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Colloquium

Religious Liberty After *Hobby Lobby*: A Panel of the 2014 Federalist Society National Lawyers Convention

WILLIAM L. SAUNDERS, HON. DIARMUID F. O'SCANNLAIN, KIM COLBY, WILLIAM P. MARSHALL & ROBIN FRETWELL WILSON

The following remarks were given on November 14, 2014 during a panel of the 2014 Federalist Society National Lawyers Convention. The focus of the discussion revolved around the recent Supreme Court decision in Burwell v. Hobby Lobby. *The discussion included such topics as the impact that* Hobby Lobby *will have on future interpretations of the Religious Freedom Restoration Act and the constitutional implications of the decision. The panel also sought to answer questions such as: Do RFRA's protections apply to publicly held corporations? What import does* Hobby Lobby *hold for religiously based exemptions outside of the Affordable Care Act context? Recordings of the conference can be found at http://www.fed-soc.org/multimedia/detail/religious-liberty-after-hobby-lobby-event-video. These remarks have been edited by the panelists for clarity.*

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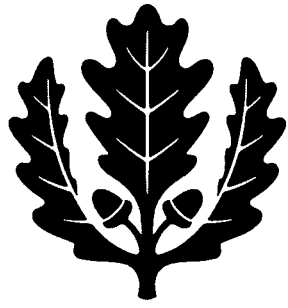

Religious Liberty After *Hobby Lobby*: A Panel of the 2014 Federalist Society National Lawyers Convention

WILLIAM L. SAUNDERS,[*]
HON. DIARMUID F. O'SCANNLAIN,[**]
KIM COLBY,[***] WILLIAM P. MARSHALL[****]
& ROBIN FRETWELL WILSON[*****]

WILLIAM L. SAUNDERS: Good afternoon. We're going to start, everybody. As I say, good afternoon. My name is Bill Saunders. I am Senior Counsel at Americans United for Life, and also happy to be the Chairman of the Religious Liberties Practice Group, which is sponsoring this luncheon, and we are very happy you could all attend. We have a couple breakout rooms of people who couldn't get in here, so we welcome those folks too.

My only purpose here is to invite you to participate in the Religious Liberties Practice Group. You can see myself or Dean Reuter. If you want to be involved or be involved in the Practice Group leadership, we would love to have you.

To moderate this session today, I just want to introduce a great friend of the Federalist Society, Judge Diarmuid O'Scannlain from the Ninth Circuit. He'll take it over from here.

[Applause.]

JUDGE DIARMUID F. O'SCANNLAIN: Thank you. Thank you very much. Welcome to this afternoon's panel discussion. I want to thank the Federalist Society first for inviting me to moderate this distinguished panel and for choosing a timely and important topic: Religious Liberty after *Hobby Lobby*.

As you are all well aware, last Term the Supreme Court decided two major cases touching on religious liberty. After Congress passed the

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[*] Senior Vice President and Senior Counsel, Americans United for Life; and Chairman, Religious Liberties Practice Group.

[**] U.S. Court of Appeals for the 9th Circuit.

[***] Senior Counsel, Christian Legal Society.

[****] William Rand Kenan Jr. Distinguished Professor of Law, University of North Carolina School of Law.

[*****] Roger and Stephany Joslin Professor of Law and Director, Program in Family Law and Policy, University of Illinois College of Law.

Patient Protection and Affordable Care Act in 2010, the Department of Health and Human Services promulgated regulations requiring employers to provide their employees with group insurance coverage for certain contraception methods approved by the Food and Drug Administration.

In *Burwell v. Hobby Lobby*, the Court was asked to determine whether the Religious Freedom Restoration Act, or RFRA as we affectionately call it, created an exemption to this contraception mandate for closely held corporations whose owners religiously objected to providing coverage for four specific methods. The Court concluded that RFRA does require such an exemption, at least for abortifacients. In so holding, the Court explicitly recognized that RFRA was designed to provide very broad protection for religious liberty.

The Supreme Court issued a similarly important decision regarding religious freedom in *Town of Greece v. Galloway*. There, the Court determined that the town of Greece's practice of opening its monthly board meetings with prayer did not violate the Establishment Clause. The Court observed that such practices had been a part of our nation's rich heritage from its earliest days and that these traditions do not run afoul of the Constitution's prohibition on religious establishments.

These cases raise important questions regarding the religious freedom jurisprudence of the Roberts Court. To what extent are the religious liberty protections of RFRA coextensive with the Free Exercise Clause? To what extent do they diverge from constitutional protections? In light of the Court's expansive interpretation of RFRA's protections, does the Court's *Hobby Lobby* ruling in any way implicate Establishment Clause limits, and what nuances might have been added to the government's compelling interest and narrow tailoring requirements?

In addition to raising important constitutional questions, the *Hobby Lobby* ruling also implicates our nation's long tradition of accommodating religion. The circuits are currently split on the question of whether RFRA entitles non-profit organizations to additional accommodation from the Health and Human Services contraceptive mandate beyond the administration's self-certification requirement. This leads us to ask, Does *Hobby Lobby* shed any light on how courts should evaluate such claims? More generally, what import does the *Hobby Lobby* decision hold for religious-based exemptions outside of the Affordable Care Act context?

Hobby Lobby's broad interpretation of RFRA also raises questions as to future applications of the statute. Do RFRA's protections apply to publicly held corporations? Where else might the Court's broad interpretation of RFRA have ramifications? Because *Hobby Lobby* was such a controversial case, will post-decision pushback influence future litigation?

Well, to help us sort through these questions, we have an exceptionally capable panel assembled here today. I will introduce each briefly and direct

your attention to his or her biography on the website for further details. We will hear from each panelist for opening remarks of 10 minutes each followed by discussion among the panel members themselves, and finally, we will take your questions from the floor.

Kim Colby has worked for Christian Legal Society's Center for Law and Religious Freedom since graduating from Harvard Law School in 1981. Ms. Colby assisted Congress' passage of the Equal Access Act, which protects the right of secondary school students to meet for prayer and bible study on campus. Her remarks will focus on legislative and public pushback to the *Hobby Lobby* decision.

William Marshall is the Kenan Professor of Law at the University of North Carolina. Professor Marshall was Deputy White House Counsel and Deputy Assistant to the President of the United States during the Clinton administration. He has published extensively on freedom of religion, and his comments will consider the problems associated with religious exemptions more generally.

Robin Wilson is the Roger and Stephany Joslin Professor of Law at the University of Illinois College of Law, a member of the American Law Institute. Professor Wilson is a highly regarded and extensively published family law scholar. She will address the legitimacy of arguments raised in opposition to religious accommodation.

With that, we will begin with Ms. Colby.

[Applause.]

KIM COLBY: Thank you, Judge, for that kind introduction, and thank you to the Federalist Society for inviting me to be on this panel with Professor Marshall and Professor Wilson.

The *Hobby Lobby* decision is a tremendous victory for religious liberty, and there is much to celebrate in Justice Alito's masterful opinion. I will note several aspects of the *Hobby Lobby* decision that deserve to be celebrated, but I also want to address why the *Hobby Lobby* celebration has been muted, even somber. Why no victory dance or even the hint of an end zone celebration after such a victory?

Hobby Lobby was the third time that the Religious Freedom Restoration Act, or RFRA, had been before the Supreme Court. RFRA was enacted, of course, in 1993 in response to the Court's 1990 decision in *Employment Division v. Smith*, which dealt a serious setback to religious liberty. *Smith* held that if a law was neutral and generally applicable, the government no longer had to show a compelling justification to override a citizen's religious convictions, but instead could simply require the citizen to violate those convictions no matter how easily the government could accommodate religious conscience.

In response to *Smith*, a coalition of 68 diverse religious and civil liberties organizations urged Congress to restore substantive protection for

religious liberty. Senator Kennedy and Senator Hatch led the bipartisan effort to pass RFRA in the Senate, 97-3, and the House passed RFRA by unanimous voice vote. President Clinton signed RFRA into law on November 16th, 1993.

The first time RFRA was before the Court in 1997 in *City of Boerne v. Flores*, the Court held that Congress lacked the authority to apply RFRA's compelling interest standard to state and local governments. But RFRA's second trip to the Court was a unanimous victory. In 2006, the Court heard *Gonzales v. O Centro* in which a small religious sect invoked RFRA to protect its right to drink tea made from *hoasca* plant leaves, a drug prohibited under federal drug laws. The Court held that the federal government may not substantially burden a citizen's religious practice unless the government demonstrates that an exemption for that particular individual would actually prevent the government from achieving its compelling interest.

Now, for anyone reading the *hoasca* leaves of *O Centro*, the Court's broad interpretation of RFRA in its third case, *Hobby Lobby*, was entirely predictable. In *O Centro*, the Court had acknowledged that the uniform enforcement of the nation's drug laws was certainly a compelling interest, but the government failed to show that allowing an exemption for the sacramental use of *hoasca* tea would prevent sufficiently uniform enforcement.

Hobby Lobby, of course, involved a different set of drugs and a different set of claimed compelling interests, but the analysis in *O Centro*, when applied to the *Hobby Lobby* facts, to me seems to make the outcome inevitable. In *Hobby Lobby*, the government might have a compelling interest in providing all women with cost-free access to all FDA-approved contraceptives, but the government failed to demonstrate that it could not achieve this interest if a relatively few closely held businesses did not provide contraceptive coverage that violated their religious consciences.

While there are many noteworthy aspects of the *Hobby Lobby* decision, I will quickly touch on four. First, the Court held that for-profit corporations are included within RFRA's protections, and in reaching that conclusion, the Court said something very significant. It ruled that its interpretation of RFRA is not cabined by the Court's constitutional jurisprudence for the free exercise clause. RFRA stands on its own two feet to provide comprehensive religious liberty protection.

Second, the Court rejected the government's attenuation argument. That's the argument that *Hobby Lobby* and its owners were not complicit in providing drugs that violated their religious convictions because the employees decided whether or not to purchase the drugs. In language that will become a classic quote, the Court responded, and I'm quoting, "Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in

effect tell the plaintiffs that their beliefs are flawed," end quote. This rejection of the attenuation argument will be most helpful to the religious non-profits' challenges to the mandate that are beginning to work their way through the courts of appeals, as we have already seen in Judge Pryor's concurrence in the 11th Circuit's grant of an injunction pending appeal in the *Eternal Word Television Network* case.

Third, the Court correctly moved consideration of a third-party burden from substantial burden analysis to the compelling interest/least restrictive means analysis.

And fourth, the Court found that the government had failed, of course, the least restrictive means analysis because the government had created an alternative mechanism for the religious non-profits in the so-called accommodation. The Court did not rule whether the accommodation would satisfy RFRA, but simply ruled that it demonstrated that a less restrictive means of achieving the government's interest exists.

