Everybody’s Business: The Legal, Economic, and Political Implications of Religious Freedom

March 24, 2014

In partnership with the Institute for Studies of Religion at Baylor University
The Berkley Center for Religion, Peace, and World Affairs, created within the Office of the President in 2006, is dedicated to the interdisciplinary study of religion, ethics, and public life. Through research, teaching, and service, the center explores global challenges of democracy and human rights; economic and social development; international diplomacy; and interreligious understanding. Two premises guide the center’s work: that a deep examination of faith and values is critical to address these challenges, and that the open engagement of religious and cultural traditions with one another can promote peace.

The Religious Freedom Project (RFP) at Georgetown University’s Berkley Center for Religion, Peace, and World Affairs is the nation’s only university-based program devoted exclusively to the analysis of religious freedom, a basic human right restricted in many parts of the world.

Under the leadership of Director Thomas Farr and Associate Director Timothy Shah, the RFP engages a team of international scholars to examine and debate the meaning and value of religious liberty; its importance for democracy; and its role in social and economic development, international diplomacy, and the struggle against violent religious extremism.

The RFP began in 2011 with the generous support of the John Templeton Foundation. In 2014 that support continued, while the project also began a three-year partnership with Baylor University and its Institute for Studies of Religion under Director Byron Johnson.

For more information about the RFP’s research, teaching, publications, conferences, and workshops, visit our website at http://berkleycenter.georgetown.edu/rip.

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In November 2011 the Religious Freedom Project sponsored its inaugural event: *What's So Special About Religious Freedom?* The conference drew to Georgetown’s campus a huge audience who witnessed a debate on the meaning and reach of religious liberty in America.

That debate, highly relevant then, has even greater purchase today.

In his 2014 book, *The Rise and Decline of American Religious Freedom*, law professor Steven Smith employs the 2011 debate at Georgetown to frame a question that has arisen with increasing insistence since: Is religious freedom in decline in the United States (as it appears to be in the rest of the world)? If so, what does it mean for society at large, including those of our citizens who are indifferent or even hostile to religion?

In March 2014 we convened at the Willard Hotel in Washington, DC a group of scholars, attorneys, a Catholic nun (and former army officer), and some of America’s best minds to debate those questions. Our day-long conference was entitled “Everybody’s Business: The Legal, Economic, and Political Implications of Religious Freedom.”

The day began with a stirring conversation between Judge Ken Starr, former solicitor general of the United States and current president and chancellor of Baylor University, and Alan Dershowitz, professor emeritus of Harvard Law School. Their discussion focused on one of the most controversial and momentous religious liberty cases in American history—the case involving Hobby Lobby, which was to be heard the following day at the Supreme Court.

The case posed the question of whether a closely-held family corporation—Hobby Lobby—could be required by the terms of the Affordable Care Act to provide coverage in its health care plans for drugs that can induce abortions, coverage to which the family objected on religious and moral grounds. In a remarkable and entertaining display of intellectual vigor, wit, and gentility, Starr and Dershowitz delved into the facts of the case and its implications for the American system of religious liberty.

As it happened, in a highly contested decision three months later the Court ruled 5-4 in favor of Hobby Lobby. At the end of this report, Judge Starr provides his analysis of that decision and what it means for religious freedom in America.

Next came a panel of attorneys. Micah Schwarzman and Ira Lupu argued for the government’s case, while Helen Alvaré and Kyle Duncan (the lead attorney defending Hobby Lobby) argued the case for the family corporation. Without missing a beat, these four continued what Starr and Dershowitz had begun: a display of what the great American theologian John Courtney Murray called “creeds intelligibly in conflict” under a canopy of civil discourse.

The day’s final panel broadened the discussion to the question of whether religious freedom was good for business and good for the poor. Three RFP scholars gave an overview of their work in answering that question: Brian Grim, Anthony Gill, and Rebecca Shah. A highlight of this panel was Sister Deidre Byrne of Washington’s Little Sisters of the Sacred Heart.

The entire day was covered by C-SPAN and was observed from the audience by the Green family, owners of Hobby Lobby. As we always do, we invited audience participation. Read on, and you’ll find an invigorating discussion of an important issue in our culture and our law—the business of religious freedom.
Welcome

Thomas Farr, Director, Religious Freedom Project

“On Topic”: Beyond Hobby Lobby: What Is at Stake with the HHS Contraceptive Mandate?

Ken Starr, President and Chancellor, Baylor University
Alan Dershowitz, Felix Frankfurter Professor of Law, Emeritus, Harvard Law School

Entering Hobby Lobby: The Case and Its Implications for Religious Freedom and Business

Moderator: Michael Kessler, Managing Director, Berkley Center
Panelists: Helen Alvaré, Professor of Law, George Mason University Law School
Kyle Duncan, Former General Counsel, Becket Fund for Religious Liberty
Ira Lupu, F. Edwood and Eleanor Davis Professor Emeritus, George Washington University Law School
Micah Schwartzman, Edward F. Howrey Professor of Law, University of Virginia Law School

Is Religious Freedom Good for Business and for the Poor?

Moderator: Byron Johnson, Director, Institute for Studies of Religion, Baylor University
Panelists: Anthony Gill, Professor of Political Science, University of Washington-Seattle
Brian Grim, President, Religious Freedom & Business Foundation
Rebecca Samuel Shah, Associate Scholar, Religious Freedom Project
Sr. Deirdre Byrne, Little Workers of the Sacred Hearts

Also in this publication:

Cornerstone Debates the Outcome of Burwell v. Hobby Lobby

Thomas C. Berg, “RFRA Worked in Hobby Lobby; What’s Next?”
Kyle Duncan, “Hobby Lobby Spells Doom for Mandate 2.0”
Ira Lupu and Robert Tuttle, “Hobby Lobby in the Long Run”
Jennifer Marshall, “Can We All Just Get Along? Yes.”
Micah Schwartzman, “What Did RFRA Restore?”
Steven D. Smith, “Hobby Lobby: A Modest Comment on a (Prudently) Modest Decision”

Conclusion

Ken Starr, President and Chancellor, Baylor University
Beyond Hobby Lobby: What Is at Stake with the HHS Contraceptive Mandate?

THOMAS FARR: I’m Tom Farr, director of the Religious Freedom Project at Georgetown University’s Berkley Center for Religion, Peace, and World Affairs. If you would like to follow us on Twitter, our hashtag is #ontopic.

Thank you for joining us for this timely and important conference: “Everybody’s Business: The Legal, Economic, and Political Implications of Religious Freedom.” I can promise you an exciting, entertaining, and illuminating few hours together.

We will begin shortly with a special “On Topic” conversation between the president and chancellor of Baylor University, Ken Starr, and Harvard Law professor Alan Dershowitz. Their subject will be the HHS mandate of the Affordable Care Act (ACA) and its implications for American law and society.

Two panels will then follow. The first will focus on the legal aspects of the Hobby Lobby case that will be heard tomorrow before the Supreme Court. The second panel today will build on the first. It will look at the fascinating question of whether religious freedom is good for business and for the poor.

Let me acknowledge the presence today of several members of the family whose business is Hobby Lobby—the Green family, including Mr. Steve Green, president of Hobby Lobby. Welcome to the Green family. [Applause] I would also like to acknowledge the presence of Bill Mumma and Kristina Arriaga, the president and executive director of the Becket Fund for Religious Liberty, respectively, as well as their staff. Becket is the nonprofit legal and educational institute that is representing Hobby Lobby before the Supreme Court. Welcome to you all. [Applause]

I am going to introduce Judge Starr in just a moment, but before I do that, let me say a few words about this event. This conference celebrates a new partnership between two great faith-based universities: Georgetown, which is the oldest Catholic university in the United States; and Baylor, which is the largest Protestant research university in the world. The cosponsors of this event are Georgetown’s Religious Freedom Project and Baylor’s Institute for Studies of Religion, directed by Professor Byron Johnson, whom you will meet later in the program.

The Religious Freedom Project is the only university-based center for the study of religious freedom in the world. Our goal is to research and disseminate knowledge about religious freedom: what
it is and why it is important for every person, religious or not, for every society, and for every state. Indeed, we believe religious freedom is important for international justice, stability, and peace.

We define religious freedom in a broad and capacious way. It is the right of every person to believe and to worship or not, and, if one is a religious believer, to act on the basis of belief in the public life of one’s nation, both as an individual and as a member of a community. Religious freedom, as we understand it, is not merely a private right to worship. It entails the right to engage in civil society, in business, and in politics on the basis of one’s religious beliefs. Religious liberty is not a mere claim of privilege by religious people; rather, it is a pillar of stable democracy, economic development, and societal flourishing in general.

Unfortunately, notwithstanding its importance, religious freedom is in crisis around the globe. According to reports by the Pew Research Center, 76 percent of the world’s population lives in countries where there are severe restrictions on religious freedom. That’s three out of four people on the planet. Outside the West, those restrictions are often characterized by violent persecution of religious minorities. Inside the West, while violent persecution is not the norm, the Pew report shows that government restrictions of religion and social hostilities toward religion are on the rise, and that includes the United States of America.

One of the questions looming behind this conference today is whether the HHS contraceptive mandate and cases like that of Hobby Lobby reflect good government policy, or instead a sign of declining respect for religious freedom in the United States. Our goal at the Religious Freedom Project is to raise the profile of this issue both here and abroad. We want to increase the attention to religious freedom among key groups that, in our judgment, are not paying enough attention; that is, government officials, the media, the academy, and the business world. We do our work through a team of international scholars—many of whom are here today—and through books and articles, workshops and consultations with governments, public addresses, congressional testimony, media appearances, conferences like this one—both here and abroad—and a vigorous web presence, including a new blog that we will formally launch later this spring.

In all of these activities, we seek to engage not only religious groups, but also secular society in general—in particular the skeptics of religion. In a very real sense, ours is an attempt to conduct a conversation about religious freedom with everyone—but especially with those who do not share our premises or our views.

In that respect, let me mention the new blog that we will formally launch later this spring. It is entitled Cornerstone: A Conversation on Religious Freedom and Its Social Implications. Astoundingly, notwithstanding the importance of this subject, so far as we can tell there is not a single blog in the United States that focuses exclusively on religious freedom, its meaning, and its value. Our goal with Cornerstone is to fill that gap. You will find a flyer on your table that gives you the URL for the blog’s temporary webpage, which we put up this weekend. We invite you to go to the blog over the next several weeks and give us your opinion on its content and its layout. We promise to take your views into account as we formally launch Cornerstone later this spring.

Now, let us get to our “On Topic” discussion between Judge Starr and Professor Dershowitz. It is our practice to engage the audience in our conversation, so we have provided each of your tables several note cards to pose questions to these two gentlemen. If you have a question as you listen, please write it down as succinctly as you can and include your name and affiliation. Then at about 1:20, we have a magnificent cadre of Georgetown students who are here with us today, and they will go around and collect the cards, and we will choose questions here to present to Judge Starr and Professor Dershowitz.

Here is how we are going to proceed now. I’m going to introduce Judge Starr and then both of these gentlemen will come to the stage. The judge will introduce Professor Dershowitz and they will begin their conversation. Let me say to Professor Dershowitz, on behalf of Georgetown University, what a delight it is to have you with us today.

ALAN DERSHOWITZ: Thank you very much.

THOMAS FARR: Ken Starr is president and chancellor of Baylor University. He also holds the Louise L. Morrison Chair of Constitutional Law at Baylor Law School. During his illustrious career, he has served the country in many ways, including as law clerk to Chief Justice Warren Burger, as US Circuit Court judge for the District of Columbia Circuit, and as solicitor general of the United States under President George H. W. Bush. Judge Starr has argued 36 cases before the Supreme Court, including 25 while solicitor general. He has authored more than 25 publications, many of them on religious freedom. His first book, First Among Equals: The Supreme Court in American Life, was published in 2002.

As someone who has had the privilege of getting to know Judge Starr over the last year, I can tell you that I do not know a man more suited to the task today: that is, to conduct a civil, intelligent,
and vigorous conversation about one of the most important and controversial issues of our time that our country now faces. That issue is what is at stake in the contraceptive mandate of the health-care law known as the Affordable Care Act. Ladies and gentlemen, please welcome to the stage Professor Alan Dershowitz and Judge Ken Starr. [Applause]

KEN STARR: I have such a joy in introducing my friend Alan. Do we agree on every issue? Well, no. But do we agree on any issue? Yes. So you see the discussion has already started. Alan needs no introduction but I am going to do it anyway. He taught for 50 years at the Harvard Law School where he was a legendary teacher. He is a great professor who cares deeply about his students, which is so important in academic life. In addition to his over 1,000 articles, he has written over 30 books—which is extraordinary. I have written one and that was very hard and not nearly as well read as Alan’s remarkable work. In addition to being this renowned chair and professor at the Harvard Law School, Alan missed just one class over the course of 50 years. Does anyone remember Cal Ripken, Jr. of the Baltimore Orioles? Alan loves baseball, as do I. Alan, what is your excuse? [Laughter]

ALAN DERSHOWITZ: I was stuck on a train eight hours outside of New Haven. Charles Ogletree had to substitute for me. [Laughter]

KEN STARR: There it is. Alan is a wonderful, caring, gracious human being and, let me also add, a great friend of freedom, including to those charged with crime. He tries to stay out of the limelight, as you know, but somehow behind the scenes he represented O.J. Simpson, Claus von Bülow, and Mike Tyson. He is a defender of liberty. He is a great friend of the bastion of liberty in the Middle East and in Israel. He feels passionately about it, while maintaining that its power always needs to be checked. He calls on us to hold the state of Israel to account. But nonetheless, the baseline is liberty, which brings me to where I think we should begin—not with the Affordable Care Act. We will get to that.

I think we should begin with the preamble to America’s Constitution, because that was the ultimate sovereign act by “we, the people,” subject to the amendment process and the purification of our constitutional order through the shedding of blood in the Civil War and the post-Civil War amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments. What the preamble lifts up is a moral vision, not just a political statement of “we, the people… in order to form a perfect union”—I like that, a more perfect union—and then to achieve certain very foundational goals.

What is the first goal after “to form a perfect union?” To establish justice. If you do not have a just society, there is not going to be anything worth defending. So it is “to provide for the common defense” and “to ensure domestic tranquility” and “to promote the general welfare.” Then the preamble builds crescendo-like in that one paragraph, that beautiful paragraph that school children should all commit to memory: “to secure the blessings of liberty to ourselves and to our posterity.”

Welcome Alan Dershowitz to a conversation about a specific subject, the Affordable Care Act and Hobby Lobby. We are honored to have the Green family here.

Let me get Alan’s thoughts to start out with, but first I should set the stage just to make sure we have common ground, and Alan will correct me if I’m wrong. I frequently stand in need of correction if I get something wrong. But briefly stated, the case that we’d argue tomorrow involving the Affordable Care Act’s contraceptive regulations involves a family. Yes, it is a corporation, and it is a for-profit corporation. So you are going to read a lot and hear a lot about whether or not the First Amendment really applies at all to corporations. Maybe they apply to nonprofit corporations because churches and synagogues may incorporate as a nonprofit. But what about for-profit corporations?

Hobby Lobby is a great American story, beginning in a garage. David and Barbara Green in the 1970s had an idea, and it’s an arts and crafts store idea. Over the fullness of time and (as they would say) by God’s blessing, by providence, and by a whole lot of hard work and energy, they now have over 500 stores—almost 600, in fact—and about 13,000 employees. The corporation is closely held, so there are no Wall Street types running around and reviewing financial statements. They may try to, but the family owns it, namely David and Barbara—the parents who are considered as

“This is a wonderful partnership between two great institutions and two great religious traditions. I can’t imagine anything that is more suited to the American way of dealing with things, an American academic way of dealing with things, so I’m thrilled to be part of this.”

Alan Dershowitz
mom and pop, now grandfather and grandmother—and the three adult children. That is a closely held corporation.

So one of the issues that is going to be in the case involves the Affordable Care Act’s requirement of providing or requiring companies’ employee benefits plans to provide certain forms of contraceptives, namely 20 different forms, including four that the Green family, as a matter of conscience, object to. They object to them on pro-life grounds; those four methods, as they see it, involve the taking of innocent human life. And so the question for the Court tomorrow is about a statute—and I hope we will have a chance, Alan, to talk about the statute as our conversation unfolds—the Religious Freedom Restoration Act. What a great name. Congress comes up with great names, don’t they? RFRA is not a great acronym, but there you have it. So if you hear RFRA, welcome to Washington, DC. We have an acronym for everything. [Laughter]

The Religious Freedom Restoration Act states that if government is going to place a substantial burden on the exercise of religion, then the government—we’re talking about the federal government here—must come forward with a compelling justification. Alan is the experienced professor of constitutional law so he can describe that aspect. But in short, it’s got to be really important, not just legitimate. One of the cases talks about governmental interest of the “highest order.” So suddenly (and liberty is truly the baseline) the government enacts something, and they did this through implementing regulations drawn by HHS from the Institute of Medicine. They didn’t just make it up, so there are these 20 methods.

But now we have that requirement of the ACA coming in to what I am calling, Alan, a conflict of visions. It is big government—and I do not mean that pejoratively. I mean that it just is big government up against a family that has been very successful and that has built this business enterprise, which is dedicated, as the Greens have said beautifully, essentially to Christian mission work. They do not live lavish lives. I have even seen that personally. They live very good lives, caring about people, including their 13,000 employees. So it is really a conflict of visions. Does RFRA now provide an exemption by Congress’ enactment? Does RFRA by its terms provide an exemption for the Green family by doing business as Hobby Lobby, a corporation? That is really at issue here. So Alan, your thoughts?

ALAN DERSHOWITZ: Well, first, that is a very fair statement of the case.
I've been thinking about this subject now for 65 years. Let me explain why. When I was 10 years old, my father had a tiny little store on the lower east side of New York where he sold men's underwear and work clothes. He was a jobber; that is, he was the middleman. He never made much of a living, but all of his life he was a very Orthodox Jew and, therefore, he couldn't keep his little store open on Saturday, which is the Shabbat. In order to make a living, he had to open it on Sunday. Occasionally, I would go and help him on Sunday. One day when I was there helping him on Sunday, the police came and arrested him for violating the Sunday closing law. They didn't take him away. They just gave him a summons and told him he had to be in court in two days. My father asked me to come out of school to watch how the American legal system operates.

He was very lucky that day because the judge he drew (an elected judge in New York) was a judge named Hyman Barshay, another Orthodox Jew. So my father came before Judge Barshay, and Barshay said, “Why are you open on Sunday?” And my father said, “Because I have to be closed on Saturday because I’m an Orthodox Jew.” The judge said, “Okay, what was the portion of the week that they read from the Bible in the synagogue on the Saturday before you weren’t able to close your store on Sunday?” In the Jewish tradition, every week you read from the Bible, and every biblical portion—we do not do it by chapter—has a name, the name of one of the characters in the portion or the first word in the Bible. My father immediately knew the answer. The judge tore up the ticket and said, “If you hadn’t known the answer, I would have doubled your fine.” So much for separation of church and state or freedom of religion.

But I had been thinking about this subject literally since that period of time. Now, I am your perfect audience here. Why? I’m a skeptic. I’m a skeptic about everything. I’m a skeptic about religion. I’m a skeptic about law. I’m a skeptic about science. I’m a skeptic about skepticism. [Laughter] I’m not even sure that’s such a good thing, but my life is just skeptical. I will die a skeptic. I will not ever know the answers to any of these questions.
So in the end, I’m waiting to be persuaded. I may end up persuaded that you are right as a matter of statutory interpretation and as a matter of a kind of constitutional overlay. I may regret that result from a policy point of view; I regret anything that hurts affordable care, anything that sets back a woman’s right to choose contraception. In fact, it’s a very interesting brief and a very interesting way you put it. You have no opposition to individuals disagreeing with you about using contraceptives. You just can’t—as religious people who feel that this is in violation of the right to life—you can’t participate in that.

KEN STARR: In those four types of contraceptives, out of the 20. Let’s just be clear about that.

ALAN DERSHOWITZ: Yes, in those four. And if it were six, it would be six, or ten if it were ten.

KEN STARR: Yeah, it’s the principle.

ALAN DERSHOWITZ: It’s the principle that really matters, and I’m completely supportive of you on the principle.

I just want to say one word about the jurisprudence before we have the discussion. I had a great time reading the briefs in this case, and it really reminded me of being back in my Jewish parochial school reading the Talmud. You know, “on the one hand, on the other hand; you read this case one way, then there’s this other interpretation of this case.” You know, there’s the old story of the Eastern European rabbi. He’s sitting in a divorce court and the wife comes in and says, “My husband is a bum, he’s a drunkard, and he beats me.” And the rabbi says, “My daughter, you’re right.” And then, the husband comes in and says, “My wife, she’s lazy. She doesn’t do anything. She doesn’t work. She doesn’t take care of the children.” And the rabbi says, “My son, you’re right.” And the student says, “Rabbi, they both can’t be right.” And the rabbi says, “My son, you’re right.” [Laughter]

And so, that’s the way I felt reading the briefs because the discussion is so Socratic. It is so Talmudic. You can interpret the constitutional jurisprudence today almost any way you want.

