza joint that had never been asked to cater a gay wedding, but whose owner answered that if it was, it couldn't participate. An avalanche of hate, including alleged death threats, caused the owners temporarily to close.

Critics disingenuously raised the specter of Jim Crow, recalled memories of the old South, and claimed that gay people were about to be sent to the back of the bus. Facts didn't matter. Legal precedents didn't matter. All that mattered was the thought that someone, somewhere, might try to raise RFRA as a defense.

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Under pressure Indiana modified its law to state that it could not authorize a provider to deny services to anyone on the basis of multiple protected criteria, including race, sex, and sexual orientation. The “Indiana fix” soon led to a different “Arkansas fix.” Both fixes mollified the media and most gay rights activists, infuriated many conservatives — who saw them as cowardly — and placated the major corporations. The battle was over.

The battle may be over, but the war rages. While many conservatives saw the quick capitulations by Indiana and Arkansas and despaired (just as leftist activists exulted), the reality was more complex and the leftist victory far less clear. In reality, the battle lines are drawn, and there is little or no reason to believe that either side will triumph anytime soon.

* * *

To understand the future, let’s explain the four truths of the modern culture war.

First, the conflict is not between gay rights and religious liberty, but between the sexual revolution and Christianity. The fury of the gay rights movement was so palpable during the Indiana controversy that it’s easy to forget the Hobby Lobby RFRA case, that had nothing to do with gay rights. Abortion battles continue to rage, sometimes with an intensity that matches or exceeds the arguments over gay

marriage. (The Wendy Davis filibuster in Texas.) And over the horizon are new battles over the very definition of what it means to be male or female. Simply put, the sexual revolution questions *everything* about sexual morality and identity — demanding changes in every aspect of sexual morality and, consequently, orthodox Christian theology.

The gay rights movement is inseparable from the sexual revolution, and the sexual revolution is inseparable from gay rights. The principles of radical sexual autonomy, freedom from any form of moral judgment, and government support to ameliorate the consequences are present in the fights over abortion, gay rights, and now transgender issues. Those who surrender on one issue tend to surrender on others as well. With similar moral principles implicated, similar moral outcomes result.

Second, not a single major orthodox Christian denomination is reconsidering its stance on sexual revolution issues.

While the media reports on the “progress” of the gay rights movement in mainline denominations — for example, the Presbyterian Church (USA) — this movement is irrelevant to the much larger Evangelical and orthodox Catholic communities. None of the large orthodox Protestant denominations are

changing their stance on human sexuality. Neither is the Catholic Church. Neither are the various branches of Orthodoxy. And these institutions collectively dwarf the liberal, mainline churches when it comes to churchgoing adherents.

The rapid advances of the gay rights movement and its allied sexual revolutionaries — coming as they do largely from liberal and less churchgoing segments of the population — will soon stagnate as they face the challenge of persuading tens of millions of Bible-believing Americans that there is nothing wrong with same-sex marriage. Given the absence of scriptural support, the gay rights movement will face many of the same challenges as the abortion lobby, and will likely meet with a similar lack of success.

Browbeating Christians into submission is not a new tactic, and it has largely failed in the abortion arena — despite the existence of legal doctrines that are dramatically skewed against the pro-life movement. Yet the pro-life movement is as strong as it has ever been, and political outcomes are starting to reflect that strength, with ever-stronger pro-life laws.

Third, the religious liberty movement is showing increasing, not decreasing, cultural strength. While it is easy to grow discouraged in the face of the wave of threats directed at Memories Pizza,

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Republican politicians' continued timidity on "culture war" issues, and the climate of intolerance that exists on campuses and in the mainstream media, the Left's failures are starting to outnumber its successes.

Consider the following:

- Cultural conservatives answered the Left's attempted Chick-fil-A boycott with a "buycott" that swamped stores, even causing some to run out of food for customers eager to show their support for a beloved restaurant, owned by people who share their moral principles.
- Leftist pressure against Hobby Lobby failed. Customers were either supportive of the owners or indifferent, and boycotts had no effect on Hobby Lobby's bottom line or its willingness to fight. Not only did Hobby Lobby win its Supreme Court case, its owners are set to open a massive new Museum of the Bible near the National Mall.
- Efforts to drive Phil Robertson — of *Duck Dynasty* fame — off the air after controversial comments failed, giving cultural conservatives a victory in a medium (cable television) seen as uniformly hostile to orthodox Christianity. While Robertson has remained a polarizing figure, there has been no serious repeat effort to remove him from the air.
- In Houston, leftist government officials were forced to backtrack within days after issuing subpoenas requiring area pastors to turn over the contents of their sermons. The outcry was so swift and so great that the city capitulated even before a judge could rule.
- Even in Indiana, as politicians caved to corporate and media pressure, the grassroots response in support of Memories Pizza soon swamped the Left. A GoFundMe account raised more than \$800,000 in small donations in days (including over \$200,000 in one day), putting the pizza restaurant in a far superior financial position than it had enjoyed before. The message was clear: Cultural conservatives are not, in fact, isolated but have the support of millions

of Americans who oppose leftist bullying.