The Court also noted that another less restrictive means exists: The government could assume the cost of providing the drugs for any women unable to obtain them because of their employers' religious objections.

Again, the Court's reasoning on this point should help religious non-profits and the courts below because the government there has given a complete exemption from the mandate to some religious non-profits, that is, houses of worship, while withholding the exemption from other religious non-profits, such as Wheaton College and Notre Dame, who have the same religious objections to the same drugs.

Finally, at oral argument in March, Justice Kennedy posed a critical question to the Solicitor General, and here I am paraphrasing: What stops HHS from mandating that for-profit businesses include abortion in their insurance coverage? The Solicitor General had no satisfactory response. But in August, California mandated coverage of surgical abortions in all insurance plans with no religious or conscience exemptions. Washington State in the spring passed a bill—specifically, the House of Washington State's legislature passed a bill—requiring such coverage, although it died in the Senate. The District of Columbia seems likely to vote for a similar requirement next week. Justice Kennedy's question was prophetic.

So I turn now to why religious liberty supporters have been so somber after such a significant win. It is because throughout 2014, we have watched attacks on RFRA, and on religious liberty itself, gain new intensity. In the spring, state RFRAs were vilified in Arizona, Georgia, and Mississippi. In all three states, for the first time, we saw opposition to state RFRAs coming from big business, which is a particularly troubling development.

At the federal level, immediately after *Hobby Lobby*, Senator Murray introduced a bill to overturn the decision. The Protect Women's Health from Corporate Interference Act of 2014 would require all employers to

cover any drug or service mandated by federal or state regulation. In the findings section of the bill, it asserts that it is intended to carry out RFRA's intent, but two paragraphs later in the operative section, it specifies that Public Law 103-141 is inapplicable—and, of course, Public Law 103-141 is RFRA.

On July 17th, the bill failed on a cloture vote of 56 to 43. Senator Reid voted in the minority for procedural reasons, so he could bring it back up at a later time. So the vote really was 57 Senators against religious liberty and 42 Senators in favor of religious liberty. Now, it's true the bill would never have passed the House, but for 57 Senators to vote to limit RFRA's protections shows the erosion of bipartisan support for religious liberty that is perhaps the severest current threat.

For two decades, RFRA has stood as the preeminent federal safeguard of all Americans' religious liberty. It ensures a level playing field for Americans of all faiths by placing minority faiths on an equal footing with majority faiths. Without RFRA, a faith would need to seek a religious exemption every time Congress considered a law that might unintentionally infringe on its religious practices. And as we have seen with the HHS mandate itself, RFRA protects against administrative abuses as well.

As Chief Justice Roberts wrote in *O Centro*—and this is one of my favorite quotes—RFRA rebuffs "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."

RFRA maximizes social stability in a religiously diverse society and minimizes the likelihood of political divisions along religious lines. RFRA embodies the pluralistic belief that we best protect our own religious liberty by protecting everyone's religious liberty. Essentially, RFRA makes religious liberty the default position in any conflict between religious conscience and federal regulation, and that's as it should be for a country founded on religious liberty.

[Applause.]

JUDGE DIARMUID F. O'SCANNLAIN: Professor Marshall.

PROFESSOR WILLIAM P. MARSHALL: Hi, and thanks so much for the invitation to be on this terrific panel. Thank you, Judge O'Scannlain. Thank you, Professor Wilson. Thank you, Kim Colby.

I always love speaking before the Federalist Society. I'm not exactly a typical speaker here; after all, I worked in the Clinton Administration, but one thing about the Federalist Society that I can say with all seriousness is this organization is really committed to hearing the other side.

[Applause.]

And I appreciate that. I grew up in a family where my dad—and I've

said this before when I've spoken at Federalist Society events. I grew up in a family where my dad was a conservative Republican and my mom was a liberal Democrat. They let me take any position I wanted as long as I could defend it. Now, it turned out I later learned that my mom was the smarter person, but—

[Laughter.]

But I'm actually not sure how they would come down on the issues today because I don't really think that a lot of these religion issues boil down to left/right or liberal/conservative as much as is commonly believed.

For example, University of Virginia Law Professor Douglas Laycock was the chief lawyer for Hobby Lobby seeking an exemption from the Affordable Care Act, but he was also the chief lawyer arguing that the prayer that was upheld in *Town of Greece v. Galloway* was unconstitutional. And RFRA itself, one might remember, was passed with strong support from both the left and the right. What I think this shows is that one's commitments to religion and religious freedom can come out in different ways, depending on the context, and that the divides among us are really not as clear as people like to think.

As for *Hobby Lobby*, Kim Colby said it best. The basic question in *Hobby Lobby* was whether or not we were going to return to the pre-*Smith* regime cases or whether RFRA was going to be interpreted as giving more power to free exercise than has existed under the pre-*Smith* cases.

When *Smith* was decided, it elicited a strong negative reaction from almost all quarters. There were a few people, however, who said that *Smith* was right. I was one of them. And I was criticized at that time from the left so when last year I spoke to the American Constitution Society on *Hobby Lobby*, and I was able to say that, "This is what you all asked for, so I am not sure you should start complaining about a law like RFRA now." So when I come before you to criticize RFRA and defend *Smith*, this is not something new.

The reason why I supported *Smith* then and continue to do so now is that Justice Scalia's opinion showed why the compelling interest test couldn't work for any length of time. That had been the experience under the free exercise clause pre-*Smith*, it had been the experience under RFRA pre-*Hobby Lobby*, and my prediction is that it will again be the experience under RFRA after the uproar over the *Hobby Lobby* decision subsides. The reason is that it is simply too difficult to keep up the level of protection of religion provided in *Hobby Lobby* for any length of time just because of the dynamics that are involved with enforcing it.

One quick aside before proceeding. The suggestion that laws should have exemptions for religious objectors obviously has some intuitive appeal. But the question of whether an exemption is good or not depends a great deal upon context. One group, for example, that opposed the passage of RFRA was the Catholic Conference. And the reason why they did so

was that they were concerned that if *Roe* was going to be overturned, they did not want there to be religious exceptions to any anti-abortion requirements. So the question of whether, as a normative matter, a law should have an exemption for religion, necessarily will depend on what that law is. But RFRA applies to every law, not just certain laws.

In any event, in evaluating religious exemptions and the compelling interest test—it is worth noting that in the years prior to *Smith*, religious objectors had won in only five cases before the United States Supreme Court. And four of them were literally the same case: unemployment insurance compensation and whether or not you could exclude somebody for religious beliefs if you allowed other claimants to be able to get an exception to available-for-work requirements. The fifth was *Wisconsin v. Yoder*, which was the Amish case providing an exception to compulsory education. And if you read that opinion, that opinion is much more about the Amish than it is about general principles of religious liberty.

Yet at the same time pre-*Smith*, the Court turned back every other free exercise claim brought before it under the compelling interest test. Justice Scalia explained why this was so in the *Smith* opinion. He noted, first of all, that granting an exemption is not a normal form of relief. An exemption means just certain people are excluded from the law. Normally, however, when you apply the compelling interest test in a speech or other constitutional case, the entire law is struck down. But the application of the compelling interest test in the free exercise context means it's just the religious adherents who are protected. So it creates a result that runs against the general principle that the law should apply to everybody, and Justice Scalia was concerned about that.

He was also concerned that any claim can be characterized as religious. And lower court cases bore that out. One of my favorite cases, for example, involved an objector who claimed that he had a religious belief that he should be able to dress as a chicken when going into court.

[Laughter.]

Maybe we can question the legitmacy of that particular claim, but that leads to some other issues. The fact is that virtually anything—what you eat, what you wear, where you sleep, everything you do—can be characterized as religiously-based. And if you take a look at the range of religious beliefs in the country, it's an amazing amount of beliefs that exist. And what it means that every single kind of activity can be characterized as religious is that virtually every law can be subject to a RFRA challenge, and Justice Scalia was concerned about that as well.

And he was also concerned about how do you evaluate the legitimacy of a religious claim? How do you evaluate whether or not dressing as a chicken is a real religious belief or not? Do you define religion, what's legitimate religion and what isn't? Well, that creates Establishment Clause issues. How do you measure the burden on a religious belief? Justice Alito,

in *Hobby Lobby*, said you need to defer to the claimant and not independently investigate burdens, but that pretty much means that anything can be a burden if the objector articulates it as such.

What about measuring sincerity? Yes, the Court, in a case called *United States v. Ballard*, said you can inquire into sincerity, but how do you do that? By cross-examination? By something that looks like an inquisition? *Ballard* also indicated that you cannot judge whether somebody is sincere by the believability of the assertion, which led Justice Jackson in that case to say: How can you do that? How can you not judge sincerity without judging believability? It is an impossible inquiry.

And finally, what Justice Scalia argued in *Smith* was that if you apply the compelling interest test legitimately across the board, you'll weaken the compelling interest test in other areas because it's just too broad of an application. That's why he rejected the claim in *Smith*. And he did so even though the specific religious claim in *Smith* was very powerful and very sympathetic.

In *Smith*, the question was whether Native Americans had a free exercise right to ingest peyote. In that case, there was a lot of evidence indicating that peyote ingestion was a major part of the Native American religion, not just their religious practice, but also who they were as a culture. Justice Scalia rejected that claim, and he was criticized heavily for it. And there were only a few who stood up and said that maybe he was right. Maybe the rule of law cannot accept a constitutional theory in which, in effect, every challenged statute is presumptively unconstitutional.

And in fact, if taken seriously, the compelling interest test would be particularly powerful in the religious exemption area because the state generally has a less-powerful interest when applying a law to just a few people (religious objectors) than it does when it applies to the entire class of people covered by the challenged statute. So the compelling interest test means that the claimant is generally going to win, and Justice Scalia was concerned about the harm that would cause to legitimate government interests if that were to be the case.

Now, as Kim Colby noted, in the *Hobby Lobby* case there were four distinct issues. Kim did a terrific job in discussing their specifics and I do not intend to revisit that discussion here. But I think, actually, if you took a fair look at both Justice Ginsberg and Justice Alito's opinions, that both make credible arguments on all four issues: does RFRA apply to for-profit corporations, whether you should defer to the claimant self-characterization of burden, was there a compelling interest (actually Justice Alito actually didn't reach that issue)—and did the government have a lesser restrictive alternative?