I am reminded of another great story, and then we can begin our conversation. It is a story of two great rabbis who were arguing about an arcane interpretation of Maimonides, the great twelfth-century philosopher. He had said something earlier in his life that was completely contradictory to what he had written later in his life, and the rabbis were coming up with one brilliant interpretation after another on how to reconcile. Finally, God says, “Look, this is the most brilliant argument I’ve ever heard. Let’s call in Maimonides. I can do that. He’s up here in heaven. He’s here.” So he calls Maimonides, and Maimonides hears both sides of the argument. He says, “But, you know, it was just a transcription error. I didn’t really mean to create irreconcilable differences.” And the rabbis throw him out saying, “What a trivial resolution of a complex Maimonidean problem.” [Laughter]

You feel that way when you read these briefs because the jurisprudence of freedom of speech, the jurisprudence of how you reconcile the Free Exercise Clause with the Establishment Clause, with the general presumption in favor of governmental regulations is so obscure and so difficult that no one can predict the outcome of this case with any certainty. I can predict one outcome.

KEN STARR: What is that?

ALAN DERSHOWITZ: And I will predict that no intelligent, reasonable person will want to distinguish between a business owned by an individual and a business which has become an S corporation. I find that to be an absurd argument being made by the government. I thought the government’s brief on that issue was trivial and silly. For me, the issue of whether you can do it through a corporation or individually is a religious issue. If your religion tells you that creating a corporation won’t allow you to circumvent your general religious obligations, you are bound by that.

In fact, yesterday I called a good friend of mine who is a very distinguished rabbi. I asked him the following question. I said, “What if I own a store and I want to open it on the Sabbath, and I’m not allowed as a Jew to open my store in the Sabbath? What if I become an S corporation and decide that the S corporation will open the store on the Sabbath?” He said, “Don’t be ridiculous. You can’t do that.” You are the corporation and the corporation is you. That is a religious principle. And it seems to me if the Court were to in any way try to undercut that religious principle by citing state law of what a corporation is or Blackstone as to what a corporation is, they themselves would be falling into the trap of violating the Free Exercise of Religion Clause. After that, I have some more difficulties which we can discuss.

KEN STARR: Very good. How about a round of applause for that? [Applause] Beautiful. That was extraordinary. We’re going to see if we could reduce the skepticism level, and I want Alan to leave here a believer, at least a believer in the Religious Freedom Restoration Act that Congress passed with an overwhelming margin. So let me put that ball in play, and I know we’ll have a panel talking specifically about the case. I think every American who loves freedom should
be applauding the statute that is at issue tomorrow in the Hobby Lobby case: the Religious Freedom Restoration Act, or RFRA.

Let me begin the story. Again, correct me if I leave something out, but let me actually begin the story with a case that your father would really relate to, *Braunfeld v. Brown*, a Warren Court decision that held that Abraham Braunfeld could be held criminally liable as an Orthodox Jew for keeping his store open on Sunday. Now let the record show that the Commonwealth of Pennsylvania that passed this law did not historically have a Sunday closing law. Why did it not? Perhaps because the Commonwealth of Pennsylvania had a pretty good record with respect to respecting religious liberty given its great history. But for whatever reason, the Commonwealth passes a Sunday closing law. Here’s the key: It does not create an exception for Orthodox Jews. You just had to close. So Abraham Braunfeld, who owned the store along with other Orthodox Jews, said, “This really imperils our financial wherewithal, period. It’s not just reducing our profitability. The competition is open on Saturdays, so we need to be able to do this.” The Supreme Court, speaking through the voice of Chief Justice Earl Warren—ordinarily a friend of liberty—said, “Listen, this is up to the legislature. If you want an exemption, a religious exemption, go to Harrisburg and do your best. But we’re not going to interfere with the judgment of the legislature.”

Two years go by, Alan, and then a subsequent case called *Sherbert v. Verner* involved a Seventh-day Adventist. So she cannot work on her Sabbath, right? And she is told by her employer, a textile mill in South Carolina, “Listen, you’ve got to work on Saturday or you’re out of here.” And she eventually said, “I guess I’m out of here.” She sought unemployment compensation and the state of South Carolina denied it. Ultimately, it goes up to the Supreme Court, and the Supreme Court said that because she is essentially being penalized for the exercise of her religious practice—she’s not prevented from going to church, but this practice of hers, namely to honor the Sabbath by not working, is being infringed by the state. The state must come forward with a compelling reason (remember our earlier part of the conversation), a justification of the “highest order,” in order to overcome that claim of religious liberty. The state came up with, “Well, we’re worried that people will be malingerers. They’ll pretend they’re religious. It will be bad for our economy.” Whatever the arguments were, they were considered by a super majority of the Supreme Court, an utter makeweight.
And so the Supreme Court, speaking through the voice of William Brennan two years after *Braunfeld v. Brown*, upheld that claim of religious liberty. Alan, something happened at the Supreme Court, and someone knows what happened at the Supreme Court, because a very persuasive justice named William J. Brennan, who had been in dissent in the Braunfeld case, was now writing the majority opinion for the Warren Court.

Is that too much law? Did everybody follow that? Okay. So that’s the case of *Sherbert v. Verner*. You say, well, I didn’t go to law school. I don’t want to go to law school. My dear friends, I’m talking about RFRA. The Religious Freedom Restoration Act reaches back into time and says we like the Warren Court’s approach. You might say, “Well, gee, that sounds like a bunch of Ds versus Rs.” My dear friends, the House of Representatives—we have Congressman Flores, whom I want to thank for being here—unanimously passed RFRA. You’re going to say, “Well, it must have been filibussed on the Senate.” Well, the Senate passed it 97 to 3. President Clinton signed it into law during his first year in office in November of 1993, and his signing statement was so powerful. It was emotional. He referred to a book at that point, a recent book by Yale. I’m sorry, I mentioned Yale.

**ALAN DERSHOWITZ:** I went there. [Laughter]

**KEN STARR:** That’s right. So I’m not sorry to mention it. Go Bulldogs. [Laughter] President Clinton mentioned Stephen Carter of the Yale Law School and his book, *The Culture of Disbelief*, and how American culture—the elite culture—is seeking to trivialize religion and to keep it out of the public square. I see some people nodding. You’ve seen that, haven’t you? Let’s just keep it out of the public square.

In other words, Martin Luther King, Jr. should have never talked about religion. Keep it out of the public square. President Clinton, signing this measure into law, talked eloquently about religious freedom as our first freedom. The Religious Freedom Restoration Act is meant to protect us as individuals, including S corporations.

I left out the peyote case that RFRA was overturning (*Employment Division v. Smith*). It could not overturn it because, it said, it did not have the constitutional power to do so. But in the RFRA the federal government said to the Supreme Court, “We do not like your decision in a case that involved the sacramental use in the Native American Church of peyote. We do not like your decision in that case because you did not hold the government to the kind of standard that *Sherbert v. Verner*, the Seventh-day Adventist case, did. You also used a different standard than in *Wisconsin v. Yoder*.” This was the case involving an Amish family who said they could not allow their child to remain in the public schools of Wisconsin after the eighth grade. The family felt that the children needed to be reintegrated into the community. A very eloquent partial dissent by William O. Douglas said that he needed to hear the testimony of the children in that case. One child did testify and said, “Yes, this is what I want to do. I want to be part of the Amish community.”

So with RFRA the Congress of the United States overwhelmingly rebuked the Supreme Court of the United States and essentially restored the standard that the Court had rejected in the peyote case.

**ALAN DERSHOWITZ:** Well, I actually worked on drafting some of the language of the Religious Freedom Restoration Act, and I very, very strongly support it. One of the cases that led to it was also the case of a Jewish psychologist who had testified wearing a kippah and had been told he couldn’t wear the kippah. The Supreme Court, in an opinion by Chief Justice Rehnquist, affirmed that. So RFRA was a situation where many in the Jewish, Christian, and other communities all got together. The beauty of the act and the beauty of some of the Court decisions that come afterward is that they really do focus on minority religions: the Hialeah case where you have a very obscure religion where they sacrifice chickens, the Amish cases, and other cases. These are not majority religions, and so there really is no conflict in those cases at all between the fear of establishment and free exercise.

Where I think we differ is when you use a phrase as broad as “religion in the public square.” Here is my take on that, and it will be different from many of your takes. So two nights from now, I’m going to be speaking to a group called Chabad in New York. Chabad is a very Orthodox Jewish group that puts up menorahs every year at Hanukkah time. They are going to put up the world’s largest
menorah right outside of the Plaza Hotel this year, and they’re going to have dignitaries light one candle, and every year they ask me to light the candle, and I every year draw the same distinction. If this is a privately funded menorah and if it’s on private land or land that is equally available to all groups, then I will light one of the candles. On the other hand, if the government builds the menorah and it’s a government decision to promote this particular religious exercise, I will respectfully decline from participating.

So I think when we use the term “religion in the public square,” we have to distinguish. Martin Luther King, of course, should never be prohibited from talking religiously, nor should I, nor should you. That’s part of not only our free exercise of religion but freedom of expression. It’s a lot harder when you ask yourself the question, “Should Congress pay for an official chaplain which it selects based on religious views?” My answer to that would be that if we would start out new—kind of tabula rasa—I would say the answer to that is clear. It should be no. But we’re not starting out on a tabula rasa. There is a history that goes back to the beginnings of the republic of congressional chaplains doing that kind of thing. Of course, congressmen and senators are all adults and they’re not going to be particularly influenced in their religious views by a chaplain saying a few words before the House or the Senate begins. But extrapolate that and put it to six and seven-year-old children in school who want to be like their friends, who don’t want to be minorities.

My wife grew up as a Jewish woman in Charleston, South Carolina where she went to public elementary school and a Christian high school because it was the best high school. She said prayers both in the public school and in the private school. Of course, she chose to go to a Christian school. She balanced on the one hand the excellence of the education against feeling a little isolated. Her parents decided—she was 14 or 15 years old at the time—that this was a balance that would be healthy for her, to see other people and other views and other perspectives. She would have made a different choice, I think, as a six-year-old or a seven-year-old. So I think these are very, very hard questions when it comes to the public square.

When it comes to issues like whether or not an S corporation, a family-owned corporation in a wonderful business, should be allowed to be exempted from providing a service that perhaps many of the employees would benefit from and would use, I think that’s a much more complicated and difficult question. I would look for a middle ground. I would look for a way of finding a way to not ask the Green family, or any other family, to compromise their religious views, but there are a few principles that have to be in operation. Number one, nobody should ever profit financially from being accommodated. That is, if you’re accommodated, you shouldn’t benefit. You shouldn’t gain any financial benefit from that. So there has to be a way of making you pay what you would pay but for your religious views, but in a way that’s consistent with your religious views. That is a kind of accommodation that I think makes a lot of sense.

Now the next question is, should you ever have to pay to exercise your religious views? That’s a complicated question. We all know whether you read about the life of Jesus or the life of other religious leaders that it’s not easy to be religious. It’s not easy to be a person of God, and it’s not inexpensive either. For most of my life, I ate only kosher food. Kosher food was 20 percent more expensive than non-kosher food. We regarded it as a kosher tax. It was worth paying because we wanted to eat kosher. I would never dream of asking the government to subsidize that 20 percent. I also don’t believe that the government should be subsidizing purely religious education. Now there are hard questions. What does that mean? They should provide police protection for schools, fire protection for schools, perhaps secular textbooks, a range of provisions.

Again, I think what we need to do is search for accommodation. At every stage, try to figure out ways of not requiring you to compromise at all with your religious views, but making sure it also doesn’t hurt those whose religious views are different from yours. I want to make sure that your 13,000 employees, or however many of them are women, who would take advantage of the four types of contraceptive devices, aren’t in any way disadvantaged by the exercise of your religious views.
I am confident this can be achieved, and I think it would be useful to try to find middle ways. I don't like to see conflicts between religion and governance. They are very dangerous historically, and it's far better if we can find methods by which we can work out these accommodations. I would like to throw it back at you and ask you, Ken, what kind of accommodation would you provide, short of the ultimate accommodation of just saying to the Green family and the cooperation, “You're out, you're exempt”? What kind of accommodation do you think would be consistent with the policies underlying the Religious Restoration Act?

KEN STARR: Well, in fact, the government provides—as you know, Alan—for a number of exemptions. There are statutory exemptions, and the administration has granted additional time and the like. So there are mechanisms that achieve, I think, this balance of accommodation that you're talking about, whether it is in fact government-funded or government-provided access to the four methods that the Greens oppose as a matter of conscience.

ALAN DERSHOWITZ: As a deeply religious person who supports the right to life, wouldn't you be at least slightly offended—and I would also throw the question to the Green family for later—if the government paid women to use abortion methods or methods that you believe are abortion methods? Wouldn't you be uncomfortable with that? I know in your brief, you say that is an appropriate accommodation, to have the government directly pay for these services. Does that not raise any level of discomfort?

KEN STARR: But it's at a different level because it's no longer your freedom of conscience that is being so directly and truly violated.

ALAN DERSHOWITZ: You're paying your taxes.

KEN STARR: But we might oppose any number of things, whether it's the war in Afghanistan or other kinds of policies. Then it becomes a matter for the democracy through our elected representatives to work through. What is beautiful about RFRA, the Religious Freedom Restoration Act, is that Congress has spoken with enormous unanimity and was supported by President Clinton, saying, “Government, please respect these religious views. No matter how important the public policy is, it's got to be a policy of the very highest order.”

In my own view, Alan, with respect to the cases, the government has a huge Achilles heel quite apart from its corporate argument, which you and I agree is very, very weak, and that is that there are exemptions galore. There are grandfathered plans. So many millions of Americans aren't protected in the way that you feel is very important.

Are your Fourth Amendment rights violated by this? [Laughter] There's definitely a seizure.

ALAN DERSHOWITZ: I'm consenting. I'm welcoming. [Laughter]

KEN STARR: Very good.

ALAN DERSHOWITZ: Because my First Amendment rights would be compromised if you can hear me.

KEN STARR: I would never think of suggesting that Alan does not have unfettered freedom of speech. Congress shall not, and certainly C-SPAN shall not. I want to come back to your wonderful statement about accommodation, that you want to find this middle ground, and you're using the word accommodation and exactly so. I think here's another area where once again we are fellow co-believers. Is the Religious Freedom Restoration Act on its face unconstitutional as respecting an establishment of religion?

ALAN DERSHOWITZ: No, I don't think so.

KEN STARR: Well, can I just add something? There's one justice now retired on the Supreme Court who concluded that RFRA was a law—that Congress passed a law respecting an establishment of religion. In light of subsequent appointments and so forth, all nine current members of the Supreme Court—unless she/he changes his or her mind—would say absolutely not, that it's in the finest traditions of America to accommodate, to try to accommodate. But there's a limit, isn't there, Alan? Because it's about whether the accommodation reaches the level—and this is a judgment call—of really burdening the folks who are not being accommodated.

ALAN DERSHOWITZ: Right. And I think the other limit is this: You have to interpret the act consistent with what the Supreme Court held in United States v. Seeger, which is that religion has to be defined very broadly to include any philosophical view that holds a place similar or comparable to what religion holds in the life of people who are traditionally religious. I think it was Oliver Wendell Holmes who used the phrase the “can't helps.” You can't help but believe in the right to life. I can't help but believe in certain other liberties and rights. I don't call them religious views. And so we will at some point have a dispute about how to define what is a religious view and what is not.

I think one has to do it very broadly in order to avoid an establishment problem, because although we know that the Establishment Clause was not originally intended to say you can't give any
preference to religion in general over secular life, it has come to be interpreted that way. It was originally obviously a limitation on the federal government not to establish a particular federal church at the time the Bill of Rights was enacted. Six states, I think, had established churches, and it wasn't seen as a violation of the Establishment Clause, but that's changed over time. I worked on the language of the Religious Restoration Act in an effort to avoid establishment problems. That was my particular task—how to draft a statute like this that won't run into establishment problems, because that's one of the hard jurisprudential conflicts: how you in any way enforce your free exercise of religion without preferring religion over other views of life.

KEN STARR: In our time remaining—and we look forward to the audience participating—Alan, we have, among other very distinguished guests here, Os Guinness, a wonderful commentator on the culture, including globally. Os asked a question in one of his recent books, *The Global Public Square*, “How can we live together with our deep, deep difference, our deepest differences?”

Also, in the book *Culture of Disbelief* and Noah Feldman’s book *Divided by God*, there’s this search, this eagerness to find how can we, given our diversity—culturally, religiously, and so forth—live together peacefully, resolve our differences peacefully without going to litigation. I think there’s a growing sense that if you were a person of deep religious faith, you’re in the crosshairs now. There are people here from different religious communities who feel genuinely embattled in terms of freedom of conscience.

So what I want to lift up in terms of the culture, what I think the Supreme Court did in a great iconic case called *West Virginia Board of Education v. Barnette*, is to say that the government cannot interfere with your freedom of belief. “If there is any fixed star in our constitutional constellation,” in the great words of Robert Jackson, “it is that no official, high or petty, can determine what is orthodox in matters” including obviously religion, but also politics and the like. That is so bedrock, I think, in the American culture. But increasingly, people of faith are not so sure that *West Virginia Board of Education v. Barnette* is in the culture anymore. It’s not, perhaps, in the politics anymore, at least to the extent that it was. There’s a sense of embattlement.

What’s your sense of that? Has the culture shifted in terms of what in fact was said, if I may say so, in *Sherbert v. Verner* in dissent? The two justices who dissented in that particular case said it was essentially a warning of what they call, for some reason, the “march of secularism”—that American culture and American law at its best can, in fact, be accommodationist.

ALAN DERSHOWITZ: Okay, so I’m going to now point my finger at you [pointing at audience] and I’m going to say it’s your fault. You haven’t done a good enough job in the marketplace of ideas to persuade Americans of your point of view. I agree with you. I think you’re losing the battle among young people. If you look at what’s going on in many colleges and universities, there is increasing disdain for religion. I don’t like it. I don’t like it. I find America to be the best country in the world in terms of not having these divisions. For example, the two countries I know best are the United States and Israel. Israel is having a terrible problem because if you’re not very religious in Israel, you’re anti-religious. The reason for that, I believe, is that the state has played too great a role in promoting religion.

Separation of church and state is good for religion. Williams said that. Jefferson said that. I don’t want to put myself in those categories—

KEN STARR: No, I think you should be allowed.

ALAN DERSHOWITZ: —and I’m hoping Ken Starr will say it by the end of the day.

KEN STARR: Amen. I think you should applaud what Alan just said. [Applause]
**ALAN DERSHOWITZ:** It’s very, very important because in this country nobody can tell me what I have to do and don’t have to do. I love religion. I love religions that I’m not part of. I admire it. I read religious books. I listen to the radio show *Religion on the Line.* I’m involved in religion in many, many ways. If I lived in a country where they told me what religion I had to practice and how I would have to practice it, I’d be religion’s worst enemy. I would be fighting it tooth and nail, and I want to keep it that way.

So my view is don’t ask for the help of government. Don’t ask for the help of the state. Do a better job. Go out there and make religion more relevant to the life of young people. Don’t create conflicts between the rights of women and the rights of religion, between the rights of gays and the rights of religion, between the rights of other dissenters and the rights of religion. You’re going to lose many of those battles, unfortunately. You have to figure out a way—and it’s your job—of making people love what you believe in and love what you’re doing.

We were just having a conversation before this began with two wonderful people who were evangelical ministers in Jordan and had been arrested in Jordan. I was telling them that I think Jews sometimes have a hard problem understanding that Christianity and Judaism are very different. Christianity is an evangelical religion. Your job is to convert me. As a Jew, my job is not to convert you. We have different religious perspectives on conversion, and Jews have to recognize that—that it’s part of your religious freedom to try to convert us. We should respect that. We should admire it. We should welcome it. We should say, “Wow, you think so well of us that you really want us to become part of you. Thank you, but no thanks. I’m going to stick with my religion, but I really, really take it as a compliment.” There has to be more of that kind of dialogue and understanding, but the state can’t pick up the slack.

If there is in fact an emerging culture of secularism, it’s not something the state can get involved in, as long as it’s not the state’s fault. Now, it’s certainly not the legislature’s fault because legislatures are sympathetic generally to religion. In fact, if this case tomorrow turns on the legislative intent, the government has no chance of prevailing because any rational person will know that the legislature intended to be consistent with the broader scope of the Religious Restoration Act. As you said, the vote was 97 to 3. The President signs it. Senate, Congress, everybody supports it. You’re always going to get accommodation from elected representatives. But the Court has been, you might say, a secularizing influence. That certainly is a realistic assessment, but I don’t think it’s had all that much influence on changing American culture.

Look, it’s happening all over the world. Europe is regarded today as a post-Christian area of the world. Look at France or England. You can go to Notre Dame today on a Sunday morning. Wherever I travel in the world, I go to church on Sunday morning, not to pray, but I love church services, and I love to see the most beautiful buildings in the world in use. When I go to a church service in Notre Dame, there are 15 Jewish tourists, a couple of Muslim tourists, and two or three Catholics praying in the front. The places are absolutely empty.

**KEN STARR:** You need to come to Baylor. [Laughter]

**ALAN DERSHOWITZ:** All right, that would be great. I would love to. But my point is a more general one, and that is that you have the responsibility of promoting your view of this society and you can’t ask the state to help you.

**KEN STARR:** Let me pick up on your comments in terms of certain issues: gay and lesbian rights, reproductive freedom, and what many view as the taking of human life. Is there in your view—I don’t want to call it middle ground—but is there cultural room for us? Is there a corridor that we can all say, yes, we’re comfortable in the corridor even with our disagreements as long as we respect freedom of conscience?

Let’s just use the example of Catholic hospitals or Orthodox Jewish doctors declining to perform certain kinds of procedures. Now, that interferes with reproductive freedom and you feel very strongly about that. But what do we do with that situation in terms of the role of the state? Should the state be able to command Simcha Goldman, the physician—he was a psychiatrist or psychologist, but let’s say he was OB/GYN—should the government be able to say to him, “You must participate in a procedure that utterly offends your conscience”? Should the federal government be able to do that?