While the Left has proven adept at using social media, so have cultural conservatives. And now when the Left overreaches, there is often an opposite (and greater) reaction.

Fourth, conservative public intellectuals are holding firm in defense of life and religious freedom.

Throughout the Battle of Indiana, there was unity among leading conservative thinkers. The consensus was clear even among those who support gay marriage: The Left had become illiberal and dangerous. A pluralistic nation must have room for cultural dissenters, and the desire to shame and blacklist individuals and destroy businesses had to be opposed, and opposed vigorously.

In fact, one was more likely to read about discomfort on the Left at some of the mob tactics than about discomfort among conservatives. This unanimity left Republican politicians relatively isolated, in the familiar position of abandoning their culturally conservative constituents to do the bidding of their corporate supporters.

Yet even this is likely to change. Most politicians are cultural followers, not cultural leaders, and if the base and the intellectual core of the conservative movement remain united, Republican politicians will eventually bend. The

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abortion example is instructive. The pro-life movement has been gathering strength for more than a generation, but only in recent years have politicians taken truly meaningful action. The pro-abortion Guttmacher Institute estimates that there were more pro-life bills passed in the last three years than in the previous decade.

* * *

The combination of high stakes — with the sexual revolution confronting Christianity itself — and the continued resolve of Christian churches, church members, and conservative public intellectuals, means that the Battle of Indiana is not only indecisive in the larger struggle, it will soon be forgotten as new battles inevitably erupt. These battles will stop only if Christians abandon their historic faith on a national scale or if the Left decides that it is content to “live and let live” — to share the public square with people who express moral disagreement and

who work to promote a cultural return to traditional morality. For the time being, however, neither side looks ready to yield. So conservatives should be prepared for more — more battles over weddings, more campus intolerance, more boycotts, more buycotts, and more cultural anger and division.

This is not the future that anyone desires, but for Christians, it is a far better future than one of isolation, censorship, and marginalization. For Christianity, this is nothing new. Cultural rejection is a scriptural promise and a longtime historical fact. As Christians in the Middle East and Africa face hideous violence, American Christians shouldn't feel overwhelmed in the face of persecution. Christianity has survived lions. It is surviving beheadings. It can certainly withstand Twitter.

When it comes to the core of their faith, millions of Christians will echo, by word and deed, the words of Martin Luther: Here we stand. We can do no other.

David French is a writer for National Review and National Review Online. A graduate of Harvard Law School, he is former president of the Foundation for Individual Rights in Education and former senior counsel for the American Center for Law and Justice. He is the author of the New York Times bestselling Rise of ISIS: A Threat We Can't Ignore. Reprinted by permission from Imprimis, a publication of Hillsdale College, April 2015, Volume 44, Number 4.



A Liberal Calls out Intolerant Leftists Who Smother Free Speech on Campus By Adam Kissel

When Columbia University's Multicultural Affairs Advisory Board complained a few weeks ago that “many texts in the Western canon [contain] triggering and offensive material that marginalizes student identities,” I thought of China, whose education minister vowed to ban “textbooks promoting Western values” earlier this year.

The rise of intolerance on campus and beyond makes a new book by columnist and television commentator Kirsten Powers a must-read. If you do not yet believe that American

higher education is smothered in intolerance of diverse ideas, read *The Silencing: How the Left is Killing Free Speech*. Nations like China might be expected to shut down a free exchange of ideas, but American students, professors, and university presidents all too frequently try to marginalize and ban disfavored words, values, and ideas.

People might be surprised to learn how many colleges have fundamentally restricted free inquiry. It has become so pervasive that honest liberals like Powers are writing books

that alert us to the danger. *The Silencing* provides dozens and dozens of examples of “illiberal” leftists who use silencing as a preferred tactic.

I know how intolerant colleges and universities can be because I worked on several of the cases in Powers' book when I was defense director and vice president at the Foundation for Individual Rights in Education (FIRE). Take, for instance, the professor who wielded a *box cutter* against a “free speech wall” at Sam Houston State because someone had written

a political statement against President Obama. The police told the *students* that they were responsible for provoking the violence, so they had to censor the wall or take it down.

Or Yale University's ban of a quotation from F. Scott Fitzgerald's *This Side of Paradise* because there is no room at Yale — at Yale — for the words, “I think of all Harvard men as sissies, like I used to be.”