But what Justice Alito's opinion clearly does is interpret RFRA more vibrantly than Justice Ginsberg does. But what I think is going to happen as a result of Justice Alito's opinion, paradoxically, is that by providing

more vibrancy to the religious claim it's going to lead to judges retreating from that commitment faster. Regardless of how you deal with the issue, for-profit corporations are going to have enormous incentives to seek competitive advantage by characterizing the claim as religious. And if *Hobby Lobby* is taken seriously, they're going to be likely to win. And that dynamic is likely going to cause judicial resistance.

Consider a pre-*Smith* claim that challenged the minimum-wage requirements of the Fair Labor Standards Act. If a claimant wins on that, they're going to have a competitive advantage over their competitors because they will have lower labor costs. And if we take the argument seriously that treating religion and non-religion alike alone isn't "compelling" enough to sustain the government's purpose, how is the claimant not going to prevail? It's not. And so businesses are soon going to discover an easy route to competitive advantage—file a RFRA claim.

And by the way, this is not just a problem about insincere claims.

I want you to consider for a minute—an earlier pre-*Smith* case did this as well—how does one determine when a belief is religious and when it is philosophical? There was a person who was objecting to working in an armaments factory in a case called *Thomas v. Review Board*, and the record on this was really unclear. He was a Jehovah's Witness but there was nothing in the Jehovah's Witness tenets that said it's improper to work in an armaments factory. But he claimed his belief was religious and the Court took him at his word. Yet, if you read the record, it's not really clear what he believed—not only to the trier of fact but also to himself.

And my guess is a lot of us, if we thought about it, might be unclear about the derivation of particular beliefs we have. Is our belief against certain regulation based on our religious objection to it, is it based on a non-religious moral objection, or is it really based on the fact that we like *laissez-faire*? There is a case from the Sixth Circuit in which the claimant seems a little bit unclear as to whether or not he's objecting to the contraceptive mandate because of the religious part of it or because he just doesn't like government regulation.

Justice Alito's opinion, as noted above, suggests we shouldn't second-guess the religious claimant about his own views. Yet if we follow Alito's direction it's going to lead to a lot of claims being characterized as religious, which is going to create pressure to deny those claims, which is exactly what happened pre-*Smith*. It also happened, by the way, in the cases after RFRA was enacted and in the state RFRAs. If you look at the record in the lower courts, it's a pretty lukewarm enforcement of the free exercise compelling interest test.

So I think where *Hobby Lobby* will ultimately lead us to is a softening of RFRA. In fact, it may very well be that *Hobby Lobby* and the other Affordable Act cases will end up being the high-water mark in RFRA protection.

This is not to suggest that all statutory religious exemptions written are problematic. I think some exemptions to specific statutes make sense. But when you have a right to religious exemption that is so expansive that it could affect every possible law imaginable, that can be easy to raise and difficult to disprove by the government, it's going to lead to a failing jurisprudence. It's what's happened before. My guess is it's going to happen again. Thank you very much.

[Applause.]

JUDGE DIARMUID F. O'SCANNLAIN: Professor Wilson.

PROFESSOR ROBIN FRETWELL WILSON:[†] Thank you. I want to thank Bill Marshall and Kim Colby for that excellent leaping-off point, and the judge for the order of the line-up, because I'm going to pick right back up where Bill left off. He talked about the risk of withdrawing from the RFRA commitment, from generalized religious liberty protections. I want to talk about withdrawal from other religious liberty protections, namely the specific exemptions that Bill described.

As Kim explained, we have seen two big wins with respect to religious objections to the mandate—not only the result in *Hobby Lobby*, which pulls Hobby Lobby and closely held corporations into the accommodations that the Obama administration extended to religious nonprofits, but those accommodations themselves. The administration's concessions for religious nonprofits were really remarkable: when a religious nonprofit cannot pay for the controversial coverage consistent with their faith, the regulations dragoon an insurer to provide the controversial coverage. Women receive the drugs at no cost and the objecting employer does not pay. Instead, random insurers, which elicit little sympathy from Americans, are made to pay for the drug or absorb the cost.

Despite these remarkable concessions, the highest percent of Americans in a decade say that religion's influence is waning, according to a Pew study. So the question is, well, how can that actually be? And I think the answer lies in the blowback from *Hobby Lobby*. For example, the L.A. Times immediately lamented that employers would now be able to assert a religious right to deny health benefits or to discriminate in miscellaneous ways, and called it a dangerous precedent.

But more important than editorial pages, compromises around civil rights and religious liberty that had been reached suddenly cratered. For example, the Federal Employment Non-Discrimination Act had finally passed the Senate after a decade of being considered, helped in part by a modest religious liberty exemption. Nine days after *Hobby Lobby*, five

[†] Figures that accompanied Professor Wilson's live remarks are reproduced in the Appendix.

prominent groups that had supported ENDA, including gay rights groups, withdrew their support, saying that concession would no longer be palatable.

We also have seen statewide efforts to balance religious liberty with civil rights crater, too. For example, Michigan's proposed sexual orientation non-discrimination law stalled on the question of religious liberty protections. Groups claimed those protections insert a "license to discriminate," even though every state that bans discrimination on the basis of sexual orientation, all twenty-one, include some concessions for religious organizations in them.

The keyed-up reaction to *Hobby Lobby* conflates two very different kinds of religious liberty protections: the generalized protections that Kim and Bill have discussed, like RFRA and RLUIPA, but also specific, tailored exemptions contained in specific laws. These specific exemptions protect a particular group or belief—that is somehow addressed in a particular statute that extends the underlying new civil right. The classic example would be Title VII's provision that allows religious employers to give preference to co-religionists in hiring. Essentially, Title VII is exempting religious organizations from a duty not to discriminate on the basis of religion itself.

Post-*Hobby Lobby*, taking a page from Justice Scalia in *Smith*, some contend that all exemptions—whether specific or general—place believers "above the law." Critics now say that all religious liberty protections, whether they are generalized like RFRA or specific, are "get out of jail free cards" entitling the "protected" party to take away the rights of others. All exemptions are bad, they say, because they risk the possibility of unfair surprise, they harm third parties, and they hamper social change.

Now, these two kinds of exemptions serve similar ends, it's true, but they get there by very different means. The fact that general and specific exemptions use different methods means that they implicate these concerns or narratives differently. So how are these kinds of protections different? General protections like RFRA and RLUIPA test the government-imposed burden on religion against the necessity, as Kim explained, just as it happened in *Hobby Lobby*. By design, RFRA adjusts burdens on religious believers after the fact.

Professor Doug Laycock observes that only a law written as a standard can protect Mormons, Catholics, Jehovah's Witnesses, and Santerias in all their varied practices. Only a law written with the flexibility of a standard can provide essential protection to religious minorities, as Kim explained, who sometimes have practices that are too small in scope, number of people, too unpopular, or just misunderstood to warrant protection in the political process.

To work, RFRA almost necessarily has to work ex-post to test whether a law or a regulation like the mandate in fact goes too far. But it is exactly

this after-the-fact determination that makes some Americans feel like there's one set of rules for one set of people—religious believers—and another one for everybody else.

By contrast, specific exemptions respond to predictable, foreseeable collisions between the demands of a new social order—think sexual orientation non-discrimination bans—and the demands of faith in the same legislation that recognizes the new underlying civil right. Because they reach a limited universe of situations, specific exemptions are actually written as specific rules, not standards, so they necessarily are more predictable.

By their very nature, specific exemptions do not allow a religious believer, I think, to be above the law.

In fact, the law is simply making clear the legislature's desire never to reach particular religious acts or entities in the first place. So, for example, when Congress chose to exempt the hiring of co-religionists from the general ban on religious discrimination in hiring in Title VII, it was essentially choosing not to extend the duty not to discriminate to these organizations on a single basis, religion. This is no more malign than when Congress exempts small employers from the reach of new legislation, something Congress routinely does, as Justice Ginsberg notes in her dissent.

These exemptions choose not to extend the duty not to discriminate on any basis to all employers under a certain threshold, and we know that those exemptions are in civil rights laws all over the place. So when a legislature chooses to exempt a religious belief or a practice from the scope of a new law, it is no more placing those religious believers above the law than when the legislature chooses to drop a small employer from coverage.

Other post-*Hobby Lobby* concerns also do not have the same force when leveled at specific exemptions, rather than generalized protections. Consider the question of unfair surprise. Specific exemptions are clear on the face of the law, making it really hard to say, "geez, I got cold-clocked by that exemption" after the fact.

Moreover, thoughtful legislators can actually pair a right to the religious objection with some notice beforehand. It could be notice to one's employees that you're not going to do a particular thing, for example that Hobby Lobby will not pay for certain contraceptives. Or it could be notice to the public that, as a Catholic hospital, the hospital will not offer abortions. Legislators can, and do, build notice into exemptions.

Advance notice actually reduces third-party harms because it allows the public to know when a provider is unwilling to assist, permitting the public to appropriately seek services elsewhere. Likewise, thoughtful legislators can condition the right to object on hardship to the public itself, which sounds like a thinning out of religious liberty, but it solves most collisions most of the time. That's exactly what Louisiana did, for

example, in this piece of legislation. Finally, specific exemptions do not necessarily impede social progress, despite the blowback from *Hobby Lobby*. Two specific examples illustrate this point.

A study of the number of abortion providers immediately after Congress enacted the healthcare conscience clause back in 1973, the Church Amendment, just after *Roe v. Wade* found that the number of physicians performing abortions in their offices leapt.‡

Why? Because the Church Amendment protected conscience in both directions. So doctors who thought, for moral or religious reasons, "I can't do an abortion,"could step off from that, but doctors who felt morally or religiously compelled to perform abortions have the liberty to do so. Neither doctor could be discriminated against through the loss of staff privileges from the local hospital.

Now, lots of reproductive rights groups take aim at conscience protections today to say there is too much protection for abortion objectors, but they forget that the Church Amendment led proximately to a 50 percent increase in the number of physicians offering abortions in their offices. Physician-based abortions remain an important, if small, part of women's access today. Some in this audience probably wouldn't see that as "social progress," but the important point here is that religious objections did not impede women's access despite the claims routinely made to that effect.

Deciding how a religious liberty protection will affect access is very difficult because religious objectors may take what I call the "nuclear option." In other words, in the mandate context, if Notre Dame objects to the mandate, and cannot secure a concession that permits it to comply with the legal mandate to provide or facilitate access to contested coverage, Notre Dame ultimately can choose to flush all of their employees onto the exchanges as a way to solve the collision between faith and the law. It is terrible public policy to encourage religious objectors to solve these collisions this way.

Many people believe that the crushing penalties under the ACA would stop the religious objector in their tracks, but this is not so. In Notre Dame's case, the penalty for not providing all healthcare coverage to one's employees would be about $32 million a year. In a recent paper I talk about the fact that Notre Dame would actually come out ahead financially if it did that, making it even dumber public policy.