**ALAN DERSHOWITZ:** I think the answer is no, except if the person is an emergency ward doctor and has somebody come in in an emergency and there’s no realistic alternative.

**KEN STARR:** But as a general matter?

**ALAN DERSHOWITZ:** As a general rule, there should be that kind of combination. Now let’s move to another area. What if a person—there are these cases now pending in the west of the United States—says “I’m so offended by the gay lifestyle that my religion precludes me from delivering flowers to a gay wedding”? Or, I had a case some years ago where a woman refused to—she was a dental resident—perform dentistry on a gay man. In her
You shouldn’t be a clerk whose job it is to have to marry people who says it’s against my conscience, the answer is get another job. If the civil clerk is an Orthodox Jew for forbidden from marrying a Jew to a non-Jew, but obviously a civil clerk can’t refuse to do that. If the civil clerk is an Orthodox Jew who says it’s against my conscience, the answer is get another job. You shouldn’t be a clerk whose job it is to have to marry people regardless of religion.

My gut tells me there’s a big difference between making a doctor perform an abortion—which I would never think would ever be proper under any circumstances except, as I said, in the emergency situation—and requiring somebody not to discriminate against a gay person, or not to discriminate against an atheist or somebody else who offends them deeply to their religious core.

KEN STARR: And then what about an Orthodox Jewish rabbi, or an evangelical minister, or pastor, or a Catholic priest who cannot in conscience—even under the law of the state where the person is serving in ministry—perform a same-sex marriage?

ALAN DERSHOWITZ: Oh, I think that clearly nobody should be required to perform a same-sex marriage. Marriage today is a religious phenomenon. I mean, in my own view—I don’t know if you know my own view, I’ve written about this extensively—I would like to see the state get out of the marriage business. The state is not in the baptism business. It’s not in the circumcision business. It shouldn’t be in the marriage business. Marriage is a sacrament, and sacraments should be performed in church.

KEN STARR: I think we’re hearing some amens.

ALAN DERSHOWITZ: My view is that everybody should be able to get a civil union, which obliges you to do certain things that you’re responsible for and gives you certain tax benefits and disadvantages, and the state benefits and disadvantages. Everybody should be able to sign up for that, and then the vast majority of us would then go to our church or our synagogue or our mosque and have a rabbi, a minister, or an imam perform the religious part of it. And of course nobody, no religious person, should ever be required to perform a marriage that’s against their religious views. I would be categorical about that.

On the other hand—and here I’m going to finalize that point I was making before—if you get any financial advantage from being able to opt out of the providing of these four different contraceptive or abortion devices, you should have to pay a tax, a general tax equivalent to the money you’ve saved, so you don’t end up profiting from the accommodation of your religious views. It seems to me that’s a fair accommodation.

KEN STARR: Well, the theme is accommodation, and I hope that everyone of good will is impressed by the liberality and generosity of spirit with which Alan speaks.

I want to come back to Os Guinness just for a second. Os, in one of his books, is expressing concern that globally the Universal Declaration of Human Rights would no longer be accepted, including but not limited to Article 18, which is a declaration—though there are international lawyers who say it does not have the force of law—but it was a declaration like our Declaration of Independence. Os is concerned that the Universal Declaration of Human Rights couldn’t be agreed to anymore globally. But at least in America, we, I think, overwhelmingly would say we agree with the sentiments of the declaration. Do you agree with that?

ALAN DERSHOWITZ: I agree with that. You know the Universal Declaration of course grew out of the Second World War, largely out of the Holocaust, written by a Jewish Frenchman named Rene Cassin. It was an amazing accomplishment, for which he got the Nobel Peace Prize. There are efforts afoot to try to undo it and to try to undo freedom of speech and freedom of religion. There are attempts to try to essentially put blasphemy laws back into universal exceptions to free speech, and I think the United States government hasn’t taken a strong enough view against that kind of international encroachment on our particular concept of liberty. Many people think it’s America trying to impose our view on others. This is an area where we’re right and they’re wrong, and we should simply not compromise on those views.
KEN STARR: This, by the way, is grist for the daily mill of the Religious Freedom Project of the Berkley Center at Georgetown University, and one of the reasons that we at Baylor University feel so drawn to come alongside and to support what the Berkley Center’s Religious Freedom Project, under Tom Farr and Tim Shah—they’re wonderful colleagues—are doing in order to have a conversation with public policymakers. We have individuals who have been in captivity, who have been in prison. Can you imagine being in prison because of what you believe, because of what you’re saying to someone? And that you can then be imprisoned in the twenty-first century? And yet, as Tom Farr said at the outset, that is the trajectory according to the Pew Forum. So it’s one of the reasons for this conversation and this effort, with respect to doing that which Congressman Flores and the Congress in 1993 said, “Let’s do something about it. Let’s have a restoration.” That’s a great word, a “restoration” of the culture of religious freedom.

As we open this up to the audience, let me remind us all of a quote by William O. Douglas. He was a pretty secular person, by reputation at least. Judge not, that you be not judged. But he was also a great friend of freedom. Whether you agreed with him or not, he was a great friend of freedom. He wrote in one of his opinions for the Court—just speaking for himself, speaking of America—that we are a religious people whose institutions presuppose a supreme being. When you return to the declaration, when you return to those founding principles, what I think the founding generation was really lifting up for all of us were the blessings of liberty for ourselves and our posterity.

Please join me in saying thank you to Alan Dershowitz. [Applause] And now we’ll hear from the audience.

THOMAS FARR: That’s right. Let me just confirm for the record that both of our guests have in other words said that the United States ought to have a firm international religious freedom policy, and I’m delighted to have you both on the record for that. I’ve written for some time that we are not doing the kind of job that we should be doing, and so I’m delighted to note that you and your conversation, or at least your penultimate discussion, was about that. Thank you, Professor Dershowitz, for bringing that up.

I’m going to read some questions here. I must say to those of you who write like physicians doing a prescription, I’m sure they were brilliant questions, but I just couldn’t read them and Byron couldn’t read them. [Laughter] So we had a little bit of a cross-eyed conversation over there. We do have some that we can read, so I’m delighted to present them.
This first one is for Professor Dershowitz from Richard Doerflinger of the US Conference of Catholic Bishops, and he says—and of course, Judge Starr, we’d like your response too—“The government believes greater access to birth control will reduce births, and Hobby Lobby already covers child birth in its insurance plans which is far more expensive than birth control. So,” says Mr. Doerflinger, “isn’t Hobby Lobby already offering to pay for being accommodated?”

ALAN DERSHOWITZ: It’s a very interesting perspective. In the brief in the other case, they actually assert the position that there’s no relationship between providing contraception and the actual birth rate. That was, for me, very questionable. They provide some empirical data that purports to support that, and they say the burden is on the government to demonstrate that close connection. But it really raises a much more profound question, and that is, does the government have a right to take a policy position in any way on whether more or fewer births should be encouraged in a society? I would be very uncomfortable with that.

In China, obviously, that position has been taken. In countries with mixed racial backgrounds, there have been efforts to try to reduce the population growth—these people, by the way, praised Margaret Sanger. If you go back and look at the history of Margaret Sanger, her goal in introducing birth control was to reduce the number of children born to undesirables in the country. It was really not a neutral method of reducing population size. I think the government has to stay out of that area. I think the government has to really be very careful about telling families whether it’s a good thing or a bad thing to have more children or fewer children. Anything that gets into that business, even in terms of suggestion, even a bully pulpit, I think treads on far too dangerous ground.

KEN STARR: I think as a matter of prudence, government likely would not say we want you to have more children, especially given the dysfunctionality that attends so much of social and cultural life now. But I do have a different view, which is, while respecting a conscience, the government can in fact choose to be pro-life. The more, the merrier.

ALAN DERSHOWITZ: Can it also then be pro-choice?

KEN STARR: Of course, the government can be pro-choice, as long as freedom of conscience is respected. To me, that’s the democratic conversation.

ALAN DERSHOWITZ: But why should the government take any position on that? Why shouldn’t that just be left to individual conscience and the government remains agnostic on the issue of choice, of life? Aren’t those the kinds of issues the government best stays out of?

KEN STARR: The perfectly reasonable view, or my view, is government can, if it so chooses, say that the better society and the good society is a society with large families. We think that’s better.

ALAN DERSHOWITZ: But then it can also say the opposite. But I don’t think it’s a good thing for the government to be saying, “We think you should limit your children to a birth ratio of one.”

KEN STARR: Absolutely. No.

ALAN DERSHOWITZ: That would be a bad thing.

KEN STARR: I agree with that.

ALAN DERSHOWITZ: So how can you accept one and not the other?

KEN STARR: Easy.

ALAN DERSHOWITZ: Not so easy for me, okay.

KEN STARR: First of all, it’s the degree of interference, and that’s a judgment call. But I’m also talking about the coercive powers of the state, and I would say any kind of coercion would be really wrong. But we, in fact, do encourage larger families in terms of saying we’re not going to cut you off in terms of the child deduction after child number one or child number two. So in our own way, we recognize—or as the economist would say, we are incentivizing—large families. I would say that’s very theoretical rather than real because you’re not really going to recover the cost of childrearing; but you can at least say, well, can government have the right to cut off the deduction after the third child? In my own view, I think that would raise very profound issues.

ALAN DERSHOWITZ: I completely agree with you, but I don’t think it would be good for the government to announce a specific policy in favor either of large or small families. I very much worry what happened in France. In France, after the war, the government took the position, I’m told, that we should reduce the number of children. If you want to be a good citizen, you should have no more than two and preferably one child. I just don’t want my government to get into the bedroom with me.

KEN STARR: I agree. I don’t want the government to do that, but I think you’re saying the right of the government to do it. I’m
“I was telling them that I think Jews sometimes have a hard problem understanding that Christianity and Judaism are very different. Christianity is an evangelical religion. Your job is to convert me. As a Jew, my job is not to convert you. We have different religious perspectives on conversion, and Jews have to recognize that—that’s part of your religious freedom to try to convert us. We should respect that. We should admire it. We should welcome it. We should say, ‘Wow, you think so well of us that you really want us to become part of you. Thank you, but no thanks. I’m going to stick with my religion, but I really, really take it as a compliment.’”

Alan Dershowitz

simply saying that my view on democratic theory is if that’s the view of the government, that’s why we have elections, then the government has the right to articulate that and then we have an election. I think it is better for the government to do that which the government does not do. It doesn’t go out and say please reduce the size of your families or whatever. But I think the government would do well, and I think presidents do this by example, by word, and by deed saying, “Hey, fathers, why don’t you care about your children? Fathers, why are you leaving the home?”

ALAN DERSHOWITZ: I agree with that. By the way, I’m told now that in Russia, this great democratic leader, Putin, has looked around and seen that the Russian population has gone down dramatically in the last several decades. They have a relatively small population, I think one of the lowest populations per size of the country of any country in the world. Not quite as low as Iceland, but they’re trying to increase their population. It makes me a little nervous when I hear about government doing too many things in that area.

THOMAS FARR: Could I just follow on before I read another question? You both say that you believe government should encourage fathers not to leave their families. Would you support getting rid of the no-fault divorce laws?

KEN STARR: Oh, that’s very interesting. Alan, take it away.

ALAN DERSHOWITZ: I would not. I don’t think the problem is divorce. I think the problem is not getting married in the first place. I think the problem of fathers, of sperm donors who are not fathers, who are just providers of an essential component of biologically having a child, have to take far greater responsibility for their children. As a man who went through a divorce and had custody of my two children, I didn’t see any inconsistency between having a divorce and being a very, very good hands-on father. I think a good divorce is often better than a bad marriage, and it can be consistent as well with good parental care. So I wouldn’t, again, get the state into the business of opting for bad marriage, or its preservation. I don’t want to see this Congress pass the Preservation of Bad Marriage Act abolishing divorce. No, I would not be opposed to no-fault divorce.

THOMAS FARR: Some would argue that no-fault divorces are part of a legal system designed to destroy good marriages.

ALAN DERSHOWITZ: I think the purpose of divorce is permitting you to remarry. That’s the purpose of divorce, which is why I helped draft the anti-get law in New York. Under very Orthodox Jewish law, a man can hold his wife who he is divorcing hostage and not let her remarry by refusing to give her religious divorce, the “get.” I actually drafted a statute some years ago in which I said one of the major functions of divorce is to permit remarriage, and the state has an interest in that, and, therefore, if there are any effective barriers to remarriage, the court has the right to inquire into those as a condition of granting the man his divorce.

It’s complicated. I have to admit I haven’t thought the whole thing through. My instinct is not to have the state put its heavy thumb on keeping couples together whose strong belief is not to live together.

KEN STARR: Tom’s question went to no-fault, and that is a very modern phenomenon of the 1960s and 1970s. I think the social science does show that children, as a rule, do better in a family.
ALAN DERSHOWITZ: Yes.

KEN STARR: Another one of the baleful consequences of at least the guy leaving the marriage is that it tends to impoverish the spouse who typically has the children.

ALAN DERSHOWITZ: We should do something about all of that. We should do all of that, but I think in most divorces, no one is at fault. The divorce is simply a function of a terrible mistake that was made of growing apart and the idea of having to point your finger at a spouse and accuse them. When we had fault divorces in New York, people would make up fault. They would acknowledge adultery when it didn’t occur, and so I think going back to fault divorces would be a serious mistake.

THOMAS FARR: Well, I’m sorry I asked. Let’s move now to a more controversial issue. [Laughter]

ALAN DERSHOWITZ: You know what they say about a lawyer. Never ask a question unless you know the answer. [Laughter]

THOMAS FARR: Now, this question was not signed, which is a no-no, but I want to ask it anyway. It has to do with racial discrimination. It references a case that I’m not familiar with, but I’m sure you will be: the Heart of Atlanta Motel case. “If the motel’s defense for its racial discrimination was based on religious grounds, would the Hobby Lobby religious freedom legal position support the hotel’s racial discrimination?” Or, to put it in another way: “Would RFRA support racial discrimination on religious grounds?”

KEN STARR: Even there, there would be a question: Does the government have a compelling interest to override? We’re going to assume that it’s a sincere religious belief. That may be an exit ramp right there if really you have a sincere religious objection to serving people of all races. So if you establish that—and courts tend to be very generous with respect to accepting claims of sincerity—then the question becomes, under RFRA, does the government have a compelling interest in stepping in and saying, “You can’t do that”?

My own view is of course it does. We had a civil war. We have the Thirteenth and Fourteenth and Fifteenth Amendments to the United States Constitution that show the inadmissible role of discrimination when it comes to race. It tore the country apart. Government clearly, in my view, has a compelling interest in eradicating discrimination on that part.

ALAN DERSHOWITZ: Let me throw a hard question at you. I belong to a wonderful synagogue in New York called Park East. I love it. I love the cantor. I love the rabbi. It’s an Orthodox congregation and the women sit separately from the men. My wife, who was brought up in a Reform congregation in Charleston, South Carolina, doesn’t like it. She says she’s being discriminated against, and their response is, “No, no, no. Separate but equal.” Now, of course, that was what the whole civil rights movement was opposed to, separate but equal. But I can’t imagine any court compelling an Orthodox synagogue to require women and men to sit together. That is such a core aspect of Orthodox Judaism that they would clearly allow it to be maintained.

KEN STARR: The Court has been very clear in all of these cases saying, “We really want to understand the context.” The context is critical. So there what you’re talking about is this deeply held religious belief of a community that has voluntarily come together. Whereas in the hypothetical, the Heart of Atlanta Motel, what the storeowner or motel keeper was trying to say is, “We do not want to serve African Americans. We want to be in the stream of American commerce, and that includes interstate commerce obviously. It’s not that we just want local people here. We’re a bed and breakfast designed just for these people.” This makes for a slightly tougher case, but not really. When you look at the nature of our economy, I think it’s quite defensible for Congress to step in and to regulate commerce using its powers under Article 1, Section 8 of the Constitution, and to do so in a very sweeping way.

By the way, that was one of the issues in the Affordable Care Act. You saw how deeply divided the Court was. Five members of the Court said Congress had exceeded its powers under the Commerce Clause. But what we’re really talking about is the constitutionality of Title VII of the great 1964 Civil Rights Act, concerning employment relationships and the public accommodations provisions, which was overwhelmingly, in fact unanimously upheld by the Supreme Court.

ALAN DERSHOWITZ: Let me throw a hard question at you. Hypothetically—and this probably won’t happen—let’s assume that the Green family loses and then they do something that they would never do, but it’s a hypothetical. They say, “Look, we have to not provide this care so we’re going to require all of our employees, the 13,000 people who work for us, to commit themselves to not using these four methods of birth control. We will not hire anybody who is not prepared to commit themselves. In that way, we eliminate any religious problem.” Do you think the Court would uphold that?

KEN STARR: I think so. I need to think that one through, but I think it’s okay because, again, the baseline is liberty. That’s their
employment. So is there any kind of discrimination on a ground that Congress has seen fit to forbid?

ALAN DERSHOWITZ: Religious discrimination. It could be religious, wouldn't it?

KEN STARR: I'm not sure, because you're saying that this is a foundational part of our policy that, yes, it's informed by religious belief.

ALAN DERSHOWITZ: But what if you had employees, potential employees, who work for them who say, “It is our religious obligation to limit our family and to use this kind of birth control”? Then, you'd have a kind of conflict. Well, they have, I think, said that they wouldn't do that, so I don't want to put any onus on them. I don't think the case is going to come out that way.

KEN STARR: It's a harder question if they lose. But the other thing I think we should remember, because you're taking us beyond this particular case, is that so many businesses in America are small businesses. Small businesses—meaning less than 50 employees—account for the vast majority of enterprises in the United States, and these companies are not required to provide health insurance for their employees. So one of the issues, I think, to consider is, if the Affordable Care Act is so important, why has Congress allowed millions of employees of small businesses to be exempt? All companies up to 50 employees—that's a fairly significant business—are exempt from ACA requirements.

ALAN DERSHOWITZ: Why doesn't Congress solve this problem? Congress could do it very simply. When you get back to work this afternoon, Congress could probably pass unanimously a resolution saying S corporations are people for purposes of the Religious Restoration Act. Problem solved.

KEN STARR: That is one of the odd things that if Hobby Lobby loses, then it's simply—I mean, it's a huge setback obviously for religious liberty—but it's really the lawyers' Relief Act because businesses will simply say, “All right. What's the nature of my partnership? Can I have a limited liability partnership and the like?” So it will be a great day for the corporate lawyers, but you can in fact manage around it. I'm not saying it's easy to take a corporation of the size of Hobby Lobby and then just say, okay, we are now filing the articles of dissolution and the like, but it can be done. Corporations can dissolve. So it's part of the oddity of this entire argument on the part of the government because it's a for-profit corporation. So think of it. If they had remained as five partners in the family, they have full protection. So at what moment did the magic occur? Poof, you had religious liberty rights and now you don't.

ALAN DERSHOWITZ: Your accountant took it away from you. [Laughter]

KEN STARR: Yeah, it is an exercise. As we say in the law, it's the exercise in formalism, which is the kind of exercise that gives lawyers a bad name.

ALAN DERSHOWITZ: Absolutely.

THOMAS FARR: Okay, three minutes left. Last question: What's going to happen tomorrow, and can you give an insight into what you think the reasoning will be?

KEN STARR: Please, Alan, you're our guest. [Laughter]

ALAN DERSHOWITZ: Well, I'm going to be there. I'm going to be listening to every word of the argument. It promises to be a very interesting argument. We will not know how Justice Thomas is thinking because he won't let us in on his views, but we will certainly hear a lot from some of the other justices. And tomorrow by noon, I'll be in a better position to make a prediction than I am now. If I had to guess though, I would say the Court would not accept the corporate-individual distinction. It's hard to know. I think they'll accept the analysis that has been put forward by the private parties rather than the government. But in the end, how they will balance and whether they will find that there is a compelling need, I just don't know.

KEN STARR: I think the prospects are bright for Hobby Lobby and are dim for the government. I tend not to make predictions, but you asked me to. I say that for two reasons. One, I agree totally with Alan that the argument with respect to Hobby Lobby—that the five family members lost their rights when they marched down Oklahoma City and filed Articles of Incorporation with the secretary of state—borders on the frivolous. I just don't view it as a serious argument. Arguments that I don't view as serious have won before, but I'd be surprised.

ALAN DERSHOWITZ: Me too.

KEN STARR: But the second thing is that the Religious Freedom Restoration Act is so powerful. I want to give you just one very quick example. When Congress also said, “Hey, we're serious about religious freedom, so we're going to even apply it to inmates in prisons”—though the religious line has got a horrible acronym in RLUIPA (Religious Land Use and Institutionalized Persons Act), it's essentially RFRA applied to institutions, state prisons, and so forth that receive federal financial assistance—all kinds of argu-
ments were made by the state of Ohio, the state of Michigan. All the state attorney generals said, “This is terrible. We’ve got to be able to run our prisons. Prisoners can make frivolous claims for religious liberty. We just can’t do this.” The Court was unanimous, speaking through Ruth Ginsburg, saying, “That’s what Congress has called on us to do. We’re going to have to balance that.”

By the way, if you look at that case called *Cutter v. Wilkinson*, it is such a great instruction of what Chief Justice Roberts has so wisely said, “Bureaucrats have said from time immemorial we can’t grant you an exception. If we grant you an exception, then we’ve got to grant everybody an exception or an exemption and, therefore, no exemptions.” That’s where Congress steps in and says, “Absolutely not.” So then, when you look at the record in that case, you see Ohio said, “Of course, we can’t provide the appropriate kind of food for Muslims.” Oh, really? Then you’re providing kosher food for Jewish inmates. When you start drilling into it, so frequently government policy isn’t quite as coherent as you might think.