These cases are from the chapter “Intolerance 101.” They get worse in “Intolerance 201,” which reports that entire Christian student organizations have been banned for requiring that their leaders believe in the groups' mission. This is not the real reason the groups have been banned, according to FIRE president Greg Lukianoff. He has seen “college after college... specifically angry at evangelical groups for their position on gay rights” look for ways to keep such groups off campus.

Most colleges do *promise* and *claim* to encourage toleration. Yale alerts students that in 1975, Yale's Woodward Report explained that intellectual advances require freedom to “think the unthinkable, discuss the unmentionable, and challenge the unchallengeable.” The exercise of this freedom is inherently unsettling.

Nevertheless, Yale College tells its freshmen, “When you encounter people who think differently than you do, you will be expected to honor their free expression, even when what they have to say seems wrong or offensive to you.”

The principle is wonderful: free expression deserves honor. Like Yale, most private colleges promise to tolerate the widest diversity of ideas. They offer the same level of speech protection that the First Amendment requires of public colleges. They have faculty handbooks that promise academic freedom. They claim to be in the business of advancing knowledge, correcting rather than reproducing the superstitions, taboos, errors, and biases of the campus culture.

Yet, time after time, when the most intolerant sector of the campus rises as a mob to declare “no room on our campus” for ideas or for speakers they see as representing unacceptable minority views, administrators lose their courage. Many faculty members also lose their courage and remain silent.

How many faculty members have stood up for free speech at Yale over the past ten years? How many defended the infamous “Mohammed cartoons” after Yale University Press banned them from a scholarly book about the reaction to those very cartoons? I can't recall a single one.

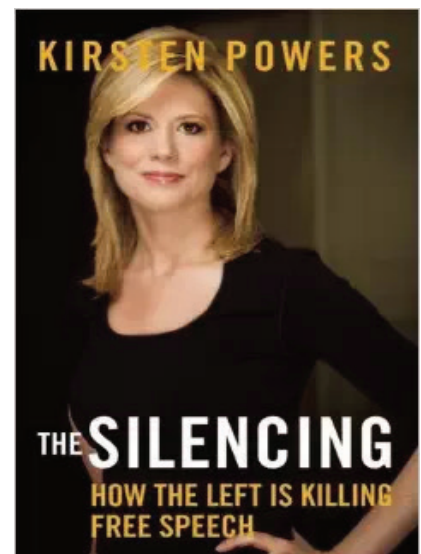
From their silent role models, students learn that silencing works. The mob learns that colleges like Brandeis, which disinvited women's rights activist Ayaan Hirsi Ali from campus, will succumb to criticism rather than defend freedom. Powers provocatively and correctly calls what Brandeis did “appeasement.”

Powers makes it clear that such intolerance comes not from the

liberal left but from the “illiberal left.” Whether the illiberal left is declaring an idea so dangerous it should be banned, sniffing off or laughing off an idea so as to discredit it, or playing identity politics and delegitimizing a speaker no matter how good her argument, faculty members too often keep their heads down and let these tactics win.

From their role models on the faculty, students learn to be activists themselves. They see that it's easy to win points and purify the public square by whining. They use long words and long sentences to describe how oppressed they are, but they are whining all the same.

From their activist role models and their silent ones, students conclude that silencing tactics are the right ones for winning an argument. Rather than developing their minds, college turns them into uncritical, intolerant advocates of illiberal politics. Students learn to pose as fragile water lilies while they loudly cry out for “protection” from those who dare to disagree with them.



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Accordingly, Powers argues, students fail to learn how to win arguments through dialogue and persuasion. They miss out on the valuable experience of vigorous argument that shakes your assumptions, but develop the bad intellectual habit of crying to authorities when they hear (or merely fear) opposing points of view.

In contrast, higher education can enable a community of wisdom-seekers to deeply challenge one another. The community value in academia is toleration en route to knowledge. There must be room for every idea, even the “unthinkable” and “unmentionable.”

Powers puts it this way: “Higher education should provide an environment to test new ideas, debate theories, encounter challenging information, and figure out what one believes.

Campuses should be places where students [and faculty members, administrators, and visitors] are able to make mistakes without fear of retribution.”

Unfortunately, few professors are willing to stand up for toleration and the highest ideals of university life — a life they have chosen for themselves. To defend this life, far more of them need to acknowledge that intolerance is interfering with the fundamental ideals both of the university and civil society, as intolerance spreads.

Kirsten Powers, speaking as a journalist on the liberal left, is a voice of reason for persuading illiberal journalists to check their biases and take a more tolerant approach. Her book’s exposure of similar biases in higher education should motivate liberal professors to promote

toleration and free expression on campus for the sake of principle, intellectual progress, and the education of the next generation.

I encourage faculty members and university administrators who share our higher vision of a university, and who want to promote it on your campus, to contact me. We can change the culture of silencing by demonstrating the virtue of tolerant engagement.

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