After *Hobby Lobby*, the significant concessions to religious non-profits are now extended to closely held corporations.

The same concerns about access animated the original abortion conscience clause too, the Church Amendment. A lengthy discussion in the Congressional Record concerned whether Catholic hospitals, in fact, will

‡ *See infra* Appendix fig.1.

close their OB/GYN units if they're not exempted, and they exempted. This example shows that sometimes when we protect religious conscience we get more access, not less, and it's wise for us to remember that.

The second example of social progress concerns same-sex marriage, which I'll just talk about very briefly.

In the same-sex marriage context, the states that have voluntarily embraced same-sex marriage have built in religious liberty protections, as Figure 2[#] shows. That doesn't happen in the courts, as you know. They do, on this first column, build them in for the clergy, which don't really need them because of the First Amendment. Maybe we could agree on that.

More importantly, these states insulated religious non-profits from a duty to facilitate a marriage. An example of this would be hosting a wedding reception or opening their marriage retreat to a marriage that they cannot actually recognize consistent with their faith.

The third and fourth columns in Figure 2 contain the most important protections: covered entities cannot be sued or punished by the government for not getting on board with its new idea of marriage. Now, outside of that core of protections, some states extend protections for things like religious social services agencies, married student housing, the Knights of Columbus, and so on and so forth, but others do not.

As Figure 3[‖] illustrates, we can think of these protections as moving out from the most private religious face, starting with the sanctuary, to services and entities at the interface with society, like religiously affiliated social services agencies.

In the fourth ring, only one voluntary same-sex marriage state, Delaware, has been willing to exempt state employees. In Delaware, judges and justices of the peace are exempt from the duty to solemnize any marriage. I actually believe that Delaware got it wrong in not qualifying the right to object by hardship to same-sex couples. Now, exemptions allow these bills to succeed when they would not have, at least not at that moment in time. Maryland provides a good case example.

As Figure 4[Δ] graphically shows, Maryland tried for years to pass same-sex marriage with what I call "fake religious liberty protections," limited only to the clergy. Then the legislature got serious and added meaningful, if imperfect, religious liberty protections for religious non-profits. That bill ultimately failed, in part because of concerns about the scope of protections for those who adhere to a traditional view of marriage. The following year then-Governor Martin O'Malley enlarged the protections to include, in particular, adoption and foster care services, and the legislation succeeded.

[#] *See infra* Appendix fig.2.

[‖] *See infra* Appendix fig.3.

[Δ] *See infra* Appendix fig.4.

Maryland House Speaker Bush, in interviews with my co-author, Anthony Kreis, said he knows for a fact that the enlarged protections mattered to particular votes in Maryland and to the bill's ultimate success.

Just as religious liberty protections mattered in Maryland, in numerous states that voluntarily embraced same-sex marriage, there were exceedingly close vote counts—even though a majority of the public supported same-sex marriage. In those states, religious liberty protections facilitated social change, they did not hamper it.

The live-and-let-live approach resonates with lots of Americans, as you can see from the poll in Figure 5.◊

As the second set of bars show, people can get behind the idea of same-sex marriage if it has modest religious liberty protections, and they have a much tougher time doing so if it does not. My point here is not to say what we should think about these exemptions necessarily. It is to say that an exemption need not threaten a larger social goal. In fact, it can support it.

Ultimately, I believe there is room both for generalized and specific protections, but whatever one thinks about RFRA after *Hobby Lobby*, it would be a shame to take down specific exemptions, too, if we find that we cannot live with *Hobby Lobby*. Thank you.

[Applause.]

JUDGE DIARMUID F. O'SCANNLAIN: Professor Wilson mentioned same-sex marriage. Do either of the other panelists who have not mentioned that want to say anything? All right. Any questions within the panel, any comments?

Kim, you may have some comments based on what your colleagues have said after you.

KIM COLBY: Do I need to turn this on?

JUDGE DIARMUID F. O'SCANNLAIN: I think you're on.

KIM COLBY: Okay. Bill has thought about this for a long time and written, and I just practice. So I don't have as much on the record about this. But it seems to me that we need both legislative and judicial exemptions to really protect religious liberty. The fact that *Smith* certainly gave its blessing to the practice of legislators making exemptions for religion is good, and is often a point that, at least in the beginning, we missed that that was a great thing that *Smith* left in place.

But I think legislative exemptions are great, but they don't go far

◊ *See infra* Appendix fig.5.

enough because, as the HHS mandate controversy has shown, we don't know what's going to happen after the legislation has been enacted and goes to the regulatory agencies, and also, even when the legislation is being enacted. Again, the HHS mandate controversy around the Affordable Care Act gives us a lot of examples.

So, you know, we have the famous quote from the Speaker of the House that Congress would have to pass the ACA before they would know what was in it. And that is, of course, true not only of the Affordable Care Act, but often what ends up becoming law has been put into the bill at the very last minute. The bill that the hearings are held on changes dramatically between the time of the hearings and the passage.

And so it's really, in many ways, not practical to expect religious faiths to have a lobbyist up on the Hill who's keeping track of everything that could possibly implicate their faith. And of course it's particularly unfair to unpopular faiths, to small faiths or to faiths that, as part of their religious beliefs, have a problem with interacting with government. So there are a lot of reasons why relying solely on legislative exemptions is not enough.

I don't know exactly where Bill comes down on this, but I was reading an article by Chip Lupu after *Hobby Lobby* where essentially the argument is, well, judicial exemptions are just so messy. But I'd rather take my chances with messy judicial exemptions than have no religious liberty available to me through those exemptions.

What RFRA does, besides help us in court when we go to litigation, what it really does—and I think this is part of what Chief Justice Roberts was referring to in the quote I read from *O Centro*—is it gives you leverage not only with legislators, but also with administrators who have to start explaining long before litigation, hopefully, why they have a compelling interest and why another means of achieving that interest doesn't work. That leverage is something that *Smith* took away that's particularly important that judicial exemptions put back into place.

JUDGE DIARMUID F. O'SCANNLAIN: Bill, a response?

PROFESSOR WILLIAM P. MARSHALL: I think Kim's observation is right. Minority religions have a difficult time protecting themselves in legislatures. That was one of the many reasons why, when *Smith* was decided, people criticized it. They thought it would have an inordinate effect on minority religions because majority legislatures would not have much regard for minority religion practices.

But minority religions did not have such a great record in front of courts either. I mean, when you come in with a belief that the judge cannot understand because it's way outside of the judge's frame of reference, they tend not to take those claims seriously. So claims that may have been quite sincere are rejected by courts that are not familiar with religious traditions.

Court are more likely to recognize claims that are very similar to what exists in majority religious traditions.

Now, all of that doesn't necessarily end the question, but then when you answer that problem by saying—and literally this is what the *Hobby Lobby* opinion does—"you can define the scope of your own constitutional right," it becomes a serious problem. Any person can seek an exemption to accommodate her religious beliefs, no matter how attenuated the law may be to her core religious principles. And she can further self-characterize any law as impermissibly burdening those beliefs.

And, at one level, I certainly understand that type of deference makes sense. I do not have the right or the omniscience to tell somebody what her religious beliefs are. I have no right or ability to tell them if the burden they feel is too attenuated. They might think it is central to their religious tradition and, presumably, under any scheme of religious liberty, it is their beliefs that count. But the result of all this is that the government cannot contest the legitimacy of any claims—all threshold barriers to mounting a claim for an exemption are effectively eliminated.

So if the government is to prevail, it will have to come up with a compelling interest in every case. That alone would be difficult given how hard it is generally to establish a compelling state interest. But add to this, as discussed above, that it is particularly difficult to establish a compelling interest against limited groups of believers, the end result is that government is going to lose and keep losing. And eventually courts are going to get tired of that. They're going to see what they might think are simply strategic claims brought under the name of religion by people who want to be excused from laws they do not like. So the courts will start rejecting those claims. That's what happened before. That's why the courts rejected the attack on the Fair Labor Standards Act that I discussed earlier. That's why they rejected attacks on state sales taxes. It's too tempting for those who want to be excused from laws they do not like to make these kinds of claims.

And, to go to the larger picture for a moment, that is what makes the religious exemption issue so problematic. Every aspect of the inquiry—what's a compelling interest, what's a burden—are so easily manipulated that you cannot provide a coherent jurisprudence. And that is why Justice Ginsberg's opinion saying let's restore the pre-*Smith* jurisprudence doesn't make any sense either because that pre-*Smith* jurisprudence didn't make any sense.

One year before *Yoder* the Court rejected *Gillette*, which was a claim for conscientious objection for people who objected to unjust wars—i.e. Catholics—and not all wars. The Court did not take that religious claim seriously. The next year in *Yoder* they did. There was no consistent pattern. So I just don't think it's going to work. It hasn't worked before; it's not going to work going forward.

JUDGE DIARMUID F. O'SCANNLAIN: At this time we're going to open the floor to questions. I'm having some difficultly because of that light, but I do see an empty mic here and I believe—is there another mic in the back? Please line up behind one or the other mics and we will take your questions in the order in which you appear. Please give us your name and your hometown or organization.

BRIAN WALSH: Brian Walsh, the Ethics & Public Policy Center. One thing, there's sort of a narrative that I'm hearing that the anti-exemptions mantra that we're hearing now has come out of *Hobby Lobby*. I can tell you from being involved in about three dozen state legislative battles that the anti-exemption mantra predates *Hobby Lobby* by quite a bit. And I know Kim's been involved in some of those as well.

As one example, of course, Hawaii, when it had its same-sex marriage bill, came with no exemptions whatsoever, for clergy or anyone else, the first bill that went through. New Jersey as well had a court decision that was made. So I'm asking basically for a response from Professor Marshall and then also from Professor Wilson, from Robin. Also New Jersey, the state court decision overturned its same-sex marriage law. There was a piece of enabling legislation on the floor that would have had protections just for clergy, and the proponents of same-sex marriage said no, we want no exemptions whatsoever.

In addition, there have been dozens and dozens of battles at the municipal level where non-discrimination ordinances have been put in place in Ohio, in Idaho, and other jurisdictions that have no religious liberty exemptions, and they also carry criminal penalties. So this predates—

JUDGE DIARMUID F. O'SCANNLAIN: And your question is? [Laughter.]

BRIAN WALSH: So my question is, first of all, what makes you think that *Hobby Lobby* is the issue? And second is, why is the parade of horribles argument relevant at this point? We've had RFRA for 20 years. Most of what you've said is going to happen has not happened for 20 years. We've had a very limited amount of litigation. Most of the instances, as you said, the plaintiffs end up losing. Why is that a bad standard if we've lived under it for 20 years and really haven't seen the things occur? By the way, the same arguments that have been made against RFRA today—

JUDGE DIARMUID F. O'SCANNLAIN: All right.