**ALAN DERSHOWITZ:** Can I end with an anecdote? So about 25 years ago, I was representing a guy who was a union guy. I later learned after I took the case that he may have had some connections with some other unsavory groups. [Laughter] I don’t generally represent people who are continuing criminals, but justice prevailed and he lost. He was in prison.

One day, he called me, and he said, “Hey, Alan.” He said, “I became a Jew.” I said, “Michael, you’re a religious Catholic. You can’t.” “I became a Jew. Every Friday I’m a Jew,” he says. “They take me out Friday night.” It was in Allenwood prison. “They take me to somebody’s house. They give me the soup with the matzah balls and chicken, and then Saturday they take me to this place and there’s some wine you can drink. Then Sunday morning, I become a Catholic again.” [Laughter] So I said, “Michael, what are you doing? You can’t do that.” He said, “No. Everybody understands. That’s the way you have to live in prison.” So Michael became a Jew Friday night, and Sunday he changes again. Of course, it makes the point. These religious claims in prisons are abused. There’s no question. People grow long beards to hide weapons. Nonetheless, the Court said even in the face of abuses, religious liberty is so much more important that you, the prison authorities, have to figure out a way of getting to these scamsters and have to figure out a way of searching the beards, but don’t interfere with the religious liberty, even of prisoners.

**THOMAS FARR:** Let’s end it on that right there.

**KEN STARR:** Brilliant.

**ALAN DERSHOWITZ:** Thank you. [Applause]
MICHAEL KESSLER: My name is Michael Kessler. I am the managing director of the Berkley Center for Religion, Peace, and World Affairs at Georgetown where I teach in the Department of Government and the Law School. I would first like to thank Tom Farr and Tim Shah and the leadership team of the Religious Freedom Project for putting on yet another stellar event. And I would like to thank our partners of the Religious Freedom Project at Baylor University, President Starr and Byron Johnson and the team, who are going to be joining us for this exciting adventure over the coming few years. Greetings to you in the audience.

Our discussion here today is part of a wider conversation about important issues of healthcare needs and costs; individual liberties; contested social, personal, and communal goods; and the way to balance these pursuits with cherished protections for equality under law and religious freedom. The Berkley Center has held previous discussions about the regulations implemented by the Department of Health and Human Services under the Affordable Care Act and the claim that they create violations of religious freedom. Previous conversations focused on questions about how religious communities and not-for-profit religiously affiliated institutions, such as universities and social service agencies, are impacted by the law. Those events are on our website and are rich with information. I submit that you would be well-served to check them out.

Today, our focus is on the claims by some that for-profit corporations are impacted by the ACA’s so-called contraception mandate, and that it violates the religious freedom of corporations and their owners. These are extremely complex legal and political questions. With all due respect to President Starr, this panel will actually really dig into the boring legal questions that he touched on very eloquently and wanted to push past. [Laughter] That is the charge to the committee assembled in front of you.

I suspect there will not be consensus emerging among the panel or the room about how the case should be decided. But I submit it is a worthy goal unto itself and the most crucial goal for our democratic order that we come to a better understanding of all of these issues, a better understanding of how each of us comes to the table finding them to be vitally important.

I also think it’s safe to assume that if you’re here today, you’re familiar with some of these debates. But here are a few quick facts to refresh your memory: In August 2011, the Department of Health and Human Services issued an interim final rule as part
of the implementation of the Affordable Care Act that indicated that they would require most health insurance plans to cover preventive services for women, including some forms of contraceptive services without any copay, coinsurance, or deductible. The rule authorized the Health and Human Services Administration to exempt “certain religious employers” and yet defined this narrowly. As you know, the debates in the last two years were about who got an exemption, who then didn’t get an exemption but got accommodations, and who at the end of the day didn’t get any accommodation.

The debate, while strenuous over the role of nonprofits, was also strenuous about the role of for-profit corporations and businesses. Over the strenuous objections of some for-profit employers like Hobby Lobby and Conestoga Wood, the government did not implement any mode of accommodation for religiously objecting for-profit businesses. The respondents in the current case on appeal in the Supreme Court and scheduled for oral argument tomorrow claim that the preventive services rule “substantially burdens their exercise of religion” under the Religious Freedom Restoration Act (RFRA). Their claim in a nutshell is that the ACA requires them to offer their employees access to a medical insurance plan which must include coverage of abortifacients, certain kinds of contraception that are claimed to terminate a pregnancy. In providing this coverage, the individual owners of the companies claim they are forced, among other things, to provide access to and pay for the use of abortion-causing drugs and devices. And this violates their religious beliefs by making them complicit in their employees’ eventual use of abortifacients.

How do we assess this claim of burden? Other questions that we will also address include: If the government has, through the legislative process, deemed it essential to cover the kinds of services that HHS determined are important for public healthcare, how does it matter if some citizens, including corporations, claim that these services would violate their conscience and religious belief and identity? Should they have to participate in the provision of those services? How is a regulation like the HHS mandate a violation of religious freedom for corporations as opposed to private individuals? How should the state respond to this claim of a substantial burden? Does the current state of religious freedom law necessitate or merely allow for accommodations? And if so, are those accommodations given only in the legislative process or is there a judicial remedy? In other words, does RFRA apply here to for-profit corporations? If exemptions are granted, where do they end?

Professor Dershowitz posed a challenging question, which I hope the panel can take up at some point: Can gender, race, and other factors also be the basis for religiously based discriminations that are now to be provided exemptions by for-profit businesses?

My last point before introducing and turning this over to the panelists is to provide a bit of background about why this case hinges on the Religious Freedom Restoration Act and is not primarily a constitutional case about our nation’s so-called “first freedom.” Judge Starr did go through a few of these points, but this is the brief story: Starting around 1963 with the case Sherbert v. Verner, the Court began to implement protections under the Free Exercise Clause whereby persons with sincere religious objections to government laws had a presumptive First Amendment right to an exemption unless these laws—subjected to so-called strict scrutiny—were found to be the least restrictive means of serving a compelling government interest.

Then came the infamous 1990 case Employment Division of Oregon v. Smith under Justice Scalia’s majority opinion, which delivered a blow to the exemption scheme. If a law is neutral—that is, not directly discriminatory against religious believers as such—and generally applicable, then it is valid constitutionally, and religious objectors do not get an exemption. Justice Scalia pointed to the legislative process as the available avenue for religious objectors to gain redress, to build the exemptions into the law at the start, and the exemptions would thereby be all the stronger for being the result of the political process, not weakly imposed through judicial fiat.

Condemnation of this decision was swift and came from all sides. As President Starr noted, it may be the last unanimous act of Congress signed by a president, which attempted to restore by statute the presumptive right to exemptions from generally applicable laws. As RFRA put it, “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person is the least restrictive means of furthering a compelling government interest.” The Court overturned RFRA as it applied to the states in the 1997 case City of Boerne v. Flores, a very fascinating case, which I recommend you take a look at. But for federal matters, RFRA still applies. And the implementation of the Affordable Care Act thus is subject to the provisions of the Religious Freedom Restoration Act. Up until these cases though, none has dealt with the question of how for-profit corporations might claim a substantial burden under RFRA. So our questions are clear. This is a legal panel that will deal with these legal issues.
Now, I will introduce our esteemed panelists who will make more clarity available to us about these complex issues. First, Helen Alvaré is a professor of law at the George Mason University School of Law, where she researches and writes about family law and the intersection of family law and religion. As a practicing lawyer, Alvaré specialized in commercial litigation and free exercise of religion matters. She drafted amicus briefs in many leading US Supreme Court cases on behalf of the Office of the General Counsel for the US Conference of Catholic Bishops and later worked for the USCCB’s Secretariat for Pro-Life Activities. Alvaré chaired the commission investigating clerical abuse in the Archdiocese of Philadelphia, was an adviser to Pope Benedict XVI’s Pontifical Council for the Laity, and has served as an ABC News consultant.

Kyle Duncan, until recently, was general counsel at the Becket Fund for Religious Liberty where his work included representing Hobby Lobby and the Green family in Sebelius v. Hobby Lobby. Duncan is now in private practice, pursuing these sorts of cases. Previously, he served as Louisiana solicitor general from 2008-2011, where he argued numerous appeals in state and federal courts, including the US Supreme Court. From 2004-2008, Duncan was an assistant professor at the University of Mississippi School of Law where he taught courses on constitutional law, church-state relations, and free speech. He was assistant solicitor general in the Texas Attorney General’s Office from 1999-2002.

Ira “Chip” Lupu is the F. Elwood & Eleanor Davis Professor of Law Emeritus at the George Washington University Law School where he has been on the faculty since 1990. Lupu’s research focuses on constitutional law with an emphasis in his writings on the religion clauses of the First Amendment. Together with his colleague, Robert Tuttle, Lupu is the author of a series of annual reports between 2001-2008 on the faith-based initiatives of President George W. Bush, and the author of many other articles and books, including the forthcoming book from Eerdmans, *Secular Government, Religious People*.

Micah J. Schwartzman is the Edward F. Howrey Professor of Law at the University of Virginia School of Law. Schwartzman’s research focuses on issues of law and religion, jurisprudence, and political philosophy. Prior to joining the faculty at Virginia, Schwartzman clerked for Judge Paul V. Niemeyer of the United States Court of Appeals for the Fourth Circuit and was a post-doctoral research fellow at Columbia University’s Society of Fellows in the Humanities. Schwartzman went to Virginia for his undergraduate and law degrees and received a D.Phil. from Oxford, where he was a Rhodes Scholar.

So the first question, I think, was perfectly teed up by Judge Starr and by Professor Dershowitz. What is the substantial burden that is claimed? How do we cognize that legally?

KYLE DUNCAN: I will take it, Michael, thank you, and thank you for having me on this great panel. As Michael indicated, I had the privilege of representing the Green family in this case in the Tenth Circuit. I see them here today, and I thank them for coming. You said this case is very complicated, and it is complicated in many ways. It brings into its ambit a number of different issues, not the least is the whole issue of corporate free exercise of religion. However, on the other hand, this case is quite simple. You asked about substantial burden. As everyone knows, RFRA, the civil rights statute at issue here, says that if government substantially burdens your religious exercise, then the government has to meet the highest standard known to constitutional law to justify that burden or strict scrutiny.

What triggers RFRA, then, is a substantial burden. And you asked what a substantial burden is. From our point of view, the substantial burden question has always been really childishly easy. If you force someone to do something contrary to their faith and you say, “If you don’t do it, we’ll fine you. Or if we don’t fine you, we’ll make you completely restructure and disrupt your business,” then by any definition known to constitutional law, that’s a substantial burden. So what we’ve always said in this case is substantial burden is very simple. It is the pressure that the government puts on someone to violate their faith.

So, what we say is substantial burden is pressure. The Sherbert case from the 1960s said that if you tell a Seventh-day Adventist
you can have unemployment benefits provided that you agree to work on Saturdays, which happens to be your Sabbath, that creates a lot of pressure. It puts pressure on someone to say, “Yeah, you know, maybe I misinterpreted my religion. Maybe I really should go to work on Saturdays.” That’s substantial pressure, right? And Sherbert said, “If I tell you, ’If you don’t work on Saturday I’m going to fine you,’” that’s a paradigmatic substantial burden. Very easy; it’s substantial pressure. That’s what we say in our brief in the Hobby Lobby case.

Here’s what the government says, and it’s brief. Because when I got the government’s brief, I thought, “Oh, good, I get to find out what the government thinks is substantial burden. This is great. We can argue about it.” Well, here is what the government says, and I quote: “A proffered burden may be deemed not substantial in cases where the nature of applicable legal regimes and societal expectations necessarily impose objective outer limits on when an individual can insist on modification of, or heightened justifications for governmental programs that may offend his beliefs.”

“None of you do. I bet that the Supreme Court justices don’t understand it, either. In other words, the government has no test. They throw out a bunch of principles and say, “Well, it’s not a substantial burden here because there’s distance and attenuation between the owners and the actual use of the contraceptives, or because there are third parties involved.” But there’s no test there.

So from our point of view, it’s a very simple case about substantial burden. It’s pressure. It’s not a religious inquiry. It’s not asking what the theology of the Green family is or whether it’s material cooperation or remote material cooperation. It’s none of that. It’s the pressure the government puts. The pressure here is very clear: Do something that offends your beliefs or we fine you or we make you totally disrupt your business. That seems to me, to us, to be very clear.”

Kyle Duncan

But if you paid attention to what the Supreme Court had done before 1963, but also between 1963 and 1989, you will see a whole long line of cases. We’ll talk more about some of them later. They have to do with civil rights laws, Social Security, minimum wage laws, religion in prison, and religion in the military. Over and over and over again, the religious liberty claims in those cases lost. And you won’t see any rigorous application of this substantial burden and compelling interest test.
So when the Smith case made the move it made, it changed something important. We’re not disputing that. But what happened in Congress was a legislative coalition of people which—an important footnote—excluded right-to-life proponents at first. Some of the folks who were really on the side of the Green family here were not on the side of the RFRA in the first two years between 1990 and 1993. But the folks who came together and said, “Oh, a terrible thing has happened. We need to restore religious freedom. We’re going to put it together, a statute that reads so simply, so cleanly.” RFRA does all this with just a few sentences. And what RFRA did was it didn’t restore religious liberty as it was in 1989. It restored religious liberty to what many lawyers would say was the high watermark in a couple of particular decisions before 1990. It restored the most vigorous version of religious liberty, as it existed in a law before that. It did not disclose that to folks in Congress. The left and the right tended to agree about this, that this was just a restoration.

And so that’s one of the reasons the majorities were so overwhelming in favor of RFRA. It’s that no member of Congress wanted to be against religious freedom in the abstract, right? This is an easy statute to support. Left and right were saying, “We’re just restoring the law as it existed before this Smith case. To vote for it, it doesn’t commit you to pay for IUD’s or to being against contraceptives or to being in favor of more religious freedom for prisoners. It doesn’t commit you to anything except religious freedom in some abstract way, and then we will let the judges figure it out. We will punt it back to the judges.” So the story was much more complex than it was told this morning.

And the right-to-life piece had to do with the possibility that Roe v. Wade was going to get overruled. Some folks, including the Conference of Catholic Bishops, thought, “Whoa, if Roe v. Wade is overruled and now abortion law prohibitions will come back into play, then some women may claim the religious freedom to terminate a pregnancy. My pastor advises it is appropriate for my family, et cetera.” And the Conference of Catholic Bishops did not want to invigorate abortion-choosing rights in the name of religious freedom, so they opposed the act. Only when the Supreme Court in 1992 signaled that it was not going to overrule Roe v. Wade, the Catholic Bishops dropped their opposition, the coalition came together, and the law went through. So that’s just the story about how the law came to be.

But the other very important jurisprudential piece for people to understand before we get back into the particulars is the difference between the statutory formula that we’re talking about—“substantial burden,” “compelling interests,” which are very flat, very two-dimensional—and the underlying religious liberty principles that the Supreme Court had developed over the course of the century, which were quite the opposite of flat. They were rich and thick and three-dimensional. They were driven by particular narratives about business, about prison, about the military, about particular claims. There’s a rich narrative in that law that just got flattened out. So a lot of Hobby Lobby’s arguments, quite appropriate lawyer arguments, are based off that flat version of what a substantial burden is—here, it is. What’s a compelling interest—here, it’s not. And that’s the way they went to argue.

Let me say a little bit more about the substantial burden piece. There are two parts to the question about what is a substantial burden on religious exercise. There is the question of what is the secular or legal cost of complying with your faith. What will you have to pay? Will you have to go to prison and pay a fine if you comply with your faith? And there is the other side of the question, which is: What is the religious cost of complying with the law? If I comply with the law, if I do what the law says, what is the religious significance of that?

Now, on the first one of those, Kyle kind of skimmed past this part of the story a little bit because the Green family and others in the same situation had a choice. They could comply with the law and include the contraceptive coverage, including the forms they object to, or they could make a $2,000 per full-time employee per year accessible payment under the Internal Revenue Code and drop coverage. They could drop all coverage, and then all of their employees would be free to go and buy policies on the exchanges, including getting subsidies when they are eligible for subsidies, and they would get the contraceptive coverage.

Now, is that “pressure”? Kyle used the word “pressure.” Yeah, there’s some pressure, but it’s a complicated kind of pressure where one option is, we are going to fine you if you offer the wrong kind of insurance policy. The other kind is competitive labor market pressure if you drop your health insurance policy. And then other businesses might be able to compete for employees. But that story is just a little richer and thicker than the way Kyle told it.

On the religious cost of complying with the law, this is where I think a lot of people have a common sense intuition. Buying an insurance policy that covers thousands of goods, only a few of which are objectionable, which your employees may or may not ever choose to use, does put the employer at some considerable distance from the choice to use those goods. It’s not like an OB/GYN doctor is asked to perform an abortion, a hands-on
procedure that involves potential human life or human life. So as a matter of common-sense, every-day intuition, I think there’s a question about what is the religious cost of buying that insurance policy when you’re that disconnected from the ultimate choice of how to use it.

But here I concede that the law tends to be on Hobby Lobby’s side, because the Supreme Court has said pretty loudly that you can’t second-guess believers on the contents of their conscience. Even if others Christians would disagree, even if some people don’t get it, this is the way the Greens read scripture. This is the way they understand it, and it’s not up to the courts to second-guess the meaning of religious questions. I think that’s probably right. I will stop there.

MICHAEL KESSLER: Does anybody want to address that particular aspect to the question? We hear the claim many times out in public discourse about this. People say, “Oh, come on. This is so attenuated from the actual delivery of these services that it seems that this is absurd that the Greens and others would object to this.” What is the best argument against that idea, that this is in fact something that would make the Greens complicit?

HELEN ALVARÉ: The argument is pretty clear on this. We’re talking about drugs and devices—as Kathleen Sebelius herself testified before Congress—that act after an embryo has been formed. So that’s clear. It’s also in the Food and Drug Administration’s material on it and the instructions for these drugs and devices. Planned Parenthood itself has a website about pregnancies with your IUD in. It is pretty clear this can act after an embryo has been formed.

Frankly, that there is also a consensus about emergency contraceptives and IUDs, which the scientific community has generally understood to act by destroying a new life is really pretty clear. Anyone who wants to read about this can find the best account in Germain Grisez’s book on abortion. He summarizes the meeting at which the birth control industry decided to change the rhetoric of pregnancy from conception to implantation. At the meeting, they say it would be a lot more convenient to do that and it would upset people if we just changed that definition. So, all of this is to say that it’s pretty clear that these drugs and devices are acting on an embryo already formed. I always like to throw in Germaine Greer’s point on this, the very renowned feminist. She said it’s really not fair to tell women there’s no difference between these kinds of drugs and devices and others that act before an embryo has been formed. So it’s a pretty big dividing line we’re talking about here.

We also have the Christian teaching, which is very classic and very, very well developed. The Religious Freedom Restoration Act would have no trouble finding that this was a sincerely held religious conviction. It is very well developed in the literature—very high-end scholarly and theological literature—regarding what we call moral cooperation. The government uses the language of attenuation. But the theological problem here is moral cooperation with procedures that are specifically named as abortifacients, including by the government through HHS, which then relied on the Institute of Medicine. This is not just one thing among many, many others. In fact, the government is pushing back so hard on hundreds of plaintiffs. The dozens of lawsuits have highlighted the witness value of this to a dramatic degree, such that a firm that went along with this now would be making an even more clear statement of cooperation than it would have previously, it seems to me.

We’re talking about grave matter. We’re talking about what is called in the literature “material cooperation”—that the people who act in the corporation to tell the third party (this is for the religious institutions), “I won’t do it, but you do.” But for a religious family like the Greens and others who are religious families running for-profit corporations, it means that they are specifically making insurance decisions to include this. It’s just not even a question of whether, in the theological literature, this constitutes cooperation with a grave evil. So I think that’s pretty clear, and I think the government really isn’t going to be able to get past that.

KYLE DUNCAN: Can I just add a couple of things to that? I agree with all that, Helen—the idea is that somebody looks at this and says, “Okay, it’s about moral complicity but it seems attenu-
Michel Kessler: A couple of things are worth mentioning. Chip hit on one of the points, which is that it is none of the government’s business whether their theology is right or not. As a matter of fact, the government doesn’t have any business going into court and saying, “Well, you got your theology kind of wrong.” The government tried that.

Michael Kessler: And the courts have been very clear about staying out of this question.

Kyle Duncan: And on things frankly far more attenuated than this. For example, Thomas v. Review Board was a case about working in a certain kind of foundry that will eventually produce a tank that will eventually be used in Vietnam that may kill somebody. And the courts were not going to second-guess the Jehovah’s Witness’ claims in that case. But you know, in a sense that’s too weak of a point, because this is really not a far-fetched claim for moral complicity at all.

What I’d like to ask the government is: If this is attenuated or this isn’t really a cognizable moral problem, why have you exempted all of these religious employers? Why have you gone out of your way to say, “Okay, if you’re a religious employer and we think you employ a lot of religious people who agree with you, we’re not going to make you do this”? Now, I suspect the government would say, “Well, we’re just being nice, or we’re just being politically savvy, or it just kind of seemed right for us to do that.” [Laughter] But I’d argue that the government is implicitly recognizing that there’s a moral problem caused with this insurance. Why are so many nonprofit religious organizations like the Little Sisters of the Poor being accommodated—or at least pretended to be—if they don’t recognize that there’s a real moral problem here?

The last thing that I would say is that if you read the fine print in the Federal Register—which, I admit, is not something that I would recommend—but if you do, you will see what the government says it’s trying to accomplish here. It’s trying to put specific drugs in insurance policies. Why? Because it wants them to be used more often and more effectively. So if some of those drugs are abortifacient drugs, which the government admits—it doesn’t use the word abortifacient, but it admits the action of the drugs—the government wants those drugs to be used more often and more effectively, and it wants to make people like the Green family cooperators in that. It doesn’t seem to me to be far-fetched at all for somebody to say, “Look, I don’t agree with your policy. I can’t stop you from doing it, but don’t make me a part of it.”

Michael Kessler: Let’s hold off on the question of the so-called “honeycombing”—the fact that there are so many exemptions that it seems to deflate the government’s claim. It was interesting to hear Judge Starr say essentially what you said, which was that the substantial burden question really is an interesting issue here. But in some ways we are deferring to the claim that there’s a substantial burden. But of course, what RFRA does is say that if there is a substantial burden the government’s interest may still be compelling enough to override that burden.
MICAH SCHWARTZMAN: I think the substantial burden argument hasn’t been made on this panel yet. It’s not an argument that I would start out defending, but I think someone should at least make the argument as devil’s advocate. So let me rehearse it anyway.

MICHAEL KESSLER: Be the devil’s advocate.

MICHAEL KESSLER: This is not an argument I would want to stand the case on, but I think someone should at least air the claim. What the government is saying is that being compelled to buy contraceptive coverage as part of the general insurance package is a lot like paying wages to your employees. Your employees get to make some choices with how they use those benefits. In that sense, health insurance is just a part of their general benefits package.

They make a further claim, which is, if you look at other aspects of religion clause jurisprudence, we have some principles to guide us here. If I, for example, am a municipal taxpayer and I object to the way that the government uses some of my money in order to fund religion in some way, what the Court says is you have standing as a taxpayer in some of these cases to object. But let’s say your tax money is being funneled or channeled through some third party’s decision—if I have to pay for a voucher, for example, and some parent or a child uses that voucher for religious education, and I object in conscience to the kind of education they receive. Maybe I object because I don’t like the school they’re going to, or maybe I think the school is teaching horrible things and even religious hatred. I might say, “Look, I object in conscience to the way my money is being used.”

And what the Court has said is you don’t have a claim. You don’t have a claim because the parent or student is making that decision. You don’t get to make that decision. Now I say, “No, no, no.” The way this works is I have to pay for something that foreseeably might cover these things, which I don’t like. Even though somebody else gets to make the ultimate decision, we know that some people are going to make those judgments. And the Court says that doesn’t matter. You are being asked to pay for something, but somebody else gets to make the ultimate choice.

If you take that principle from the Establishment Clause context and apply it here in the Free Exercise Clause context or under RFRA, it seems like the same idea on the whole. I think that is the nature of the substantial burden argument, the attenuation argument. You’re too far down the line, or the decision is being made too far away from your contribution to it. That’s the way that argument gets worked out.

MICHAEL KESSLER: Micah, you’ve written about this. Could you explain a little more about the way that some of the Court precedent backs up that claim, particularly the outcome of United States v. Lee?

MICAH SCHWARTZMAN: United States v. Lee is something we should have a more general conversation about. This case involves an Amish employer who objected to paying for Social Security taxes. What he said is that in the Amish community, we take care of our own. We don’t have to pay into Social Security because our community takes care of its members in their retirement. We never draw on Social Security, and we should not have to pay into it. The Supreme Court said that that claim for exemption is overridden by the government’s compelling interest in promoting uniform application of the Social Security system. You have to pay into the Social Security System; there are no exceptions. It turns out that Congress did eventually create an exemption for the Amish, but only for those members of its own community, not for employees who are outside of the community, which is very important.

But here, the Court recognizes there was a burden on the Amish employers. It’s an interesting tension in the substantial burden argument. I think Hobby Lobby rightly makes a good point of this. There is case law for them to argue for substantial burden. In that sense, I agree with Chip and Kyle. I just want to air the argument on the other side. I think it’s important to see what the government is trying to say before we say this decision is so easy.

MICHAEL KESSLER: Sure. So what do we then make of the claim that the government has a compelling enough interest in enacting the Affordable Care Act and the contraception provisions as part of preventive services, which may decrease overall health spending and increase health care efficiency, among other things? Does that rise to the level of compelling? We heard President Starr in the previous panel seem to suggest, “No it doesn’t rise to the level.” Professor Dershowitz may have gone the other direction. So where do we assess those arguments? Helen?

HELEN ALVARÉ: The claim for compelling state interest that the government makes here is first of all at a pretty high level of generality. They’re saying it’s gender equality and it’s public health with respect to women. The problems with that are really legion. By the time this case gets to the Supreme Court brief, the government is actually arguing that children will not be born from unintended pregnancies. This will be good for children because we won’t have children born with smaller pregnancy intervals and their birth weights will be healthier.
Nor, this claim is curious for a couple of reasons. First, the mandate that Congress gave to HHS—who then turned to the Institute of Medicine for its report—was about preventive health services for women, not preventive health services for children. So that’s one interesting wrinkle. Second, they make the argument that preventing children from being conceived—or once they’re in embryonic state, destroying the embryos—is a children’s health argument. So that’s very unusual. Third, I read through the Institute of Medicine’s report line-by-line and unpacked every single scientific source it cites; there is not a single scientific argument about children’s health.

Second, about women’s health, I’ll just confine my few remarks to what is at stake here. The case is being argued tomorrow because it’s about drugs and devices that act on an embryo. With regard to public health for women, these are really contested medications and devices. Consider all the lawsuits that have now run into the hundreds and hundreds of millions of dollars on some of these drugs and devices because of their negative health impacts on women.

But I think most interesting is the fact that no study of these devices or emergency contraception—not even one—is acknowledged by the leading researcher on this, James Trussell at Princeton, as showing a causal relationship between more usage of them and less unintended pregnancy or abortion. There is not a single study. And you have to show causation in a compelling state interest analysis—that is, show that this is a strong state interest because it will help bring about the results that the law intends.

These studies just don’t exist at all. This is probably because of what Janet Yellen, our new Fed chairwoman, has identified as a phenomenon of risk compensation. She and her husband wrote precisely about the proliferation of contraception and abortion in society leading to a risk compensation effect. In other words, what we’ve seen with emergency contraception is more, not fewer, unintended pregnancies and abortions. It’s stunning. You could see this argument also play out with other contraceptives. But with emergency contraceptives in particular the data is really, really clear. So the compelling state interest argument doesn’t work there.

Also, concerning the argument about women’s health, consider all of the citations that the government attempted to make about the cost of contraception being something that impaired women from getting it or was related to gender equality. If you actually drill down to the sources they’re all citing, such as the Medicaid and Medicare report on women’s health care costs during child-bearing years, it turns out that maternity is actually the biggest health cost differential—that is, having the child, not contraception. There is no data showing that the cost of contraception represents the cost differential between men and women of child-bearing age.

My final statement concerns the gender equality argument. I started a group that ended up ballooning into 41,000 women. These women are really angry that the government seemed to be saying—when it was politicizing this mandate during various political campaigns—that women are not equal unless they enter society childless. In other words, being childless is something that the government has to help women with, because then they can enter society on the same level as men. The statements on that in the government’s briefs—all from the trial courts and the Supreme Court—disturbed enough women that they got together to oppose them. It’s not all women. But it’s a deeply divisive statement on their part.

MAGH KESSLER: Chip.

IRA LUPU: A couple of things. First, it’s true that the two cases that are being argued tomorrow—and it’s been said many times now—involve objection by employers to just a handful of contraceptive devices or services, not the full range of them. But—and Kyle knows this extremely well since some of these were his clients when he was at the Becket Fund—there are many, many, many cases in the lower courts where the employers object to all contraceptives, not just to these four. I cannot imagine that Kyle up here or anywhere else was going to say, “Oh, you know, those people ought to lose, right? Hobby Lobby should win. Conestroga Wood should win because it’s just these four. But the folks that object to the whole range of contraceptives? No, that’s just too much.” You know, I’m sure you don’t think that.

KYLE DUNCAN: You’re right. They should all win.

IRA LUPU: Right, you think they should all win. So when we’re talking about this, let’s not be fooled into thinking this is just about emergency contraception, not that these four are unimportant. Hormonal IUD is safe and effective but also expensive, so that being insured or uninsured makes a difference. But many of the other cases are about all contraceptives, not just these four.

Second, I think there’s frequently a subtle misstatement or just confusion about how the compelling interest test works in RFRA and free exercise cases. The government doesn’t have to show it has a compelling interest in the policy taken as a whole. It has to show it has a compelling interest in not allowing opt-outs.
Government may burden a person’s exercise of religion if it demonstrates that application of the burden to the person—making this company do this—is in furtherance of a compelling interest, and it’s the least restrictive means.

So the question is always about opt outs. What are the interests at stake in opt-outs? If we allow companies—some small but some quite large in terms of number of employees—to opt out under RFRA, we are going to have however many thousands of women employees and however many more thousands of female dependents of employees—daughters, spouses, et cetera—whose insurance coverage will not include this particular set of goods and services. Now, they’ll still be able to get them if they can afford them. Some people will be able to afford them better than others. In the case of hormonal IUDs, which are not recommended for everyone, but are the safest and most effective for many women and the most expensive, it’s really hard for me to understand the argument that these women aren’t being harmed by losing insurance coverage for that particular service. So the government’s interest in opposing opt-outs for religious reasons is to make sure that these women are not deprived of this particular kind of coverage, or all contraception in some other cases.

MICHAEL KESSLER: That then sets up the question that was raised earlier about the so-called honeycombing—that is, that there are already so many exemptions and exceptions made under the law that there are millions literally uncovered. So why not then allow an accommodation on religious grounds along with all the other grounds for exemptions?

IRA LUPU: Would you like me to answer that or would you like someone else? Micah, do you want to run that or you want me to run that?

MICAH SCHWARTZMAN: Go ahead. You’re on a roll. [Laughter]

IRA LUPU: I think the most significant of those exemptions is the grandfathering of preexisting policies. You can keep the policy you have if you like it. We can make fun of that. But there is a policy in the Affordable Care Act that businesses—employers—keep their pre-ACA policies until they change them. That is, they can keep their prior coverage, which might, in some cases, exclude this sort of contraceptive coverage. So for some time, there will be women who are covered by those policies. I don’t know how many don’t get these particular services under those grandfathered policies, but whatever it is, that’s the number that’s not protected.

This is a transition rule, right? This is an attempt to let businesses adjust over time. Anytime a business wants to be on the market and say, “Okay, we want different deductibles. We want more of this. We want more of that. We want to cover more dependents.” If they want to change their policy in any way, they have to buy a new one and their grandfathering is over. When the grandfathering is over, then these coverage rules kick in. So two years, four years? It’s hard to imagine. It’s going to be a very long time before the number of women who are not covered by policies that include all pregnancy prevention services get covered by such policies, but that number is going to get smaller and smaller and
smaller. So that’s the government’s compelling interest operating over time, not all at once. If Hobby Lobby wins the case, that’s a permanent exemption. That’s not a transition rule. That’s as long as Hobby Lobby is in business.

MICHAEL KESSLER: Helen, quickly respond, and then we’ll turn to Micah and Kyle.

HELEN ALVARE: One problem, I think, with Professor Lupu’s argument is that when the government declares some benefit, it changes day by day. Today it’s emergency contraception or all contraceptives. Tomorrow it could be what people, or what everybody, understands to be abortifacients. The day after that, in an aging population, it could be certain forms of assisted suicide. If the legal argument goes that once the government says this policy has to include this benefit and that becomes the new baseline, then anyone who isn’t providing that is all of a sudden given the label of taking away a right the government just announced five minutes ago. I think that’s a really problematic legal test. I think the slippery slope on it is really bad.

KYLE DUNCAN: I just want to respond to what Chip was saying on grandfathering. If you like your plan, you can keep it, right? Provided you don’t make certain changes to it. So what we’re talking about here is whether the preventive services mandate, specifically the contraceptive mandate, is a matter of compelling interest. Is it something that’s so incredibly important that the government must override religious objections to it? So if you look at grandfathering, Congress made some prioritization when it did the grandfathering. It said, “Look, even if you’re grandfathered, your plan still has to cover your dependents up to age 26, and it can’t have lifetime limits and no preexisting conditions.” That’s Congress requiring these items. I mean, you’ve all heard about your kids now have to be on your plan up to 26, right? Your kids are happy about that; you’re maybe not so happy about it. But Congress said this is extremely important and we’re going to apply this even to grandfathered plans, however long this transitional period lasts—and it’s indexed to medical inflation so who knows how long it’s going to last. And there are millions of plans that are grandfathered and will continue to be grandfathered this year and next year.

But Congress did make a sort of set of priorities and said, “Look, these are important to us. We want these in plans now.” Now when you look at a regulatory agency like HHS, it says, “Look, this preventive services mandate is important to us.” Okay, but it’s obviously not as important as what Congress said in the law itself. That seems to me to be a huge blow against the compelling interest argument. There’s no doubt that many people think that the contraceptive services mandate is important. There’s no doubt about that. The question is: Is it a compelling interest?

The other thing I would say very quickly is that the government has to prove that it’s a compelling interest. The government bears that burden under RFRA to prove it. Now, if you look at the evidence in this case, all the government has put in is the Institute of Medicine report. If you look at the five pages out of the hundred and something pages that are devoted to discussing the contraceptive mandate, what the government says is that there are certain women in a narrow age group and socioeconomic group who are at genuine risk of not having access to contraceptives unless they have insurance, or unless they have some kind of help to get them.

Now, the government has not bothered to prove in this case, has not offered one shred of proof, that any employee working for Hobby Lobby or any similarly situated employer—people who have full-time jobs, people who have generous health benefits already that cover 99.9 percent of all preventive services already—

“I will be really interested to see […] whether we’re actually going to see some better empirical data from the government than I’ve seen so far on the compelling state interest issue. I think they’re getting away with sort of an evangelization on emergency contraception and contraception in general with arguments that just play to politics or ideology.”

Helen Alvaré
that those people have a genuine economic crisis of access to contraceptives. I think the government has to put something forward that shows this in order even to get to the compelling interest test at all, and the government hasn’t done that.

MICHAEL KESSLER: Micah.

MICAH SCHWARTZMAN: I think this actually raises an interesting point about the way this litigation has gone so far. The first thing is that the argument that’s going to happen tomorrow is coming up in a very early posture. There have been no trials in any of these cases. There are no real facts in any of them, at least after discovery. So we don’t know anything about the costs to employees except for what the parties have alleged in their briefs. There has been no testing of any of that.

That raises, I think, a background consideration for this litigation, which is that the posture of all these cases or the structure of the litigation is the same across all the cases. That is, it’s a private employer versus the government. But there is a substantial constituency who will be directly affected by the outcomes of this litigation. It’s not represented anywhere in it, and that is the management and the employees of these corporations. There are no employee plaintiffs, no employee interveners. We don’t really know very much about the kinds of facts that they would bring into this litigation. In some ways I think it’s a little bit early for the Court to be taking up these cases without hearing from all the parties who will be affected by it. The government has represented the interest, so to speak, of some of these employees. The way that it does that, I think, is by framing its compelling interest partly in the form of a claim about women’s health. That’s important, obviously.

But there is a larger consideration here and that has to do with concerns that are found in the Establishment Clause, something that we haven’t talked at all about so far. The Religious Freedom Restoration Act was meant to restore a standard under the Free Exercise Clause. But there are two clauses in the First Amendment. The second clause is the Establishment Clause: “Congress shall make no law respecting an establishment of religion.” The Supreme Court has interpreted the Establishment Clause to impose certain limits on religious accommodations. One of those limits is that any accommodation should not impose significant burdens on third parties—what the Supreme Court calls third party non-beneficiaries, that is, people who don’t otherwise benefit from the accommodation. What the government is arguing here is that allowing Hobby Lobby an exemption under the Affordable Care Act would shift the costs of paying for contraceptives to Hobby Lobby or other corporations to their employees, effectively requiring their employees to subsidize the cost of Hobby Lobby and complying with its religious observance.

For almost all employees in this country—say, those who are employees of religious nonprofits—they have a statutory right to receive these benefits as part of their employer-based health insurance. It would only be these employees subject to an exemption in the cases like Hobby Lobby’s who would have to pay for these benefits. That is the first compelling interest that the government articulates in its briefs at this point. That is, what Hobby Lobby is asking for would shift the costs from the employer to the employee. It is that cost-shifting that raises a concern under the Establishment Clause, forcing employees to pay for their own employers’ religious beliefs and practices.

That argument might at the bottom rest on claims about women’s health. But first, it rests on this concern about who pays for religious exemptions. As I said, employees aren’t in this litigation. They can’t come to the government and say right now, “Look, we didn’t choose to organize health insurance the way that the government did. We’re stuck with this just the way that Hobby Lobby is stuck with this. But we have interests here too.” I think it’s unfortunate that their voices aren’t heard independently in this litigation.

MICHAEL KESSLER: Great. We have about 20 minutes before we open it up for questions. There are a couple of very substantial questions we still haven’t addressed yet. One issue that some people say is really not even an issue, yet is really sucking up a lot of the oxygen in the conversation, is the question about the particular for-profit kind of business that is claiming a right of religious freedom or religious liberty—that is, the corporate structure. How can a corporation claim to exercise religious liberty, such that the Court should grant it an exemption or on accommodation under this law? Is there something about entering into the stream of commerce that is different than being a social service agency or a religious institution, in which one can gather individuals around a sort of common cause? And does this mean that for-profit businesses are much more susceptible to government control and regulation than other kinds of social institutions? Chip, do you want to get us started?

IRA LUPU: I think a startling amount of time has been wasted on this particular question. I really do. I think in every case, the question should be: What is it that the corporation wants as a matter of its religious freedom, and what are the consequences? That’s the argument Micah was just making. I share his concerns
that there is an Establishment Clause problem about shifting the cost of an employer’s religious convictions to its employees. But we can imagine that there are so many ways to think about this that push you out the other way on the question of corporate conscience or religious freedom.

First of all, I bet you half the people in the room have investments in some sort of social investing fund where you care about the corporate moral conscience—you know, such as Whole Foods, who sell free range chickens, or those vegan restaurants and all kinds of enterprises that have a corporate identity and attach moral commitments to that corporate identity. I think most of you wouldn’t blink at the thought that a corporation could have moral commitments and a moral identity.

I want to go back to some things we talked about earlier. If it were an Orthodox Jewish merchant who was closing on Saturday, and the business was in the corporate form, and the state said, “No, in the business of selling meat or whatever it is, you must be open on Saturday,” would we really say, “Too bad, you’re incorporated and so you’re stuck with the law.” If only you got rid of your corporate status and became an entrepreneurship or a partnership, then you could complain about the law”? That doesn’t make any sense to me whatsoever. What makes sense is to look at exactly what the corporation wants to do and ask whether this is something we’re going to recognize as its right to do. That’s what we’ve been talking about up until now.

**KYLE DUNCAN:** I couldn’t agree more with what Chip has said. I was in Whole Foods yesterday paying too much for cheese. [Laughter] I walked by the fair trade coffee stand and resisted the temptation to pay too much for coffee. But the slogan over the fair trade coffee said that it ‘caffeinates your conscience.’ And I said, “Okay, Whole Foods is talking about my conscience. Whole Foods has a conscience.” You know, I heard this rumor when we brought this lawsuit that corporations cannot exercise religion. I went and looked at the case law and I found no case that could ever say that. In fact, I found tons of cases that said that nonprofit corporations exercise religion all the time.

I also found cases that said individuals can exercise religion even when they’re in the midst of commercial pursuits. Sometimes, as in *Lee*—which I hope we can talk about soon—they’ll lose, but there’s no doubt that they’re exercising religion and that commerce doesn’t sort of collide with religion and dissolve it like acid. There’s no precedent for that whatsoever. So I agree with Chip that an astonishing amount of time has been wasted on that argument.

**MICAH SCHWARTZMAN:** In fairness, let me waste a little more time. I don’t want to stand on this argument either. I put my name on a brief about the Establishment Clause concerns and about the substantial burdens on employees. I think this case, for me, turns on those kinds of questions. I wouldn’t, at the end of the day, make decisions on this basis. But I do think, again, these arguments have convinced appellate courts in various parts of the country, and a lot of other people in this nation are convinced that corporations, especially large for-profit corporations, don’t have rights of religious liberty. And I think we ought at least to understand what their argument is like.

So here are a couple of ways at it. As a matter of law, there is also no precedent on the other side. There is no precedent that says a large for-profit corporation has rights of religious conscience. No Supreme Court case is on point. There are cases involving sole proprietorships like *Braunfeld*, and like the Amish employer in *Lee*. Yes, that’s true. And there are cases involving nonprofit religious organizations and churches that everyone acknowledges have free exercise rights.

The question is, why do they have free exercise rights? One distinguished answer in our history is that they have free exercise rights because churches are understood as voluntary associations going all the way back to our framers and beyond that to John Locke and other theorists of religious toleration. Churches are voluntary associations in which people come together, who share religious values, and the church represents their values and interests. It stands in their shoes, so to speak, to assert their rights of religious conscience. Individuals have freedom of conscience, and churches represent their freedom of conscience sometimes in litigation. No one disputes that. That is, I think, a matter of wide consensus in our society.

But that’s on one polar side of the spectrum. On the other side of the spectrum is, say, Walmart, a large, publicly-traded corporation with potentially millions of shareholders. Can a corporation of that kind assert the religious interests of its constituents—not only of its owners, but maybe of its management, its millions of employees, and so on? How are we supposed to think about claims for religious liberty of corporations of this kind?