BRIAN WALSH: —were made 300 years ago.

JUDGE DIARMUID F. O'SCANNLAIN: I think we understand your question. Does anyone want to try that first, and then any other members of the panel?

PROFESSOR WILLIAM P. MARSHALL: I'll let Robin respond to the exemption issue.

The point that I was making is RFRA—I mean, what *Hobby Lobby* does is enforce RFRA vibrantly. It hasn't been enforced vibrantly up until now. It may go back to a court of—a lukewarm state of enforcement afterwards. I mean, that was the point I was making. In the Free Exercise Clause, same thing.

Yoder and *Sherbert* sounded like it was a strong protection, but it turned out not to be. And the only point that I'm making is that it's likely to return to a relatively lukewarm level. *Hobby Lobby* provides a higher degree of protection than I think we're seeing in the lower courts under RFRA and also saw in the lower courts and in the Supreme Court before *Smith*. And the reasons for it were capably announced by Justice Scalia's opinion in *Smith*. He described exactly why the law had evolved the way it had.

JUDGE DIARMUID F. O'SCANNLAIN: Kim, did you want to—

KIM COLBY: Sure. So I appreciate the point that Brian is making. I agree, and Robin is much more the expert on these laws than I am, but the exemptions generally really were about enacting same-sex marriage. And is the best exemption we're going to get really that a minister doesn't have to perform the ceremony or it doesn't have to happen in a church? That's, you know, barely the tip of the iceberg of the issues that are going to arise for religious liberty from this dramatic change in the definition of marriage. So that's very troubling.

The thing that I really appreciate about what Brian's organization does is they are trying to build bipartisan religious liberty caucuses in the state legislatures. And I'll just go back to a theme I sounded. We need bipartisanship on this issue if it's at all possible. I don't know if it is.

One of the really troubling things that we saw and maybe is blamed on *Hobby Lobby*—I don't think so, but the timing might say it is—is that, as Robin referred to, ENDA passed the Democratic-controlled Senate literally a year ago today with some significant religious liberty protections. Religious organizations were exempt, and then also there was additional language that they were protected from conditions or withdrawals of their tax-exempt status and other things as well. It was a strong piece.

The President, in May or June, said he was considering the executive

order to protect LGBT rights in hiring by federal contractors, and that was issued in July, of course. And he basically said, I'm open to hearing whether it should have religious liberty protection. A number of us asked for the same religious liberty protection that had passed the Democratic-controlled Senate just a few months before and those protections were not included. So it's a very troubling time where we're seeing, I think, a hardening against religious liberty exemptions within the Democratic Party that's very troubling for the future of religious liberty.

JUDGE DIARMUID F. O'SCANNLAIN: Robin, did you have a comment?

PROFESSOR ROBIN FRETWELL WILSON: Just a quick one. Brian, I agree with you, obviously. There has been a slow ratcheting up. And you are absolutely right. In December 2013, Lambda Legal pulled their support of proposed marriage equality legislation introduced after Governor Christie vetoed a law with a modest religious exemption in it. I think a lot of people would like to have that exemption back now, but gay rights groups have determined that they do not need to bargain.

And that's actually one of the risks. If you don't bargain and embrace voluntary same-sex marriage, you risk a judicial decision recognizing marriage equality without any religious liberty protections. I call these states "black hole" states because no one gets protections. You're not going to get any new safeguards out of the judiciary. It's not their job, really. To get religious liberty protections, you're going to have to get them from the legislature. In New Jersey's case, I think people probably now regret that they did not keep the marriage equality law that came packaged with some protections.

That said, there has obviously been a ratcheting up of distrust post-*Hobby Lobby* to push back against all religious protections, Brian. I mean, even in my original remarks I was going to call it a collective freak-out, but then I thought that's not dignified.

[Laughter.]

But that is what happened, right? We have had a collective freak-out about the cost of protecting religion. And I think one of the reasons—I haven't thought this through, maybe Bill or Kim has a better sense of it, but I think one of the reasons is this isn't some cute little religion like the Amish. It isn't the state coming down on the Amish too hard by saying they can't have gray, rather than orange safety triangles on their buggies. We're now talking about majoritarian beliefs getting a "pass" in a way that has a ripple effect for many, many people.

In other words, after *Hobby Lobby* we have seen a new awareness of the calibrating between religious liberty and the social state, where before people weren't as aware of the reality that protecting religion sometimes

carries a cost. So that's the acceleration after *Hobby Lobby*, that religious liberty protections somehow got personal. It wasn't marginal and minoritarian anymore, it's majoritarian, and I think that's where some of the problem lies.

JUDGE DIARMUID F. O'SCANNLAIN: Next question from the floor.

JOHN EASTMAN: Hi. John Eastman, Chapman Law School and the Center for Constitutional Jurisprudence. I always like to kind of get down to the foundational principles on these things, and there are a couple of aspects of this case that forces us to confront a couple of things.

The Bill of Rights is always phrased in recognizing pre-existing fundamental rights, not giving them. And the fact that we had to rely on RFRA at all means that these religious freedoms exist only by the grace of government. That seems odd to me. I know how we get there, but it ought to force us to re-confront, I think, *Employment Division v. Smith.*

The second piece of this is this is not a use of a religious exemption to prevent somebody from causing harm to others. This is taking money from A, giving to B; robbing Peter to pay Paula, if you will. And this underlying violation of that basic principle of the social compact, you know, all of the reaction to the case, it just ignores what's really going on here. Is there any way to re-engage those foundational conversations maybe by way of this case or others similar to it? In other words, should we have a freedom restoration act, not just a religious freedom restoration—

[Laughter.]

JUDGE DIARMUID F. O'SCANNLAIN: Bill?

PROFESSOR WILLIAM P. MARSHALL: John, somehow I think you're not really talking about RFRA there, but the first part of your claim—

[Laughter.]

On the first part of your claim, the question of whether the Free Exercise Clause authorized exemptions, there was a great colloquy on that by two members of the Federalist Society. Michael McConnell said "yes" and Philip Hamburger said "no" when they took a look at the historical evidence. I think if you read Philip's piece closely, you will find he's got the better of the argument about whether the Framers anticipated exemptions as a relief for particular burdens on religious liberty, and there are a lot of reasons why that might be the case.

With respect to the question of whether you want me to stand up here and defend the Affordable Care Act, I don't think that's the nature of this panel. But I do believe that we have a commitment to equal opportunity in

this country, and it's a very strong one. And one of the things I share with this organization is a great belief in individual freedom. At the same time, I do not think you have access to that individual freedom when you are sick. So for me, efforts to provide health care to all make complete sense as a mechanism to promote individual freedom.

JUDGE DIARMUID F. O'SCANNLAIN: Robin?

PROFESSOR ROBIN FRETWELL WILSON: Dean Eastman, I'm very sympathetic to the fact that you should not have to go to the government and ask for this favor. That said, that's where you got left after *Smith*. That's the world we are in. And if we don't recognize that and stay in front of it, there are going to be significant repercussions, I believe.

Now, I'm very sympathetic also with what Kim said. That's a high task, right? You would have to be aware of everything going on all the time. And, really, a lot of the tension here is over the degree and size of the administrative state. That they could even push into something as intimate as contraceptives and who's paying what for whom, for "Paula," to use your metaphor, I think is really deeply problematic.

On the other hand, once we got to this point, I think it is incumbent on us as a society to try to find solutions that do not, for example, say—and I know you are not implying this—"we don't think this is an important issue," because collectively it's been decided to be an important issue. And I do have sympathy with the Institute of Medicine report when they say this is a women's access issue, it's a gender workplace participation issue. And I don't have a whole lot of sympathy for the folks that want to bracket the question and say, "geez, you know, this is a funding problem, not an access problem," because if you don't have $20 for a pill pack, that *is* an access problem.

So if we want to garner religious protections in the process, we have to get real about the reality of the administrative state and engage that and then say, how can we step off without getting in the way of the greater project? And if we can't articulate that, then we aren't going to get the grace of government and it's just going to get worse.

JUDGE DIARMUID F. O'SCANNLAIN: Next question?

PAUL JOHNSON: Hi. I'm Paul Johnson. Two quick questions, first to Professor Wilson.

I was wondering, in the wake of the *Hobby Lobby* decision there was a lot of hysteria both in the media, even among my friends, that rights had been taken away, et cetera. I was wondering, if there were no slavery or no war or 14th Amendment and civil rights movement, would we be here today? Would there be some sense that I'm being discriminated against

because I don't get pills or I have—I'm being discriminated against because they won't bake a cake for my same-sex marriage, that sort of thing?

Second question. You mentioned before that two decades ago there was—if you used Congress as an index, there was a moral consensus that religion generally should be protected, and that seems to have whittled away to a large degree. What happened? And did that acceleration of change take place on January 20th, 2009?

PROFESSOR ROBIN FRETWELL WILSON: Could I ask you again to just say the first question because I'm not sure I got the tail-end of it?

PAUL JOHNSON: Oh, okay. I guess I'll try to just speed it up again.

PROFESSOR ROBIN FRETWELL WILSON: I'm sorry.

PAUL JOHNSON: No problem. The *Hobby Lobby* decision, there was a lot of hysteria.

PROFESSOR ROBIN FRETWELL WILSON: Right.

PAUL JOHNSON: At least I perceive it that way, both in the media and just people I know. And the question I have is that there is—there seems to be an entitlement of, I guess, sort of rights generally. I'm just wondering because of obviously the history of blacks in the country with slavery and the civil rights movement, has that sort of opened the door for people to feel entitled also to other rights like, again, having a baker bake a cake at your same-sex marriage, and if they don't bake the cake they're going to sue you because they discriminated against you because you're homosexual that sort of thing?

PROFESSOR ROBIN FRETWELL WILSON: Okay.

JUDGE DIARMUID F. O'SCANNLAIN: Does that give you enough to go on?

PROFESSOR ROBIN FRETWELL WILSON: I got it.

JUDGE DIARMUID F. O'SCANNLAIN: Okay.

PROFESSOR ROBIN FRETWELL WILSON: Okay.
[Laughter.]

PROFESSOR ROBIN FRETWELL WILSON: You know, it's interesting; after today I'm speaking at the 50th anniversary of the Civil Rights Act, a conference at Boston University, and one of the things that I want to talk about there is the Civil Rights Act and an exemption buried in it for Mrs. Murphy.

You all remember Mrs. Murphy? She's the fictional widow who runs a boarding house and became a bone of contention during the Civil Rights Act and later the Fair Housing Act. In both, she is exempted if she rents rooms in her owner-occupied house. In the Fair Housing Act, is she rented four rooms and occupied one of them, she is simply dropped from the scope of the law. In the Civil Rights Act, she can rent five rooms, occupying one.

Mrs. Murphy was posited to be a bigot. She didn't want black people living in her house and we let her step off in the Civil Rights Act. The reason we did it is because it was part of a package of sweeteners that allowed that underlying victory of public access to public commercial services to be realized.

The Civil Rights Act was sort of unique because there were so many things going on at the time, not the least of which was President Kennedy's assassination. But when you got to the Fair Housing Act, people like Senator Walter Mondale said explicitly that it was better to cut off one slice of the loaf and get the rest, than to have nothing. So, we sometimes exempt people that we disagree with. This is how religious people are going to be seen, to some extent, in the modern debates about same-sex marriage.

We have to articulate a reason why it's good and decent to let Mrs. Murphy step off. I think it's good and decent because it's her home, and even if she wants to be a bigot, that's her house and that's her prerogative. I think it's good and decent because she has a right to decide who she associates with. I think it's good and decent because I don't like the government very much, and I certainly don't want to give the government a whole lot more power over me.

So I think there are really good reasons why we do that. And it's important that those kind of compromises have been stable and enduring. The Pew Foundation for decades has asked people, "how do you feel about interracial marriage?" And in 1964, when we adopted the Civil Rights Act, I think it's something like 10 percent of Americans—it might have been 13 percent—said, we don't really care. Last year, 89 percent of Americans just didn't care about interracial marriage.

I actually think we get to a world where people don't care about race and other issues faster if we don't make religious martyrs along the way; if we don't crush people even when we can. So I think this is an evolving enterprise. How do we figure out how we live together with each other in a decent way? I believe exemptions get us there.

JUDGE DIARMUID F. O'SCANNLAIN: Okay, the next question, please.

FRANÇOIS-HENRI BRIARD: Yes, my name is François. I am the chair of the French chapter of the Federalist Society. And to answer your question, Judge, my hometown is Paris.

[Laughter.]

JUDGE DIARMUID F. O'SCANNLAIN: Welcome, François. Good to see you.

FRANÇOIS-HENRI BRIARD: Thank you. My question to the panel is this one: We Europeans are very interested in your very sophisticated case law about religious freedom. My question is, how do you manage religious freedom versus living together? I mean, just in a few words, you know that in our country we prohibited the burqa, you know, the veil, and we won the case before the Court of Strasbourg in July.

And we did that not only for security reasons, but for—to protect living together, what we call nonmaterial order. If you belong to a society, you cannot hide your face because in the Western civilization face is very essential to us. So between living together and religious freedom we have made a choice, which is living together. What would be your opinion on this? Thank you.

PROFESSOR WILLIAM P. MARSHALL: I am concerned that it may not be not sufficiently accommodating to religion to make us "live together," to use your term. But I think it interesting that in a sense your point is the antithesis of the previous question that asked whether we are sympathetic enough to religion? In fact, I think what we are lucky enough to have in the United States is a pretty good compromise.

You know, the question about are whether we are anti-religious, now, that came from the previous questioner. He was suggesting that there's been an attack on religion. But the primary separationists in American history were the evangelicals, not Jefferson. They were the ones who argued that the worst thing for religion was to be supported by the state. That's where our tradition came from on that. It's not from this pro-religion/anti-religion dichotomy.

And I think that is a false dichotomy. I mean, the example I used with Doug Laycock is a real one. He believes that the best way to protect religion is to not have government prayers, and to allow exemptions such as that found for *Hobby Lobby*. I think a lot of us can disagree as to the best way to protect religion. I don't think the approach that France took with the no accommodation is a good one. I think it leads to the kind of

blowback that Robin talked about.

And fortunately, as a country we've been able to deal with this for quite a while, though not always successfully. We forget at times that people killed each other in the United States over which version of the Ten Commandments was going to be displayed because the Catholic and Protestant ones are very different. But somehow we've learned that letting government get too involved with religion is not helpful.

JUDGE DIARMUID F. O'SCANNLAIN: Kim?

KIM COLBY: Thank you. We certainly—as Bill was saying, we chose to go a different way than France a long time ago. Unfortunately, some of the voices that are speaking in academic circles—I was at a Harvard Law School symposium called "Religious Accommodations in an Age of Civil Rights" in early April of this year and it's available on YouTube if you want to watch—where that same idea was articulated, which is that there is a common good and the state will define what that common good is, and the common good does not include religious accommodations.

It's a very scary thought. I hope it reflects very few of the people in academia, but these views are being voiced out there that we just are going to have religion in church or synagogue or mosque and in your homes, but you don't get to take it with you out into the public square or into your commercial activities. I think we chose a different way 400 years ago—but unfortunately every generation has to keep choosing that way. We have to keep choosing pluralism. We have to keep choosing free speech. We have to keep choosing religious liberty. And this generation in particular I'm afraid is having a very difficult issue with that.

I do a lot of work in—and many of you know me and thought, how long can she go without talking about campus access issues—but that's what Cal State and Vanderbilt and Bowdoin are all about: this idea that has taken hold in the educational institutions that they don't have to accommodate the religious people. They'll set up their own orthodoxy, and if you won't comply with it, you have to leave campus.

So yet again—and this kind of goes back to John Eastman's question—we just have to keep educating the next generation that America is about pluralism and it's about letting each of us identify ourselves even within our religion in a very public way.

JUDGE DIARMUID F. O'SCANNLAIN: Robin, did you have something?

PROFESSOR ROBIN FRETWELL WILSON: No.

JUDGE DIARMUID F. O'SCANNLAIN: All right. Next question, please?

REBECCA DOWNS: Hi, my name is Rebecca Downs. I'm a 1L at Regent University School of Law. And I noticed Ms. Colby mentioned how the celebration of the victory of *Hobby Lobby* was very muted and somber, and I've noticed that too. So I was wondering if you could maybe expand upon that. And I'm wondering if it has to do with maybe the religious liberty component of *Hobby Lobby* wasn't so popular, especially among young people, and how to make that more popular. Thank you.

JUDGE DIARMUID F. O'SCANNLAIN: Kim?

KIM COLBY: Well, just very quickly, I think we were all very concerned by what we saw during the time around *Hobby Lobby* about the state RFRAs, as well as this push toward making abortion part of all insurance plans.

As someone already may have mentioned, *Hobby Lobby* is a religious liberty case, but it also has to be understood, obviously, in this broader context in which the HHS mandate is a sharp departure from the 40-year tradition, that Robin was talking about, where we've all, since *Roe v. Wade*, said that we're not going to force people to participate in abortion against their conscience. The HHS mandate departed from that.

That's part, too, of the soberness around the *Hobby Lobby* case. It was sort of like, are we really having to fight about this? Are we really going to compel people who have religious objections to these drugs to pay for them?

PROFESSOR ROBIN FRETWELL WILSON: Can I say just a word?

JUDGE DIARMUID F. O'SCANNLAIN: Oh, yes. Robin?

PROFESSOR ROBIN FRETWELL WILSON: Well, one, I applaud Becket for case selection on this because it is significant that the first case to get to the Supreme Court was about abortifacients and not just objection to contraceptives. So I think they're really to be credited for that. That was a good move. But I want to go back.

We've been talking a little bit about Arizona and the state RFRA fights that did not go well. And I just want to say two things about it that may go a little bit back to Francois' question about living together in a plural society.

One of the things that happened in Arizona is you had people say, "well, gee, we have to have this expansion of the state RFRA," which was

already in place, to clearly cover sort of commercial groups because we, quote, "need to stave off gay rights." Literally, people in the Washington Post, religious believers, said that.

Now, if we set up religious liberty as a straight-up contest with other values in our society, one can almost be assured that religious believers are going to lose, at least when those other values are LGBT rights, partly because of the younger generation. This is the civil rights issue of their lives. As I say in a new paper, the push-back on religious exemptions to LGBT rights is only going to get worse because of demographic shifts.

But I also think what's really important is there were no gay rights to "stave off" in Arizona. There was no statewide nondiscrimination statute. And that matters because those protections that I diagrammed coming out of the voluntary same-sex marriage laws are responses to the fact that there is a nondiscrimination statute that proceeded the embrace of same-sex marriage.

When antidiscrimination statutes precede marriage equality, religious groups that wanted to participate with the government in contracts—they wanted equal rights to be contract partners—might be denied. This is because of statutes and policies that were put in place to respond to racial, gender, and other kinds of discrimination in the provision of services that are not as deeply religious as marriage. That's a reason that the scope and intended application of nondiscrimination statutes had to be clarified in voluntary marriage equality laws. These nondiscrimination statutes, which I think are important, are about burgers and taxis and large commercial apartment buildings. They were never about something as religiously infused as marriage. They were never about a uniquely religious sacrament.

But that said, if people say things as we go forward in "red states"—states that until the Supreme Court's November 2014 denial of certiori in a same-sex marriage case, which turned most of the country "blue" for purpose of same-sex marriage overnight—people say things like "we have to have religious protections because now gay people have rights," that is going to be a losing proposition. And it should be.

So I think that we have to think harder about why those religious protections are necessary. They're not really for marriage equality. They are from those underlying non-discrimination statutes spilling over to things that they were never intended to reach originally, like marriage. But I would hate to see this whole debate become Arizona. That would not be good.

JUDGE DIARMUID F. O'SCANNLAIN: Next question. Yes.

ATTENDEE: I had a question for the panel about free exercise challenges.

JUDGE DIARMUID F. O'SCANNLAIN: A little louder, please.

ATTENDEE: Sorry. I had a question for the panel about free exercise challenges because one of the points I think you all made was that, after *Smith*, those challenges have gotten significantly harder even than they were before.

Has RFRA, especially as kind of bolstered by both the *O Centro* decision and the *Hobby Lobby* decision, made people less inclined to challenge laws under the Free Exercise Clause as not neutral and not generally applicable? In other words, has it reduced the incidence and strength of free exercise challenges by having the RFRA option available instead?

JUDGE DIARMUID F. O'SCANNLAIN: Anyone want to try that?

PROFESSOR WILLIAM P. MARSHALL: I haven't looked at that empirically, but *Hobby Lobby* and *Conestoga* raised the free exercise claim of inequal treatment as well as the RFRA challenge. And if I'm a lawyer bringing one of these claims, I'm going to raise both of them and I'm going to look for some way to argue that the challenged law is not a neutral law of general applicability. The challengers, of course, won such a case in *Lukumi Babalu.*

But my guess is that RFRA sends—I mean that the *Smith* decision sends a signal that you're pretty sympathetic to the government's position that it is a neutral law of general applicability and then you have RFRA as the backup. So a court that wants to avoid a constitutional issue is going to do exactly what the Court in *Hobby Lobby* did and decide on the statutory claim and not reach the constitutional claim.