In some ways, *Hobby Lobby* is an easy case because you’ve got a closely held corporation with a very small number of owners. What happens when we start to expand the number of owners? What happens when the owners disagree about the nature of their religious beliefs? What happens when we have proxy battles over whether corporations ought to engage in religious practices
or not? How, if at all, can we attribute religious liberty interests in those cases? These are very, very complex kinds of questions. And if the Court finds that religious corporations do have free exercise rights, we're going to have to think about those kinds of questions, I think, in a lot more detail and a lot more complexity than we have so far.

There is a serious challenge and a serious set of questions that arise under this. I would beg to differ with Professor Dershowitz and with Judge Starr that no rational person could take the other side of this. In fact, a lot of rational people have taken the other side. A lot of federal judges have taken the other side, and I won't be surprised if some of them do tomorrow as well.

MICHAEL KESSLER: Helen.

HELEN ALVARÉ: A quick response to Micah. This description, particularly when you get into the question of large corporations and shareholders and a large body of management, crosses over into the question about the alleged parade of horribles that follows if you allow corporations to do this. I think Micah's point really moves toward a point that I wanted to make, which is the idea that somehow allowing corporations to have a conscience is more problematic than it is good. Well, Kyle has already briefly argued that it's good and we like it when corporations have a conscience, and we like to do business with them.

But if in the future it is decided that for-profit corporations are allowed to exercise religion, you'd still have to find that they were exercising religion, not something else, and that it was sincere. Then of course, the government still can come back with its compelling state interest. So the idea that the parade of horribles follows instantly from answering “yes” to what is often seen as the first question—which is, can a for-profit corporation have a conscience?—just doesn’t play out. It is indeed a complex question depending on the nature of the corporation, and how they exercise religion, although I think Professor Lupu's statement earlier, “What is it that they’re doing?” (Is it religion?) may be the easier part of this than the issue of what it looks like when they exercise it.

MICHAEL KESSLER: So is the only thing holding back the floodgates of that parade of horribles the government's interest? In other words, your argument is that race and gender, for instance, might not even be grounds for claimed exemptions under RFRA if Hobby Lobby turns out for the Greens.

HELEN ALVARÉ: I don't think that's the first hurdle of the government's compelling interest. You've got the fact that you already have a variety of civil rights laws—the Americans with Disabilities Act, laws on pregnancy discrimination, Title VII, et cetera. It turns out companies actually want to do business with us. They aren't looking to discriminate against people they're doing business with or people that they wish to hire who are qualified. So you don't have the parade of horribles in the past. They have, however, brought a lawsuit when the government mandated certain insurance policies. Second, of course, you do have very robust arguments, historically, on all of these other nondiscrimination points—race, gender, et cetera—that are not there with emergency contraception and other forms of contraception, where the arguments are contested.

MICHAEL KESSLER: Well, what about the thinking that women should be at home and you don't want to hire women to do this job, or you don't want to sell these products to women because you don't think women should be in commerce. Chip, do you want to respond?

IRA LUPU: Yes. The cutting-edge case here could be about a single pregnant woman or single mother. But I think the real cutting-edge case we can all see coming is if Congress enacts the Employment Non-Discrimination Act, or ENDA, and thus adds sexual orientation to the federal law about employment discrimination. If Hobby Lobby wins this case, I have no idea what its attitude would be about covering spousal benefits for a same-sex spouse. But around the corner, many more states, by court order or by legislation, will be recognizing same-sex marriage.
And there will be litigation about hiring, firing, refusing to hire, and especially about refusing to pay spousal benefits in the case of same-sex spouses based on religious objections to that form of marriage. That's coming.

MICHAEL KESSLER: So as a way of wrapping up our discussion, I want to pose the question—not how do you think the Court is going to rule, because I don't think anybody can really judge that—but rather: What is the future of religious exemptions in your mind, given how the Court might rule? If the Court rules one way or the other, where are going to be the critical issues, the places that we're going to see the flashpoints? Chip has already talked about same-sex marriage. We just saw this in some of the state anti-discrimination laws and the state-level RFRA's, because almost every state has a RFRA that was passed almost simultaneous to the federal RFRA. Where do you see the problems emerging, depending on how the Court rules? We'll just go down the row.

IRA LUPU: One of the beauties and the devilish qualities of RFRA 20 years ago is that everybody agreed not to think down the road, like about what are the bad religious freedom claims that are going to come. They're going to be about drugs. They're going to be about gay rights. They're going to be about prisons. They're all just hold hands and jump off the cliff together because we think that there's something at the bottom of that. [Laughter] You know, the courts will knock out the bad ones and save the good ones. It won't be perfect but we're better off with it than without it.

I think a law like RFRA is so general, and very different from a practice-specific accommodation, right? Everyone has to cover employees, but churches don't. We can all see that this is very bounded and confined in particular. But this kind of general law opens it up, and I think this is going to be very much on the Court's mind tomorrow in the way they decide this case. It may influence them in their thinking about the wisdom of corporations bringing these kinds of claims or not. Or I certainly think it's going to influence some of the justices on the point that Micah and I have pressed about third-party rights, about the rights of employees. We don't want to empower corporations that have all this leverage over employee benefits—minimum wage, maximum hours, nondiscrimination—as a matter of religious freedom. But nobody knows 30 years from now what we're going to be fighting about on these kinds of issues.

HELEN ALVARÉ: I would disagree on the historical point about the Religious Freedom Restoration Act because the attempts to have civil rights nondiscrimination carve-outs were turned back. They knew that they were going to face them in the future, I think, and they decided to allow the compelling state interest analysis to play out. I do agree, though, with that part of Professor Lupu's analysis that says we're going to have to wait and see how that plays out.

But they knew that civil rights challenges were coming, number one. Number two, I completely agree with your point about same-sex marriage, less so about people of various sexual orientations. The objection is not about people, it's about an event. It's about an institution which until about five minutes ago, in historical terms, the Supreme Court understood was related to kids in every single case they had ever covered on state marriage recognition. So again, that's new, this whole question as to whether this very recent same-sex marriage phenomenon presents a civil rights non-discrimination claim.

“I am the CEO and co-founder of Integrus Holdings, Inc. which, like Hobby Lobby, is a family-owned business. And knowing that the Greens are in the room, I take this opportunity to salute you. More than most in the room, I understand the gut-wrenching choices that are involved in doing the right thing and the stakes for your business, your personal reputation, and your fortune. So whether you agree or disagree with the Greens, one has to admire them.”

Scott Hamberger
The final thing I would point out is that I will be really interested to see—if there is more protection acknowledged for for-profit entities, and if religious freedom has a higher profile—whether we're actually going to see some better empirical data from the government than I've seen so far on the compelling state interest issue. I think they're getting away with sort of an evangelization on emergency contraception and contraception in general with arguments that just play to politics or ideology. But they really haven't made much of a science-based argument. So I'm going to need to see if they're going to step it up on the compelling state interest analysis, because they might be compelled to do so if religious freedom is more protected.

MICAH SCHWARTZMAN: If for-profit corporations can make claims for religious exemptions, I think we see two growth areas in terms of litigation and questions. One is: What counts as a significant burden on people who don't benefit from the exemptions? That is, what would justify a compelling interest in the case of a corporation shifting costs onto its employees in a way that would cause courts to restrict those exemptions? Maybe an exemption for abortifacient drugs—if they are that—wouldn't so burden employees as to create this kind of concern, but lots of other claims for exemptions might well do that. If Hobby Lobby wins its case, I think we're going to see a lot more cases testing the boundaries of that cost-shifting principle.

The other question that's raised if Hobby Lobby is successful is about the consciences of people who are not strongly motivated by religion. What's the line about “caffeinating your conscience”? KYLE DUNCAN: Whole Foods.

MICAH SCHWARTZMAN: I don't know if Whole Foods is religiously motivated; maybe not.

KYLE DUNCAN: I doubt it. [Laughter]

MICAH SCHWARTZMAN: Professor Dershowitz made a point about this earlier. What are you going to do with people who make claims of conscience outside the context of traditional religion? Is RFRA going to cover those kinds of people under the principle that the Supreme Court articulated in the Vietnam draft protest cases? If you're even vaguely religious or even if you're not religious, but your claim sounds like a claim of conscience of the kind that would be familiar to somebody who's traditionally religious, are those people going to be protected? Are they going to be protected when they own for-profit corporations? Those are all questions that I think are coming eventually.

Sure, when the government says you're going to give this to your employee, or you're going to give this to this other person, or you must provide this service to these people, and if there's a resistance to that claim on religious grounds, then sure, somebody is not going to get the service or benefit. Somebody is going to be able to say they're a loser in the process and somebody is going to be able to say they're a winner. But we're talking about religious freedom, and at least in 1993 it seemed like we had a very robust commitment to the principle. Maybe Chip is right that we didn't foresee all the different “Rubik's Cube” permutations of the principle. I don't think we're ever going to be able to see all of that.

But the question from my point of view is, do we have a commitment to religious freedom as against government imposition on people? And how are we going to work that out? Are we going to work it out in the court system with a thumb on the scales very strongly, as I think our traditions require, in favor of the sincere religious believer? Or are we going to have some other system? I certainly hope that we continue along the path of the Religious Freedom Restoration Act. Whatever the outcome in the Hobby Lobby case—and I certainly hope we win, but whatever the outcome—I hope that everyone takes away from this case that religious freedom is a robust, real commitment that we all should make to each other.

MICHAEL KESSLER: Great. We have about 15 minutes for questions. I ask that you introduce yourself. Be exceptionally brief so that we can distribute questions around the room. There is a microphone with a fine, young Georgetown student bringing it around, so please wait for the microphone. Yes?

SCOTT HAMBERGER: I am not a fine, young Georgetown student although I used to be a Georgetown student. My name
is Scott Hamberger. I am the CEO and co-founder of Integris Holdings, Inc. which, like Hobby Lobby, is a family-owned business. And knowing that the Greens are in the room, I take this opportunity to salute you. More than most in the room, I understand the gut-wrenching choices that are involved in doing the right thing and the stakes for your business, your personal reputation, and your fortune. So whether you agree or disagree with the Greens, one has to admire them.

For the record, our company has taken no position on this matter. But I do believe that companies are moral agents; therefore, this kind of question has significant implications for business people, particularly family business people. Listening to the discussion from the dais today, I’m struck by what seems to be missing. There’s a lot of talk about a theoretical relationship between a company and its employees. Professor Dershowitz made a statement that his wife chose to go to a Catholic school or a Christian school; therefore, a certain amount of Christianity was okay.

We have a relationship of choice with our employees. They choose us and we choose them. It’s not a theoretical relationship, it’s a real relationship. So the notion, for example, that we should simply drop them to the tender mercies of the health exchange and just suffer a $2,000 penalty is a moral decision for us. Could we save lots of money? We certainly could. But morally, are we willing to throw them to the tender mercies of that system to see what happens?

The point, to which I’ll arrive momentarily, is that I admit that I’m nothing more than a simple businessman who has to worry about making his way in the free market and making payrolls on Friday. But what seems to be missing to me from this discussion is the notion of that relationship between us as employers and our employees who choose to be with us. If we fail to provide a benefit that is so valued by those employees, certainly they will vote with their feet and leave. So I do not believe they are silent. I believe they are represented in the free market of employment. Please educate me as to why that issue of employee-employer relationship has not come into the discussion from the dais today. I’m certain it’s simply because I’m missing the intricacies of the case.

MICHAEL KESSLER: Chip, Micah, do you want to respond?

IRA LUPU: I missed the beginning of the remarks. You said you’re a businessman. Is that what’s at the beginning?

SCOTT HAMBERGER: Correct. I’m a co-founder of a family business.

IRA LUPU: You’re in a business. Okay. Listen, I don’t know how many employees you have. I don’t know what your relationships are. You speak as if you’re someone who cares deeply about their well-being, and we’ll take that in good faith. I still wonder if
the Affordable Care Act should have left it to you and your em-
employees to negotiate the contents of the health insurance policy. 
Are your employees unionized? What kind of bargaining power 
would they have? What would they push for? What would you 
push against? Would you not want to cover certain high-end ex-
penses? Would you not want to cover plastic surgery because you 
have some concerns about it or principles against it?

So we’ll accept that you care about the people who work for you 
and they care about you and they also care about themselves. So 
we have some choices. Either we let it just go to bargaining and 
it’ll come out however it comes out, or the government speci-
fies minimum coverages because they think that’s what everyone 
should get. And there are plenty of people who think that the 
Affordable Care Act would be better if it was Medicare for all, 
single payer; let it just run that way.

But that is not the way it runs. So it’s left in the employer’s hands 
to decide how to manage that. But this Hobby Lobby case fo-
cused on particular goods, so it suggests a kind of cafeteria idea 
where somebody’s picking and choosing what’s in the coverage. 
I’m not convinced that’s a good general policy, religious freedom 
aside.

MICHAEL KESSLER: Next question.

CHARLES ARIAN: Hi. I’m Charles Arian. I’m also a former 
Georgetown student. I’m a rabbi in Gaithersburg, Maryland. Ac-
tually, my first job was as the Hillel rabbi at UVA. So I’d like to 
also say, “Go Hoos! Wah-hoo-wah!” [Laughter]

My question is, if Hobby Lobby prevails, would a logical corol-
larly be a successful claim by a Jehovah’s Witness-owned com-
pany not to provide coverage for blood transfusions, or indeed a 
company owned by Christian Scientists not to provide medical 
coverage at all?

KYLE DUNCAN: We’ve heard this concern before; we call it 
the parade of horribles. I don’t mean to denigrate the question, 
but that’s what we tend to call it, it’s the parade. If they win, then 
this will happen and this will happen and this will happen. Look, 
there are lots of responses to this. I think one of them is that 
RFRA has been around for a long time. Where are these claims 
on behalf of the Jehovah’s Witness and the Christian Scientist 
employer? I’ve never heard of one.

So I tend to think these are truly hypothetical claims. If such a 
claim was made and the government had a blood transfusion in-
surance mandate or something like that, one would think that the 
government would have powerful evidence that that is a compel-
ing interest and that it must have that mandate. And it wouldn’t 
have a grandfathering exemption, for instance. It wouldn’t say, 
“Well, if you haven’t made certain changes to your plan, you can 
avoid the blood transfusion mandate.” I just can’t imagine that 
state of affairs. That’s my simple answer, but maybe it’s too simple 
because I haven’t seen that claim yet, and I don’t know what evi-
dence it would involve. If such a claim ever arose, which I think 
is highly doubtful, the government would probably win.

MICHAEL KESSLER: Micah, Chip, Helen?

IRA LUPU: Let me make one small point. I agree with Kyle, the 
government would win. Those are cases where maybe life and 
death is at stake in the provision of basic medical care in the form 
of a blood transfusion. But I also think there’s some theology 
going on here. This is a theological choice. I’m not objecting to 
it, I’m just noticing it. Some faiths will say, “Listen, for us, we 
can’t do it. We can’t take blood transfusion. We won’t give our 
children blood transfusions. But we don’t object to others having 
them. We’ll fund the insurance policy that lets our employees 
have them because that’s their matter of choice about health and 
faith.” These cases, the contraceptive cases, involve faith choices 
about what others are going to do, not just what employers want 
to do as a matter of religious conviction in their own healthcare. 
That’s a big difference between the two categories of cases.

AUDIENCE MEMBER (unidentified): I was wondering what 
portion the Hobby Lobby owners pay now per employee for 
health insurance coverage—which they do have, I’m sure—as 
compared to the $2,000 fine. And I was wondering if that was 
relevant. Also, what portion of the ACA cost covers abortifacients 
and what portion covers the birth control? Is there some way that 
that could be accommodated?

KYLE DUNCAN: I don’t mean to evade the question, but—

AUDIENCE MEMBER: That’s private information?

KYLE DUNCAN: Yeah. I certainly don’t want to talk about that 
sort of confidential information. But I wanted to respond this 
way. The idea of simply dropping insurance, which is what the 
$2,000 penalty goes toward—if you drop insurance and your 
employee is going to the exchange and get some kind of subsidy, 
then you have to pay a $2,000 per employee penalty—it’s always 
been—
AUDIENCE MEMBER: Yeah. How good is the insurance Hobby Lobby provides versus what can be gotten on the exchange?

KYLE DUNCAN: That's an issue of just sort of throwing them out to the tender mercies of the health insurance exchange, as someone said. But the other issue has always been very clear, and the government has never contested it in this case, and that is the idea that doing that would be catastrophically disruptive to the business and to its relationship with its own employees. You know, after all, we have an employer health insurance system. We've had it in this country for a long time. It's underwritten by the Tax Code. There are reasons why we have an employer health insurance system. There are reasons why we come to depend on it. The government in this case is saying, “We're not going to create an alternative system for contraceptive benefits or other health care benefits. We're going to glom onto the employer health insurance system and make you part of that because, frankly, it's the convenient way to do it.” So I think I'd answer it that way.

GALEN CAREY (National Association of Evangelicals): There was quite a bit of talk about the alleged cost shifting and employee burden. But isn't it the case that the Affordable Care Act created a regulatory burden on the employer? So if there's an exemption from that burden, doesn't that just bring us back to where we were before the ACA was put into effect, so there shouldn't be really any cost-shifting implicated?

HELEN ALVARÉ: The question of cost-shifting depends on what your baselines are, right? According to the Alan Guttmacher Institute, which is commonly cited about coverage of contraception, about 90 percent of employee policies cover this. So really, what the ACA has done via this regulatory provision is shift the cost onto employers. So the first cost-shifting happened there.

Then the other point to bring up here is Cutter v. Wilkinson. The Supreme Court takes a look at the application of the Religious Land Use and Institutionalized Persons Act (RLUIPA) and asks, “Wow, is it an accommodation? Is it an establishment?” It's the question that Micah has raised here. And he says that if the government has created the burden and then they decided to accommodate it, so long as they do so in a denominationally neutral or even-handed way, and if they don't burden beneficiaries unacceptably, then this is okay.

So you're fighting over baseline theories as to what burdening non-beneficiaries entails. I'm suggesting two things. First, there are doubts about the data concerning what this is really doing for people in terms of lowering unintended pregnancy. Moreover, all the government's data on women's health and connected with unintended pregnancy has no causal material in it. Second, even if you set that aside, you have to ask the question: What is the limit to the government declaring a benefit and then saying that your refusal to give it is shifting the problem onto non-beneficiaries? That to me is one of the most interesting questions here.

MICAH SCHWARTZMAN: I agree it's interesting but I think a precedent resolves it, which is that the baseline is the statutory right provided by the Affordable Care Act. In United States v. Lee, the employer says, “Well, you shifted the baseline when you created the Social Security system.” No court I think will buy the argument that there is a baseline shift because the statute came into creation. We have all kinds of statutory rights that are attached to the employee-employer relationship. This is one. The fact that it's new, I don't think, changes anything. It's just like all of these other kinds of statutory entitlements that the government has created. I don't think there can be a principle that statutory rights don't change baselines. I don't think that can be an intelligible principle for determining when employees are burdened by exemptions.

HELEN ALVARÉ: I would disagree with that reading of Lee, however, which I don't think was about shifting a cost onto the employees, but rather about the employer getting exempted from what they referred to as a large, uniform, actuarially complex tax system. This is different from what is going on here, which is a private-to-private transaction—that is, company to health insurance company. This raises the question of the employee who will have to pay more for contraception versus less now, which I think is a very different question from the one in Lee.

MICHAEL KESSLER: Well, we have drawn to the close of this panel. I expect everyone will be looking forward to the oral argument tomorrow—and learning that we know nothing about how the Court will rule or on what basis! [Laughter] And then we will have a number of months to wait for the outcome. I ask you to join me in thanking Chip, Helen, Micah, and Kyle.1 [Applause]
Is Religious Freedom Good for Business and the Poor?

BYRON JOHNSON: My name is Byron Johnson. I direct the Institute for Studies of Religion at Baylor University, and you heard a little bit earlier today about the partnership between Baylor University's Institute for Studies of Religion (ISR) that I direct with Rodney Stark and the Religious Freedom Project. Let me just say how delighted we are on the Baylor side to be joining in this partnership with our good friends at the Religious Freedom Project. Tom Farr, Tim Shah, and I have been in discussions for the last three years, so we're delighted about this partnership and we hope that it will last for many years.

When we had a private audience with the Pope in December during a conference in Rome, the Pope got a real chuckle out of our partnership. I was glad that we made him smile when he heard that Baptists and Catholics were coming together to pursue religious liberty. I was also glad to hear Alan Dershowitz say that he was delighted about the same partnership, so who knows who will be the next dignitary to put their blessings on our partnership.

This panel—“Is Religious Freedom Good for Business and the Poor?”—is going to be a little bit different than what you've heard. There are no attorneys on the panel. [Applause and laughter] On our staff at the Institute for Studies of Religion, we have political scientists, sociologists, psychologists, and historians. We even have our own epidemiologist, Jeff Levin, who's with us today. We study religion. We're mainly number-crunching social scientists, so we look at religion to see if it affects health, if it affects individuals, kids, adults, families, communities, society, the poor, and prisoners. We invariably find that religion is associated with remarkably positive outcomes. It's good for people. It's good for groups. In fact, we've been trying to do studies that would show religion is harmful just to get some publicity, but we have not been able to demonstrate that. We're working on it. We've been praying about it. Some of you, who believe in intercessory prayers, please help us. [Laughter]

Let me introduce today's panelists to you. Sister Deirdre Byrne is going to be sitting to my left, and I was so delighted to get a chance to meet her because we've talked on the phone and we've exchanged emails. If you haven't had a chance to read her bio, I'll give you just a little bit of it here. She is a fully professed religious sister with the Little Workers of the Sacred Hearts right here in Washington. Prior to joining the order, Sister Dede attended Georgetown University Medical School. She later held a general surgery internship at Georgetown University Hospital. She worked in the Army for 29 years and retired in 2009 at the rank
of colonel. In fact, I’m surprised you’re not an attorney as well, Sister Deirdre. [Laughter] She has traveled all over the world. She has taken vows of poverty and chastity and obedience, as well as a private fourth vow to work and provide free and loving medical care to the poor and uninsured right here in Washington, DC at the Spanish Catholic Center, but also around the world. She has served in Kenya, Haiti, the Dominican Republic, and Sudan. She’s going to bring a unique perspective on our topic this afternoon.

Next to her is Brian Grim. Many of you have known Brian and his work for many years. He was with the Pew Research Center conducting cross-national studies of religion, and his work is really well respected. Now Brian has branched out and formed a new foundation, the Religious Freedom and Business Foundation, but he will continue to do the same work on religious demography. He has written a couple of important books on this topic. Most recently, he is coauthor with Roger Finke of The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century. We’re delighted to have Brian with us.

To Brian’s left is Anthony Gill. Yes, the guy wearing the cowboy hat. [Laughter] Tony is a longtime friend. He’s a professor of political science at the University of Washington. He’s also a distinguished senior fellow at ISR and has been working with us for a number of years. He also works closely with the team at Georgetown, and he has written several important books also related to this topic, including The Political Origins of Religious Liberty and Rendering unto Caesar: The Catholic Church and the State in Latin America. He also does a “Research on Religion” podcast. This is where he interviews both everyday people and scholars alike on religion and makes it all accessible for everyday people. Tony has been doing this now for several years, and we really appreciate that.

And then last on the panel is Rebecca Shah, who’s here at Georgetown University in the Berkley Center and the Religious Freedom Project. She’s been doing great research recently on entrepreneurship and economic development in the modern world. She’s the principal investigator on a research project that’s looking at the effects of tithing and thrift on the enterprising poor, especially in India. That project is funded by the Templeton Foundation.

We’re delighted to have all of these panelists here, and I’m going to kick the ball off by asking a question to Tony Gill. Tony, the title of our panel is, “Is Religious Freedom Good for Business?” Is it?

ANTHONY GILL: Yeah. Religious liberty is good for business because religion is a business. That might rub some people the wrong way here. People might be thinking that I’m comparing religious organizations to something that just sells snake oil. They’re only in it for the money. Some of you might be pleased to hear that. You might think that’s what religions do. I don’t necessarily think that’s the case, although there have been some snake oil salesmen throughout history.

Some of you might also be rubbed the wrong way when I say religion is a business because you think that there is a difference between the sacred and the secular. What I want to do today through this conversation is try to erase that distinction, because what I am coming to do today is not so much defend religious liberty per se, but defend liberty writ large. The important thing about understanding how religious liberty is good for business is understanding that the same liberties that we seek for religious liberty are the ones that also make business successful. To compartmentalize religious liberty from our other liberties is a very dangerous thing that I believe will erode our general liberties and then will affect religious liberty. I’ll just take a moment to explain that and why I see religion as a business, as it is important.

I’m a religious guy, and I praise God every day for all the great things that He has given me, but nonetheless, I’ve realized that I can’t do it alone. I’m responsible for my personal salvation. I have no problem with that, but I can’t do it alone. I need other people around me to help me out. I need people to share the joy that God has given me, and I need congregates. I’m a busy person otherwise, and I can’t do all the things that I need to fully understand my faith in God, and so I need people who specialize in that. I need priests. I need pastors, rabbis, imams. We need all those folks.

There is a necessity for religion. Religion is a very social part of our lives. I know some people say, well, religion is a very personal thing, but when you look at it, all the great religions, all the successful religions throughout society have been communal—they require that people come together. They need to aggregate in churches, in mosques, in synagogues and other places, and that requires a number of liberties beyond just the right to believe as you think. There are folks here that say, well, it’s liberty of conscience and you can believe what you want in your own head. But in order to act upon those beliefs in your own head, you come together with other individuals and form these religious organizations. And you need things like private property rights, the ability to build the place to meet, to do with that property as you best see fit, to enter into contracts with pastors and other employees and with other individuals within your congregation.
All of these things are rights and are personal liberties that are very essential to building business as well. If we lose sight of that and we compartmentalize just religious liberty, thinking of it only as a personal right of conscience, that’s very dangerous because what will happen over time is that we will slide into this belief that we can regulate and take away some of the liberties of other entities, of other businesses. Hopefully, that won’t affect us at all, but it does come around to bite us eventually. The more you restrict liberties for the business community, the bigger the state, the bigger the government will grow, and the more taxation that the government will need to run its various bureaucracies. That’s going to have a profound influence on churches and other religious organizations because churches don’t pay taxes as much. They compete with the government for a lot of other different social services that are provided. It might come down to the point where the government says, well, we don’t need churches as much. We’re doing all these other things, and we’ll start to erode those liberties. I think that has been happening in the last several years, and we might discuss more about how that happens, but that’s my initial salvo. I’m here to defend liberty and not just religious liberty.

BYRON JOHNSON: Okay, great. Brian, you have done work recently on testing the religious economies theory. For most people in this room, they’re not going to be familiar with that theory. Maybe you could present the theory and then the data behind it and what you’re finding when you look at countries around the world.

BRIAN GRIM: Yes. I’ll be glad to, but I did ask permission if I could take a poll first. Is that okay?

BYRON JOHNSON: Yes, yes. Let’s do the poll. We’re social scientists. That’s what we get to do. [Laughter]

BRIAN GRIM: As a researcher, I was at the Human Rights Council in Geneva a couple of weeks ago, and I did the same poll. I’m hoping today for better results.

So I have a business card—this isn’t part of the poll, it’s just a psych test—and on the back of my business card, I have four triangles. Of course, you can’t read it, but the middle one says religious freedom; the bottom right triangle says civil society, including religious groups and others; and then the other one says governments. That’s usually who gets together and talks about this issue of religious freedom.

So at the UN, I just took a poll of how many audience members were from government agencies or work with the government. So it’s the same poll here. How many are with the government or a government agency? We won’t take any pictures, but okay. And then how many are from civil society—religious groups, et cetera, not including businessmen? Let me pull out the business card again, because in my third triangle at the top are the people who weren’t at the Human Rights Council. So how many here are from business? This is a thousand times better than it was at the Human Rights Council. I spoke at the UN a few weeks ago in New York at the US Embassy. It was packed room, maybe twice as many people as are here today, and I didn’t have a single businessperson. That’s part of the message. I think that’s coming out of the religious economies for which I’ll share some data points: not only is religious freedom good for business, but business is good for religious freedom. It works both ways and maybe as we talk, I’ll explain those ideas, but the data are overwhelming on several points.

First, we’ve seen a rising tide of restrictions on religion around the world coming both from governments and from groups and

“...The data also clearly show that where religious freedom is practiced, you have better business environments. You have more trust within a company when a company respects religious freedom. You have an environment where innovation and ideas are stronger. For instance, where there’s religious freedom, you see twice as much innovation in that economy as you see in places where there isn’t religious freedom or where religious freedom is low.”

Brian Grim
society. Social intolerance and religious hostilities ranging from terrorism to not loving your neighbor have swept the world. That’s what Tom Farr began with by sharing that 76 percent of the world’s people live in countries with high or very high restrictions on religious freedom.

But the other work involves looking at what’s going on in the world. How do you make sense of that? What does this mean? The book that Byron mentioned that I wrote with Roger Finke at Penn State looked at what the connections are between actions governments do, actions people do, and this religious violence that we’re seeing. What we found was that as people in society try to make their society favor just their religion and no others, it has a relationship with government actions, and governments respond to that and reinforce that. They sort of build this coalition of intolerance. When that is set in place, religious violence is the result. Looking at the data, these connections are clear, and the solution or the antidote to that is religious freedom. When people in society respect your neighbor’s faith and where governments guard that respect, then you see less religious violence.

That’s the first model that’s been tested in the religious economies model of how deregulation can lead to greater freedom and less intolerance. But the data also clearly show that where religious freedom is practiced, you have better business environments. You have more trust within a company when a company respects religious freedom. You have an environment where innovation and ideas are stronger. For instance, where there’s religious freedom, you see twice as much innovation in that economy as you see in places where there isn’t religious freedom or where religious freedom is low.

Part of that is due to what religious freedom means. It means that you’re set free to dream, that your faith that motivates you to do something good for someone else can motivate a business to do what we’ve been talking about with Hobby Lobby today. This faith inspires me to do something good for my fellow man, and sometimes that’s profitable. And then that profit itself gives people jobs and gives people the ability to develop their own lives. So where religious freedom functions, the full person and the full capacity of people are set free then to engage and help societies.
I’d like to give one personal anecdote that I’ve shared on other occasions. I have four kids. Three were born in China, and two of the three that were born in China are here with me today—a doctor and a nurse. The anecdote is they were raised in Saudi Arabia. They were raised in Muslim countries, for the most part, China and Muslim parts of China. And this is what got me into the religious economies model. When I was in a country where I could not practice my own faith, I lost interest in working hard for that country. For instance, when we were in Saudi Arabia, it was illegal to be a Christian. I would be fired if I said, “Merry Christmas.” The only place we could go to worship was behind barbed wires at the US Embassy. We had to sort of brave that trip to go across town. I thought, “I just want to get my family out of here. I don’t have an interest in this.”

Then some years later, we worked right across the border in the United Arab Emirates. It’s also a Muslim-majority country where religious freedom was not perfectly respected, but we could have our church. We could go to church. We could practice our faith. My motivation to serve in that capacity and see good come was transformed. It was night and day between those two places. So at the personal level, I see it, and these personal experiences of working in many of these countries led me to think this isn’t just my own experience, but I think this is how the world works. That’s what motivated the research I’ve done in looking at these connections.

BYRON JOHNSON: Becky Shah, let me ask you this question: There’s a view held by some that religious freedom may lead to the denial of other liberties and opportunities, for example, education and employment, and thus hinder development, not help development. How pervasive is that view?

REBECCA SAMUEL SHAH: Well Bryon, it’s a very pervasive view. I’ve been in the field of development for 20 years. I’ve been at the World Bank, and the view that religion is detrimental to development was held there for a very long time until Jim Wolfensohn came, and he set up a faith and development office. Even then, people of faith, those who wanted to include faith in development projects, were sort of tolerated. What informs this view? Well, one is there’s a belief among development practitioners and scholars that people are passive victims of dubious ideologies, that conversion that happened in the parts of the world that I worked in is a western artifact. Western missionaries are going out there and converting people when in fact studies have shown—and there’s a lot of data on this—that conversion is mostly taking place because of indigenous missions.

And there is another very pervasive view that informs this belief that religious liberty is detrimental to development, and that is the view that patriarchy is engraved in all the world religions. Therefore, one has this view that religion violates human rights—religion subjugates women. Now, religious liberty is not a panacea, Byron, by no means. There are certain aspects of certain religions that are very patriarchal and do subjugate women. But the beauty of religious freedom is that it enables people to critique their religion, to reform their religion, to exit from a religion. That is taking place in parts of the world that I’ve worked in which there are very repressive forms of patriarchy and women are exiting their religion. So yes, it’s a prevailing view, but the beauty of religious freedom is that it’s there to enable people to have a choice.

“The important thing about understanding how religious liberty is good for business is understanding that the same liberties that we seek for religious liberty are the ones that also make business successful.”

Anthony Gill

BYRON JOHNSON: Great, thank you. All right Sister Dede. I’m coming to you.

ANTHONY GILL: That’s a nice hat by the way. [Laughter]

DEIRDRE BYRNE: Thank you. It covers the gray better. [Laughter]

BYRON JOHNSON: I’ve read your bio to people, and I think they may have already had a chance to read it. By the way, she was deployed to Afghanistan for her last stint in the Army because she wanted to be there for the troops. So I just thought that you have to tell us about your journey, okay? We’ll just hit the pause button and let you tell us about your journey.

DEIRDRE BYRNE: Well, hopefully it’ll be short. But first, I wanted to say that Mother Teresa always said that her business in religion was to bring the love of Christ. My mother always said
My journey was circuitous because miraculously—and I say that because it was a miracle—I was able to get into medical school. Bill Cosby used to say some graduate magna cum laude and some summa, and I graduated thank you, Lawdy! [Laughter] So getting through med school, I joined the Army. I had no clue what I was doing, but it was a blessing in disguise. I had served for the first part about nine years, and then I didn't resign my commission. I said if there was ever a need that I would like to be able to pay back whatever I was given, because in those days, I was a family physician and life was fun and easy. I chose mission works in places like Korea to get the taste of being away from my wonderful family to see if I could survive. Then I had an experience in India working with a medical mission sister and really felt that I wanted to pursue surgery, thinking that would be the best combo for working as a missionary.

So it was a circuitous route. During that time, I had the blessing of scrubbing in on the open-heart surgery of Cardinal Hickey who started the Catholic Healthcare Network and the clinic where I work presently. He will hopefully one day be canonized. He is a holy man. He became a spiritual friend after I managed him post-operably. In those days, we did every other night call so it wasn't this wimpy 80-hour workweek. [Laughter] We worked a lot.

Then I also had the blessing to meet with Mother Teresa. They wanted me to be one of her doctors and it was really just coming to completion when she came to Washington to reaffirm my vocation, but I was in the midst of searching for the world's best community and stumbled upon them after I finished my surgical residency in 2001. I was in the process of entering them.

Now mind you, I had joined the reserve unit back at Walter Reed Army Hospital. It was really, basically, easy money reading my medical journals and using that money to be able to go serve the poor. I was working with the Catholic Medical Mission Board overseas to keep my surgical skills up because Cardinal Hickey, as I was discerning my religious vocation, had recommended that I spend half a day in prayer and half a day serving the poor. And as a general surgeon, it's hard to juggle, especially here with malpractice insurance. I did a lot of that service in Africa where I could do a heavy load of cases in a short amount of time.

And then it was September 10, 2001, and I was up in Manhattan. That next morning I was down in Manhattan, too. The Twin Towers fell, and by that afternoon, I was at the base of the towers giving food and water to the firefighters with a couple of Missionaries of Charity. It was just another example of God saying, “No, I have a plan for you.” For everyone, He has a plan, and that was my little plan: to be His kind of witness and serve the poor.

So when I came back, I was able to enter the Little Workers and go through my formation. And then, boom, you know, after about 2003, the reservists started being pulled. Our mother general, our general houses in Rome, and our sisters—many of them were freed. The Italians love the Americans. To this day they say that we really freed them from a lot of their lack of religious freedom—and freedom, period—during the Second World War.

The whole world was still in a state of shock with what happened with Al-Qaeda. So I therefore was able to do this little crazy juggle of donning the military uniform. At the same time, I was a religious sister. I was deployed three times, and my last one was in Afghanistan. It’s where I experienced a lot of things I’ll share later. That was it. I finally made the final vows with the community and so a few of them are here. You can pick them out. They're wearing the same outfit as I am. We shop at the same store together. [Laughter]

BYRON JOHNSON: Well, let me follow that question with another one. Now, you’ve told us a little bit about your journey. Can you talk about religious freedom around the world since you’ve had a chance to be in places like Kenya and Korea and Egypt? Can you talk about religious freedom or the lack thereof in many of the places where you have served the poor, and how that has affected your work?

DEIRDRE BYRNE: I have been to places where I have seen people who don’t have the freedom of religion that I have experienced my whole life. Coming from our American life, I'm very open to my faith. I'm not the greatest missionary in the sense that I don't speak about it a lot. It was Saint Francis that said, “Go out and preach, and if you have to say a few words, go ahead.” So I
do a lot of my preaching by taking care of the sick. It gives you a chance when you’re at the bedside of a sick patient—there’s a real bonding with the patients where they share, and they know that you care about them. They know our faith because I always work at a Catholic hospital, so that I can keep my spiritual batteries charged, which for us Catholics means the daily Eucharist and maintaining the prayer life that we live as religious sisters.

My most recent experiences were in the Nuba Mountains of Sudan, where people are being killed. They are murdered. We received casualties. I’ve seen terrible things, like arms blown off children. The people there in the Nuba Mountains of Sudan, which form the border between the north and south parts of the country, live in peace. They live together with many religions. But in the north, the Khartoum, people are bombing and using terrible forms of military action, so that they swirl through and chop off limbs and fingers and faces and whatnot. I, myself, was still able to live my religious life.

And when I was in Afghanistan, before being deployed, we were told we can’t talk about our faith because, if it wasn’t our US soldiers, we would be taking care of people from the Muslim religion. But the word got out because at that point I was a full religious sister—I was a nun with a gun. [Laughter] I wore the uniform so they didn’t really know, except maybe my hairstyle really didn’t look so hot. [Laughter] Some of the Afghani translators that were also physicians would ask me, “Are you a religious sister?” And I said—I saw this as my chance—“Yes. Do you know what that is?” And they said, “No.” I said, “Would you like me to explain that to you?” And they said, “Yes.” I said, “Well, have you ever heard of Mother Teresa?” I figured that would shorten the conversation. They said, “No, we have never heard of Mother Teresa.” At that point it shocked me to realize how much people are not able to get the news of what’s going on. They’re not being taught what other people are doing around the world. They’re just given this one regime, and they are censored.

So I did share with them a little bit of the life that I live of poverty and chastity. The obedience vow has always been the difficult one. [Laughter] It was really a wonderful experience because they could see with our military soldiers how much love we really had in our hearts, because most military folks are very God-fearing, God-loving people. We’re there not only because we were given orders, but also because we really want to help these people.

BYRON JOHNSON: When I first talked to her on the phone, she said I’m not sure what I can offer this panel. [Laughter] Okay Tony, I’m back to you.

ANTHONY GILL: Alright.

BYRON JOHNSON: Now, you suggested something that is kind of outlandish here on the face of it, but you say religious organizations and leaders are often quick to support the entrenchment of liberty in the non-religious sector without realizing that such support actually works against them. Can you talk about that?

ANTHONY GILL: I have a great example of that, actually. I know this is partially sponsored by Georgetown, so this is going to maybe step on a few Catholic toes. But again, the general argument that I want to make, that I want to get across, and that I see in my own research is that the liberties and rights that we have as religious organizations and as religious individuals are equally important as those that are in the regular commercial market. We can’t compartmentalize these two and just focus on religious liberty and ignore the other liberties. We can’t work against those other liberties, because if we move against the secular world and try to regulate it and restrict some of the liberties of individuals in that frame, it’s going to come back and haunt us.

This is a statement from Cardinal Francis George, who is the Archbishop of Chicago. He made this statement on May 20, 2012. This was in relation to the Affordable Care Act. He writes,
“Since 1919, the Catholic bishops of the United States have taught that universal access to basic healthcare is a component of the common good in a fair society.” That sounds wonderful. I love to see people around me healthy and happy. And so it’s a very good thing what Sister Dede does here. She does really wonderful things to make sure that people who are in distress, who are sick, and who are ill are cared for. So far, so good. The cardinal continues: “In the Church’s teaching on social justice, concern for universal healthcare takes its place with concern that everyone has sufficient food and decent shelter and an opportunity for a job with a family wage. The Bishop’s Conference, therefore, supported the goal of the healthcare reform bill that was passed a year ago. It has many elements that contribute to extending healthcare for all: the provision that insurance companies cannot impose preexisting conditions as a restriction on offering health insurance policies; the provision that sons and daughter can remain covered by their parents’ insurance through their college years; increased coverage of health benefits for mothers and their children.”

So again, what he’s saying at this point is that the Church supported the Affordable Care Act. They supported restrictions on various businesses, on various insurance companies, on various individuals that they should have this, that, and the other thing. It’s a regulation. It was restricting liberty. But here’s the payoff line: “But these and other benefits should not be brought at the expense of religious liberty and the freedom of conscience. Freedom of conscience means that neither an institution nor an individual should be coerced by the government into doing or paying for an action they believe to be immoral.”

This was a big awakening, I think, for the Catholic Church because what was happening was that they were saying, in effect, yes, let’s get the government more involved in healthcare for a wonderful reason. We want to see everybody healthy, and it seems like it’s going to be good idea if we pass the Patient Protection and Affordable Care Act. It has a nice name after all. So we’re going to restrict and tell insurance companies what to do. We’re going to restrict businesses and tell them what they can do. But when it comes to our turf, all of a sudden it was, “Whoa, whoa, whoa.” But the big realization here is what’s good for the goose is also good for the gander, right? It’s that you’re asking for freedom in one area, but denying it to those in the other area.

It’s a critical mistake that we can often slip into, and it’s not surprising that this came about because, again, as you decrease liberties in some area, you’re going to increase the coercive power of the state. That state is going to use that power eventually to restrict your own liberties. You might not think so. You think they’re doing everything for good causes, but it does come around. It does come around to bite you. I think that’s what is important here.

For people who are very interested in religious liberty, the big issue here is to respect the liberties of others, because they will join your cause as well. So religious liberty should be good for business as well, because the liberties that churches enjoy—to be able to proselytize, to do the things that they do, to enjoy the gifts that God gave them, and to do it freely and to their utmost—is exactly what the folks at Hobby Lobby are doing.