KIM COLBY: Right. I think at the federal level you're definitely going to go with RFRA unless it's a *Hosanna-Tabor* type of case where it's church autonomy. *Hobby Lobby*, of course, was not. There's no balancing test as RFRA has a balancing test. The federal free exercise claim will still come into play as to state and local laws.

JUDGE DIARMUID F. O'SCANNLAIN: Next question?

BRIAN BISHOP: Brian Bishop from the Stephen Hopkins Center for Civil Rights in Rhode Island. I wanted to associate myself with John Eastman's concern about this version of American exceptionalism, you know, in particular but perhaps from an ironic direction, because my concern with the exception approach is that—there was another answer to *Smith*, of course, which was to reconsider our substance paternalism.

In other words, there was a solution there that didn't necessarily involve going directly to religion and it went to freedom, or to the sense of our ability to undertake these decisions on our own in a community that we would hope is imbued with religious and other views to help us in those decisions.

JUDGE DIARMUID F. O'SCANNLAIN: And your question is?

BRIAN BISHOP: So my question is, again, would the answer to—would the answer to any of these, without the church working with people for freedom—they get their exception—where is our protection from pay-for-birth-control paternalism or this type of thing? Where are people who don't have a religious motivation, but have a freedom motivation? We have lost the church as allies.

JUDGE DIARMUID F. O'SCANNLAIN: Anyone?

PROFESSOR WILLIAM P. MARSHALL: I think one of the arguments against the free exercise exemption or the religious exemption was illustrated by that *Thomas* case that I talked about earlier. If he had a philosophical objection to working in the armaments factory, he lost. If he could phrase it as religious, he won. There is that problem.

There are some who will argue, "let's expand conscientious exemption across the board to both deeply held philosophical and moral beliefs." And maybe if you make that argument, some have argued, you represent an equality of conscience. The Court in *Thomas*, however, rejected that position and chose only to protect religion under the Free Exercise Clause.

But I do think that part of the problem you can have—I mean, I think a lot of people are jumping onto the *Hobby Lobby* case not so much out of a concern for religion, but concern of *laissez-faire* economics, which is what you're talking about: Get the government off our back. But if that's your principle, then there is no difference between getting the government off the secular person's back and the government off the religious person's back.

KIM COLBY: Okay, Judge.

JUDGE DIARMUID F. O'SCANNLAIN: Yes, Robin?

PROFESSOR ROBIN FRETWELL WILSON: I think it's a great question, so I would just add two things.

One, some state law objections actually are more inclusive than just a religious objection, so the abortion conscience clause I discussed actually says you can object for moral as well as religious reasons. Some state

versions of those kinds of conscience clauses will include philosophical reasons. So that's broader, more capacious. I think you would be happier with that.

But beyond that, even if there is an exemption that's just for religion, if you have a moral objection you can go into court and say, "wait a minute, it's not fair that my moral objections get no credence, too." Sometimes to avoid the possibility of an Establishment Clause violation courts will read an exemption more broadly. That happened in the military conscientious objector arena, where now one can assert a nonreligious, sort of world-view objection to war. The exemption is read in a way that's more expansive than what came out of the legislature.

JUDGE DIARMUID F. O'SCANNLAIN: Next question?

JOY BRIGHTON: Joy Brighton. Kim, I'm just wondering if, given the change that's happening in the world that we're all talking about, if there isn't a point that we're going to have to define what religion is, because when we were talking about religious accommodation and François was talking about banning the burqa—which might be religious accommodation, but it also might be a denial of individual liberties if in fact that woman has no personal choice of what she's wearing. And I think this difference between personal faith and controlling others, imposing roles on other people, and how if you're seeing that, if you're thinking that that's something that needs to be defined or looked at, religion versus control.

JUDGE DIARMUID F. O'SCANNLAIN: All right. Kim?

KIM COLBY: This is not a very satisfactory answer for you, but I just think anyone who's tried to define religion has decided it's too difficult to do. I'm just willing to live with quite a bit of—I called it messiness earlier. I think that when you sit down and try to write down a definition of religion, it's very hard to do.

But the courts, overall, I think have done a pretty good job of recognizing when someone is invoking a sincerely held religious belief. It will be interesting to see what the Court does with the *Holt* case, in which we may have a decision in the next month or so. But I just don't think that the way to go to resolve these problems is to start defining religion because I just don't think we'll get it right.

And it also kind of goes to one of the arguments that *Smith* makes that bothers me the most: we really can't have expansive religious liberty because we have too much religious diversity. But that's why we have religious diversity, because we protect religious liberty so strongly. So I'll just go with trying to protect as much as we can and, you know, the courts

will take care of a lot of this for us, I think.

JOY BRIGHTON: Thank you.

JUDGE DIARMUID F. O'SCANNLAIN: Robin?

PROFESSOR ROBIN FRETWELL WILSON: So I think that's a terrific question. Can I just say a couple of words about it?

We get this question in a different religious liberty context. When we think about whether family law should depart from a set of norms at the time of divorce—about whether you pay alimony, how you divide property, or award custody of children—to accommodate certain religious beliefs or communities. So, for example, should we have a different norm for or allow Islamic families to self-define a norm that would depart from the background civil understanding that custody is awarded according to the best interests of the child? We are seeing that debate in Great Britain over the 85 Sharia courts operating there and what the status of decision reached in those tribunals should be.

I'm happy to share with you an article that shows that there are big rifts between the outcome under Great Britain's civil divorce laws and what would happen if, for example, you allowed Islamic norms to govern a dispute. And I think that would leave many women at risk for losing custody of their children. It would leave them at risk for receiving alimony only for three months, which is called the *iddat* period. And they may not have any property at all.

To be frank, those outcomes are a crap deal for women, and children, and I would not be willing to recognize them myself. But some people want to say that if women in these communities are not willing to accept this outcome, they have a remedy: they can simply exit the religion. Now, that's not very helpful, in truth, because they can't exit. They self-identify with that community, it may be the only community they know. They may have relocated to that area and have barriers to work—language, little education, every other problem, and they're an insular minority within a Western culture. So to just say, exit if you want another better result, is not satisfactory.

That said, if those kinds of breaks with the background civil law are unacceptable—and they just are unconscionable—then we have to say in that instance there will be a floor below which we are unwilling to respect religious norms. That point comes when it becomes a zero-sum game and we're actually talking about leaving women on the social safety net—an unconscionable result even if justified by reference to a religious understanding.

JUDGE DIARMUID F. O'SCANNLAIN: Next question?

KENNETH JOST: I'm Kenneth Jost, author of *Supreme Court Yearbook*, published by CQ Press, and my own blog, Jost on Justice.

Judge, you began by mentioning both of the major religion-related decisions from the Supreme Court and I haven't heard anything said about *Town of Greece*. And so in the context of the panel topic, I'd like to ask each panelist to address the question whether the decision in *Galloway v. Greece* is a win or a loss for religious liberty.

PROFESSOR ROBIN FRETWELL WILSON: I'm going to pass.

JUDGE DIARMUID F. O'SCANNLAIN: Kim, do you want to—

KIM COLBY: Do you want me to start?

[Laughter.]

Well, actually I'm glad you asked that question because Bill made a comment very early in the panel that I agreed with, which is there was religious liberty on both sides of that case, and I think the majority came to the only conclusion that it could on the Establishment Clause issue, which is—you know, the First Congress writes the First Amendment, sends it off to the states to be ratified, and turns around and hires paid legislative chaplains. It's hard to say that legislative prayer is a violation of the Establishment Clause. And interestingly, both the majority and the dissent agreed that *Marsh v. Chambers* was correctly decided. I found that fascinating.

The other reason I think the majority opinion is right is that it comes in this very strong strand of free speech, free exercise, and Establishment Clause cases that for the past 70 years, since *Cantwell v. Connecticut*, has basically said we do not want government officials parsing private religious speech to decide whether the speech is religious or not, to decide whether it's religious speech but not worship, to decide a variety of things.

This is why the Court should grant cert in the *Bronx Household* case. It's up on a petition for cert. It's been filed. New York City is saying that it will rent to any community group empty public school space on evenings and weekends unless the group is going to use it for religious worship services. They can use it for religious speech. They can use it for religious worship, but not for a religious worship service. And the New York City Board of Education is completely equipped to tell you when your activity is a religious worship service.

[Laughter.]

So I hope that case is granted cert and justice is brought to the churches in New York City.

But anyway, I think the majority had to come out the way it did, but I'm very sensitive to the fact that in a pluralistic society the religious

people who may like the prayers being said in the Town of Greece increasingly live in a pluralistic society that doesn't like those prayers. We need to be people of integrity and be very sensitive, in the areas where we do have the ability to control some of the speech, to the dissidents or to the minorities or to the other faiths because increasingly we need that pluralism ourselves.

JUDGE DIARMUID F. O'SCANNLAIN: Bill?

PROFESSOR WILLIAM P. MARSHALL: I wasn't surprised about the result in the case. I mean, I think I agree with Kim, because the issue for me on prayer is less should we have prayer or not, but the question of whose prayer, and that's where everything breaks down. Do we really want the government to pick and choose whose prayer?

Now, what do I think of that decision? It's a Justice Kennedy decision, which means it doesn't make sense.

[Laughter.]

And I think people on the left and the right can all share that view.

[Laughter.]

In that case, what he says—and literally in two lines, one right after another, he says the government can't decide what's a nonsectarian prayer because that does exactly what Kim is talking about: it gets government evaluating religion. And then in the next sentence he says, but if the prayer says bad things about other religions or is otherwise divisive, then that wouldn't be okay. Somebody square those two sentences for me because I'm teaching the case next week and I need some help.

[Laughter.]

JUDGE DIARMUID F. O'SCANNLAIN: Okay. Robin?

PROFESSOR ROBIN FRETWELL WILSON: I'm okay.

JUDGE DIARMUID F. O'SCANNLAIN: Okay. Next question?

ROGER PILON: Yes, thank you, Judge O'Scannlain. Roger Pilon—

JUDGE DIARMUID F. O'SCANNLAIN: Roger.

ROGER PILON: —from the Cato Institute.

Much of the earlier discussion focused on the difficulty of applying the *Hobby Lobby* rule, which I think misses the point and so I'm going back to John Eastman's question. What have we come to as a country where religious liberty has to be treated as an exception rather than the rule?

There was a time when freedom of association was one of our first

principles. Now we have to defend not associating because of the overlay of a massive body of anti-discrimination laws. And it seems to me the real problem is with 1937. In a ubiquitous state you're going to have to inevitably define what religion is—to go back to an earlier question—in order to get out of the oppressiveness of that ubiquitous state. And I wonder if you would care to comment on that, Bill especially.

JUDGE DIARMUID F. O'SCANNLAIN: Bill, why don't you lead off?

PROFESSOR WILLIAM P. MARSHALL: Okay. I'm not going to sit here and defend the administrative state. I will say that the notion that we don't protect religion seriously in this country is just plain wrong. We protect religion under numerous statutes, and we provide a tremendous amount of protection for religion under the Speech Clause, including worship, proselytization.

You know, the interesting thing about pre-*Sherbert* law was so much religious exercise was protected under speech. So all we are really talking about here is religious exercise that does not have an expressive component. And then we get to the question of why should we protect certain kinds of exercise motivated by theological views as opposed to some that are motivated by equally deeply felt moral or philosophical views?

If your point is that maybe we ought to have more conscientious objection in general against the various laws that are out there, I can't disagree with you on that. But RFRA does not do that. RFRA protects only religion. So you really have to ask this fundamental question—why should we protect just one kind of way of looking at the world and not another way of looking at the world?

JUDGE DIARMUID F. O'SCANNLAIN: Robin?

PROFESSOR ROBIN FRETWELL WILSON: So, Roger, it's just going to get worse because there's the rise of the "Nones," you know, the people who do not identify with a religion. And I think Kim hit it on the head. Where once religious believers occupied the majority—a nice position to be in—they have suddenly found themselves in the minority. The timing is unfortunate because a metastasizing administrative state means that more and more often, we will witness direct collisions between the administrative state and so many religious convictions.

We haven't talked about the kinds of exemptions that are going to allow religious people to live out their lives, but at this point with the same-sex marriage laws, the kinds of exemptions that we've gotten are bigger than just the clergy. That's not really a fair assessment of them.

They go specifically to religious non-profits who receive assurances that their tax exemption will not be yanked, at least by the state or local government; they're told they can't be excluded from government benefits, and that's all to the good.

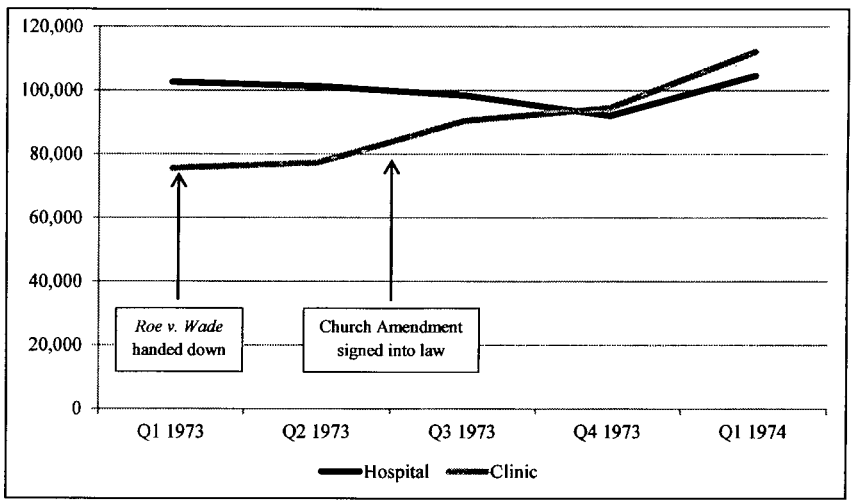
But right now we don't do anything for those wedding photographers who work in states with pre-existing sexual orientation nondiscrimination bans. We don't do anything for those bakers. Now, society could say, "look, we're just not going to have any Christian or Jewish or other religious people in these professions in a world that embraces same-sex marriage—at least if the business owners have deep religious convictions about facilitating certain marriages." And I think that would be really unfortunate, but as we become less and less religious, that means that there is going to be, in Dean Eastman's words, the need to ask for grace.

JUDGE DIARMUID F. O'SCANNLAIN: That brings us to the end of our panel. Please join me in thanking the questioners and our panel for a great conversation.

[Applause.]

APPENDIX

FIGURE 1. Place and Number of Abortions Performed Before and After Passage of Church Amendment



Source: Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What* Hobby Lobby *and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703 (2014).

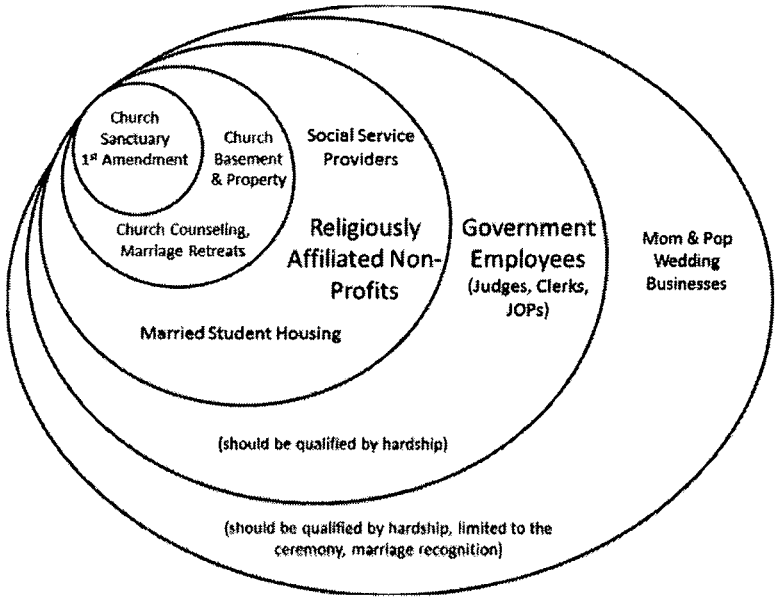
FIGURE 2. Religious Liberty Protections in Voluntary Same-Sex Marriage States

	1	2	3	4	5	6	7	8	9	10
	Exempts **clergy**	Expressly exempts a **religious organization** (including nonprofits) from duty to "provide **services**, accommodations, advantages, facilities, goods, or privileges" for solemnization	Expressly protects covered objectors from **private suit**	Protects covered objectors from **government "penalty"**	Expressly protects covered objectors from "promotion of same-sex marriage through **religious programs, counseling,** courses, or retreats"	Expressly allows a religiously affiliated **adoption or foster care** agency to place children only with heterosexual couples unless program publicly funded	Allows religiously affiliated **fraternal organizations** to limit membership and **insurance** coverage	Exempts "promotion of marriage through . . . **housing** designated for married individuals."	Expressly exempts non-clergy authorized celebrants (**e.g., judges** and justices of the peace) from duty to solemnize	Carries forward **existing exemptions** from preexisting nondiscrimination statute
Same-Sex Marriage by Legislation										
MD	✓	✓	✓	✓	✓	✓	✓			
RI	✓	✓	✓	✓	✓	✓*	✓			✓
NH	✓	-	✓	✓	-		✓	✓		✓
MN	✓	✓	✓	✓		✓		✓		✓
CT	✓	✓	✓	✓		✓				
DC	✓	✓	✓	✓	✓					
NY	✓	✓	✓	✓				✓		✓
WA	✓	✓	✓	✓	✓					
VT	✓	✓	✓				✓			
HI	✓	✓	✓	✓						
IL	✓	✓ ("facility" only)	✓	✓						✓
DE	✓			✓						✓

* Rhode Island permits adoption or foster care agencies to make such placements whether or not the program is publicly funded.

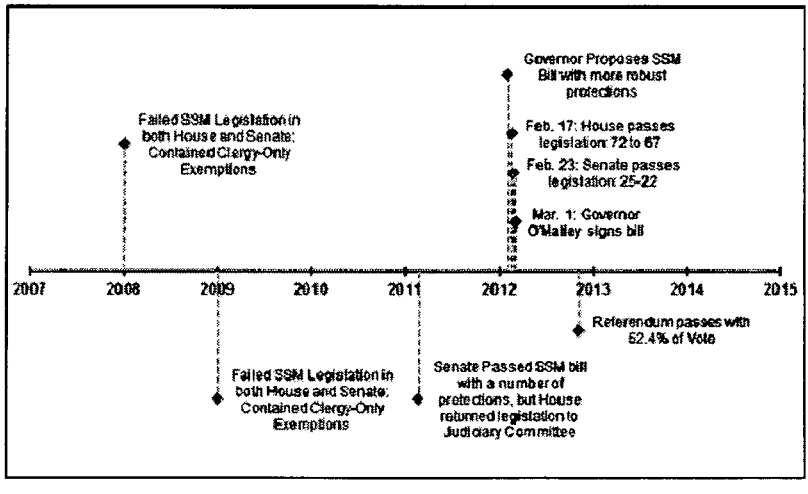
Source: Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161 (2014).

FIGURE 3. Religious Liberty Protections



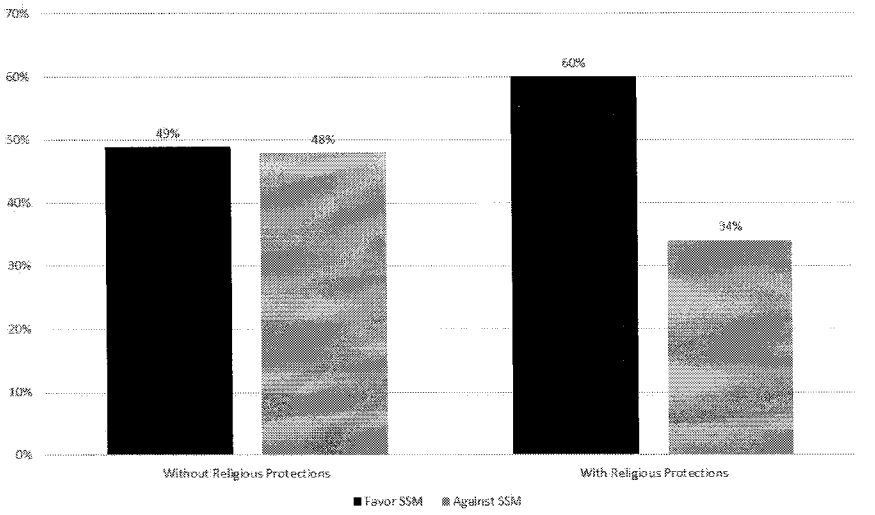
Source: Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951 (2015).

FIGURE 4. Evolving Religious Protections in Maryland's Proposed and Enacted Same-Sex Marriage Legislation



Source: Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161 (2014).

FIGURE 5. Same-Sex Marriage Support When Combined with Protections for Others (Utah)



Source: Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951 (2015).