For me, this compartmentalization that we heard in the previous panel drove me crazy. We’ll carve out exemptions for this thing or that thing. We’ll create this big overarching regulation. We’ll restrict liberties here and there, but then we’ll carve out an exemption here based upon religious liberty or an exemption there and base it upon that. I mean, the way I view it is that God gave us all a bunch of different gifts. When we do our daily business, we’re doing that all the time. Whether it’s selling frames and macramé projects and all those kind of things like they do at Hobby Lobby, or if you’re in your church on a Sunday morning, it’s all the same thing there. The religious liberty that is really important for religion and that we advocate so strongly for has to be translated over to other individuals, because they need that liberty too.

BYRON JOHNSON: Brian, in your work, you state that religious hostilities and violence and conflicts are all recognized. Of course, many people have cited that. Tom gave us a statistic at the outset. Could you give us some more data on just how bad the situation is and how it’s changed over time?
BRIAN GRIM: Yeah. For instance, harassment of women over how they dress religiously has gone up by nearly eight times in just six years. We’re seeing that these incidents are happening in more than a third of countries. In one out of every four countries, governments themselves restrict religious conversion. So thinking about some of the other arguments that have been made and that, Becky, you were making, when governments start interfering in just that basic choice of whether or not I would like to change my faith—it’s not about proselytism, but just that freedom to make a choice—these are very deadening types of restrictions. Many times these kinds of restrictions are justified because they want to try to reduce the tensions that come over religious change. Can I flip my data around a little bit?

BYRON JOHNSON: Sure.

BRIAN GRIM: For the past 12 years I’ve been studying this. Everywhere I go and speak about this, I always talk about where the problems are. This leads to this, and here’s the problem. I just came from Brazil. I’ve taken a different approach there. I have a pyramid of all the countries with the very high and high restrictions at the bottom and the moderate restrictions are in the middle. The United States, by the way, is in this moderate category. At the top are the countries with low restrictions. I was sitting with Brazil’s vice president, Michel Temer, and going through the data with him. With the top of the paper folded over, I said, “These are the 25 most populous countries.” He looked at it and said, “But where’s Brazil?” I said, “Oh, here it is,” and I unfolded the top. I said that Brazil has the lowest government restrictions on religion of any country among the 25 most populous. He sat there, and it was a big conference table with aides and folks around, and he said, “I didn’t know that. I mean, I’m the vice president. I didn’t know that. I should know that, because I am a constitutional lawyer”—nothing wrong with lawyers. [Laughter] He said, “I helped write the religious freedom provisions for Brazil. This is great news.”

I say this because this is the case that proves the opposite side of the story. Some of you may know this, but Brazil is a country that has undergone more religious change than perhaps any in the past 50 years. Fifty some years ago, everybody in Brazil was at least nominally Catholic. Today, only two-thirds of the people are Catholic. What have they become? Well, a few have become no faith, but most have become Pentecostals, Charismatics, Evangelicals, Latter-Day Saints, Seventh-day Adventists. You know, a whole variety of faiths have sprung up.

As I talk about these things with different leaders around the world, I use the Brazil case study. I say, “Can you imagine this happening in Pakistan—that a third of the country changed their religion?” Then they say, “Oh well, this is just within Christianity. It’s no big deal.” Well, there have been wars, long wars fought over this in Europe.

So I gave another analogy. What if this would happen in Iran, where there’s a Shi’a majority? What if one-third of Iranians will switch and become Sunni or maybe even something even further out, like Ibadi as they are in Oman? You can’t imagine this kind of religious change happening violence-free. There is really no violence and Brazil’s economy is booming. The country is optimistic. Skyscrapers are going up. They have problems like the rest of us, but it’s a success story of what the data are saying from the opposite side.

So that’s part of the story, I think, that maybe our panel is saying. The whole story here is that when you do have religious freedom, there’s really a good side to it. There’s plenty of bad that happens in business. There is corruption, businesses plow down the Amazon, and there are things that people can criticize business for, but there’s also this positive side.

BYRON JOHNSON: But when you argue that it is a part of the religious economy model, there’s competition.

BRIAN GRIM: There’s competition, yeah.

BYRON JOHNSON: So the Catholic Church now has competition, and now the Protestants have competition with other Protestants that are Pentecostal, and et cetera.

BRIAN GRIM: Yeah. Well, I sat down with Cardinal Orani, who wasn’t a cardinal when I first met him. He just became a cardinal on February 22. He’s the cardinal of Rio de Janeiro.

ANTHONY GILL: After he met with you?

BRIAN GRIM: Yeah.

ANTHONY GILL: Good job. [Laughter]

BRIAN GRIM: Anyhow, I sat with him and we are going to have a big awards project in 2016 at the Rio Olympics, awarding the best of the companies around the world that have had the best initiatives for respecting religious freedom in their company or in their society or in the world by their weight class—multinationals, nationals, companies led by women, young entrepreneurial companies, and so on. Cardinal Orani just sat there, and he said,
“This is exciting. We’re in. Whatever needs to be done, you can count on us.” And he said, “But I have a question. This isn’t some Catholic initiative?” I’m Catholic, so that might be why he thought that. I said, “No, no. Everything we’re doing is completely multi-faith. For Muslims, where this is a big issue and it’s unknown, once they hear about it, they realize that religious freedom is a big issue for their businesses.” He just said, “This is great. This is our stance as a church.”

It’s hard to understand, but when I was in Brazil earlier in the year and spoke at a religious freedom event, 30,000 people came out for a religious freedom event.

BYRON JOHNSON: Just like your normal talk here in the States. [Laughter]

BRIAN GRIM: Yes, normally. [Laughter] But they’ve embraced it. And the Church itself, which you can consider a loser—you know, they lost a lot of followers, and when I talk to priests and others, they lament that—but at the same time, they ask: Why did we lose them? Maybe we weren’t meeting their needs. Would the best solution have been to clamp down and prevent people from leaving, or to allow us to now see how to engage and serve people better? Just flipping the data around and looking at the positive case studies has been, at least for me, very enlightening, and I think people respond to that message. It’s sort of my tagline: Religious freedom is good for business. That’s a simple statement but it’s very true.

BYRON JOHNSON: Sure. Now, Becky, I’m going to skip ahead because of what Brian was just saying and ask you this question. You know, the religious landscape is changing all around the world. A lot of people would have us believe that the world is becoming less religious all the time, much more secular. In fact, many parts of the world are becoming more religious. A part of that is the whole conversion process. In a lot of the research that you’ve done, especially in India, you’ve actually studied conversion. It would be very helpful if you could talk to us about the issue of religious freedom and conversion.

REBECCA SAMUEL SHAH: Absolutely. When people think about religious freedom, I guess what they don’t think about is the people who benefit from religious freedom who are very much on the margins: the very poor, the women, the outcasts in India with whom I worked and studied. I do want to talk about a specific aspect, the right to convert, which is severely under threat in India as we speak.

I just want to cite two examples from my study. I’ve studied hundreds of micro entrepreneurs in India, South Sudan, Peru, and Latin America. But I’ll concentrate on India for a moment, because I studied very poor women who are dalits, who are outcasts, the poorest of the poor, the lowest caste. My study has shown that the women who can convert—right now they can convert, thank God—benefit in two very important ways.

We’ve seen that the converts in our community are more likely than any other group to report domestic violence. Now, what would these people—who are necessarily the constituents, who are against religious freedom, who probably lobbied against religious freedom, who probably would be lobbying tomorrow against Hobby Lobby—what would they say if these women, because of their connection with forms of Pentecostal Christianity and Protestant Christianity, connect with a pastor? These women, interestingly enough, report their abuse not just to their friends. They report it to a male pastor. Who is better to deal with a drunken, violent husband than a male pastor who goes to visit the home and over time can stop this abuse? They’re plugged in an open, warm, welcoming community. This is what conversion does for these women.

Many people also believe that microcredit or mere access to credit will launch the poor out of poverty. In other words, all they need is credit. We found that it isn’t just the mere access to credit. In fact, credit can drive people further into debt. You have more money; there are more temptations. You use your loan to get another loan, and before you know it, you’re in so much debt. What we found is that the women who are converts were connected with these communities who tithe; that is, they give religiously motivated donations. Some of these women make such little money, but they tithe 10 percent of their income. And they tithe it before they buy their groceries. Try and imagine that!

But titthing actually works as a sort of constraint. It limits them. It prevents them. It’s a self-control mechanism. It prevents them from wasting their money. One of the clients I met was able to save enough to build a two-story house. She has a refrigerator—I wish we had a PowerPoint; I would show her standing behind that shiny refrigerator. She has a washing machine—there’s no running water, so she pours a bucket of water but washes the clothes. She has a two-wheeler and a shop, which she has expanded now and sells many things apart from just candies. Because she tells me—and we’ve tracked her income—that she joined this community where she saved a significant amount of money by not gambling. She used to gamble about 2,000 rupees of her income every month, what we call chip funds. But she stopped the gam-
bling. She put that aside. You know why she put that aside, Byron? Because she knew that she had to limit her money and the waste-
full spending. Because she had to tithe. She had promised to tithe.

So conversion can uplift. It doesn’t subjugate. I don’t believe it’s 
repressive. I believe it’s progressive. These women, these converts 
that I’ve met, have shown me in ways far more remarkable and 
unbelievable the ways in which conversion can transform. So 
I pray for my country, because conversion is bringing up these 
marginalized people, it’s uplifting them. It’s good economics.

BYRON JOHNSON: Sister Dede, you’ve travelled all over the 
world. Following that comment by Becky, what would you say, 
as you worked with the poor in all these different places, about 
religious restrictions that you’ve observed and how that affects the 
poor?

DEIRDRE BYRNE: I think we have a situation here in our own 
country at the clinic where I work. It’s not a definite but it’s a fear. 
Because we are a clinic that serves the poor completely, 50 per-
cent of the patients that we serve at the Spanish Catholic Center 
are undocumented, and the other 50 percent could possibly get 
the Affordable Care Act, what we call Obamacare. There’s a risk 
or a fear that we could lose the grant money that we receive. We 
rely heavily on grant money. These are nongovernmental donors. 
But I’m always amazed at the amount of money that is given to 
an organization like Planned Parenthood, which provides women 
healthcare in a very specific way, where our clinic provides the 
whole gamut of internal medicine. We do mammograms; they 
don’t. We provide all sorts of care. And we do not receive money 
from the government, with a few exceptions. But Planned Par-
enthhood will get a room, a million dollars a day of tax money, in 
order to keep them alive.

I fear that we will not survive without the donors’ money. And 
there is a threat that we could lose it if we don’t embrace the Af-
fordable Care Act, and if we don’t accept patients that receive 
that income. Our focus is the poor, the people that fall through 
the cracks that don’t have Medicaid or Medicare. We take care of 
people who can’t really afford that or aren’t allowed to have it. So 
that’s the one fear.

The other fear is that there’s going to be red flags on those who 
don’t have the Affordable Care Act programs. That will tell them 
that they are probably undocumented. I think we’re going to run 
into a crisis with our poor here in our own country. I’m not pro-
moting people sneaking across the border. But people flee from 
their country and a lot of them have been here for a long time. 
So that’s a big fear.

BYRON JOHNSON: Tony, a question for you. You’re a social 
scientist so you talk a lot about correlation, and every now and 
again you were bold enough to talk about causation. In one of 
your papers, you mapped out six different models for religious 
liberty. We don’t have enough time for you to talk about all six 
of those, but it would be great to hear you talk about the causal 
connection between economic development and religious liberty.

ANTHONY GILL: There are a number of different pathways. 
What we are doing right now is part of the Religious Freedom 
Project, working with a number of great scholars, some of whom 
here flank me. We are talking about whether there is a connection
between religious liberty and economic development, as well as social flourishing and democracy more generally. And a couple of the ones that I’ve heard here, the ones that we can see taking place both with Sister Dede and in the stories that Becky told, relate to the building of what we call “human capital” and “civic skills.” The stories that I hear today are just so wonderful, and you heard them implicitly in some of the earlier panels. There is a misperception that businesses will never reach out and provide healthcare for their workers, and that they won’t care for their workers, so we have to come in and do these things. In other words, you can’t leave it to the private sector. But here you have these wonderful stories; once religious organizations are free to do the work that God calls them to do, they step up to the plate and do these amazing and wonderful things.

The things that Becky is talking about here at the micro level, just little tiny things that people weren’t able to do before but now are able to do, make small changes in their lives. They build the skills of these women and these dalits in India, leading not to major expansions and growth, but a steady step-by-step improvement, and everything gets better. It’s going to get better over time. And the work that Sister Dede does, just going out there and saying, “We’re going to help people. Give us the freedom to do that,” also builds organizations that helps people out and builds these civic skills that reverberate throughout society. We see that in our own research here, in our own experiences, that it’s just absolutely amazing to think why religious liberty wouldn’t be a good thing. You’re allowed to find your own true God-given skills and explore those.

The other pathway that I tend to hang my hat on a lot—and I’ve talked about this before—is the issue of contingent liberties. It’s this realization—and I think the Catholic Church is coming around to realize this now, too—that our liberties are contingent upon a number of other liberties, not just that small compartmentalized religious liberty. Yes, it might be difficult. Liberty, as Becky says, is not a panacea. There are a lot of bad things that might come when people are free. But I think, overwhelmingly, we see people step up to the plate and do wonderful things. And to the extent that we can provide freedom for all individuals and not just religious groups, and that these religious groups are saying that my liberty is contingent upon somebody else’s liberty—that makes me stronger.

This is the work that Brian has seen in Brazil through his research. Yes, the liberty might lose us some converts. It might be difficult. It might create some social problems. But overall, it makes us stronger in the long run. We see that as religious groups come to realize that their property rights are being violated, and their freedom to contract is being violated. They become a voice. They become advocates for liberty writ large. And as liberty expands throughout society, societies grow. We know that historically. I don’t know how you can deny that. Let religious liberty ring. And allow us to build these civic skills and allow us to reach out to other individuals and support their freedoms and liberties as well.

REBECCA SAMUEL SHAH: Byron, can I just make a quick point?

BYRON JOHNSON: Sure.

REBECCA SAMUEL SHAH: Tony mentioned the efficiency of faith-based organizations. I was reading an economic journal about an experiment involving these two secular Swedish economists. Now, Swedes are no fans of religion, let’s be honest. They did an experiment in healthcare clinics in Uganda. It’s a serious peer-reviewed economics paper. It’s got all the econometrics on it. They gave the faith-based clinics money and they gave secular clinics money. The faith-based healthcare clinics in Uganda used the money to increase the quality of their care, lower the cost of provision, and extend the reach of their services. The secular clinics jacked up their wages and used it for other prerequisites. And they went back to do another report last year that says that even though the faith-based organizations held a very small share of the market, people will walk for miles in Africa—in Uganda, in the study—to get to these faith-based clinics. They do a better job. So this is just to tag into the pathway Tony mentioned earlier.

BYRON JOHNSON: Following up on that, Brian, can you talk about correlation and causation between religious freedom and these examples of hostility that you talked about a second ago? Where religious freedom goes down or religious freedom goes up, what do we see in terms of hostilities and conflict?

BRIAN GRIM: Maybe one example I can focus on is Pakistan, and I can give a positive example at the end. In Pakistan, blasphemy is illegal. That means if you say something, do something, perhaps even think something that’s critical of God, it’s a capital offense. You can be put to death. That’s the penalty. For this type of law, you know, the justification is we don’t want you to say something that might offend her and vice versa. The religious sensitivities are so important. We need to protect ourselves from hurting each other’s feelings; therefore, we’re going to criminalize blasphemy and then keep that problem down.

Then what the data shows—and this is a global analysis—is exactly the opposite. When you institute these laws that are pur-
portedly trying to keep religious sensitivities from being hurt, they instead are used to stoke tensions. To give a business example, in Pakistan, a number of companies have come under allegations of blasphemy from their business rivals. So the business rival—who is trying to undercut its competitor—makes accusations against its rival, saying that an advertisement showed too much leg, or that they said something that was blasphemous. Can you imagine businesses getting dragged into court for blasphemy? That happens. These laws then get used seditiously, and you have many cases where there are false accusations. Then when somebody is accused and the judges throw the court case out, vigilant violence comes in and says you offended our sensibilities. This is what happens. Then they’re killed.

On the positive side, much of the work I’ve done for decades is look at these problems. A few months ago, I met with people from the Evangelical Lutheran Church, which is the main Church in Finland. We were talking about religious hostilities towards minorities in Pakistan, Ahmadiyya Muslims for instance, and Christians in Pakistan. Pakistan is majority Sunni Muslim, and even Shi’a are a minority there. And there are tensions there. They were talking about what could be done. Then the idea came up: Maybe there are some things businesses could do. I have never seen people just drop and marvel at a new idea. They said that’s the first encouraging idea we’ve heard, and they’ve been working in Pakistan for many decades.

Of course, I didn’t know why it was so positive to them. But we continued our meetings and I met with their ambassador in Helsinki—where, by the way, they just closed their embassy because the religious security situation is so bad. I told them about Tibet. There’s a researcher in Lausanne, Switzerland who has been going to Tibet. I think many of you know the issues in Tibet. He has been helping Tibetan Buddhists develop the tourist industry for this influx of Han Chinese tourists coming from China to see Tibet. This researcher was sharing this at the Human Rights Council. The Chinese had just vehemently objected to an Uighur from Xinjiang who was talking about problems in the Muslim area of China. So I was sure that the Chinese delegation would again try to shut this Tibet talk down. But the Chinese delegation just sat there and they got relaxed. Next thing I know, they are nodding their heads. Because he’s talking about helping Tibetan Buddhists celebrate their religion and their culture by becoming tour guides, having bed and breakfasts, hosting tourists, and fixing up the monasteries. The Chinese thought the Tibetans were not being “split-ists,” but were instead cooperating and doing something productive.

I shared this story in Finland with the current and former ambassadors to Pakistan. All of a sudden they said, “Well, you know who the Christians are in Pakistan? They’re dalits. They’re converts from Hinduism, the dalits.” They said, “Well, you know, they’re thought of as the garbage collectors of Pakistan.” Then the business idea clicked in. Pakistan has really bad waste management, and there’s not much recycling. We could go in and help develop some waste management that would be very profitable. The county would love it. The Christians could run the business. The Muslim community and everyone else would think this is great. You know, they’re the dalits. Let them take care of it. But then they could use that negative stereotype and turn it around into a sustainable business that serves the country.

It’s not exactly all from the data, but it makes more sense when you start looking at the data from a problem-solution perspective. So that’s what I mentioned at the very beginning, when I said it’s not just that religious freedom is good for business, but that business can be good for religious freedom.

ANTHONY GILL: What Brian said here echoes a lot of the work that I’ve done earlier on. One of the great arguments against religious liberty has been that it would create a lot of chaos and a lot of conflict and tension. That oftentimes does arise in the short-term. I’ve seen some of these in my own research in Latin America. But as Brian just mentioned here, over time, Brazil realizes that everybody gets strengthened. The Catholics are stronger because of the Evangelicals. The Evangelicals are stronger because of the Pentecostals. It really enhances each organization.

We think about the beneficiaries in terms of the organizations, but the people who actually benefit are the individual consumers of religion. The parishioners have so many better options now and better people working for them, just as it is in business. McDonald’s benefits because there is a Dairy Queen across the street. It’s ultimately the consumer and the consumer’s sovereignty in free markets that really rules the day and that tends to create benefits, so it’s a beautiful thing. And I should hasten to say that Baptist basketball has improved immensely because of Catholic competition. Thank you. [Laughter]

BYRON JOHNSON: We have one more question for Becky and one more question for Sister Dede, and then we’ll open up to the floor. Becky, you’ve studied entrepreneurship. Can you give us some insights about what you’ve learned in terms of entrepreneurship among the poor? You can quickly follow that up with what you’re finding about high net worth entrepreneurs as well.
REBECCA SAMUEL SHAH: I’ve had the privilege of interviewing micro entrepreneurs and high net worth entrepreneurs. It’s really been an honor because I’ve learned a lot about religious freedom and business from both of these groups. With poor entrepreneurs, I made my point earlier about credit. You know, credit alone is not enough. It really is not enough. Because what I’ve learned from poor entrepreneurs is that they are aspiring entrepreneurs. They need the credit, but they need to be plugged in to Christian networks. In India, these are very important religious networks. The poor need to be a part of networks. Such networks could help them control and regulate their spending and effectively utilize their micro credit loan. There’s been a lot of work recently decrying micro credit. It’s useless. It doesn’t work. Clearly, in economics terms, one needs a significant injection of funds to really scale a business up. For instance, if you’re selling omelets on a cart, how could you really support your family? You need a serious amount of money.

But why are some of the entrepreneurs that I’m seeing succeeding? Because they are using the funds that they have and investing it carefully. They have self-control. They are exercising their willpower. They have hope. Hope is very important. It’s not just belief that something is going to be okay. I call it religiously-motivated hope that the future is good. I’m going to invest in the future. I’m going to educate my daughter because, guess what, she’s going to get a job. That’s what I’ve learned from poor entrepreneurs.

What I’ve learned from high net worth entrepreneurs is wonderful. I wish I could tell you my Quaker story. I had it all ready. I have studied the Quakers. I’ve learned that the Quakers were a religious minority, and many people wanted to persecute them. But the British didn’t persecute them. They let them be. They were a pesky group, you know. They wouldn’t swear oaths. They didn’t fight. All they had was business.

So they set up many businesses. They were strong, strong Christians. Because of their commitment to the truth and to honesty, they set a price. They fixed a price. For example, think of walking into a shop and seeing a bar of chocolate—like Cadbury or Rowntrees. My husband told me, don’t mention English things, nobody will understand. But almost all Americans know about Cadburys and Rowntree chocolates. When a person walked into a Quaker shop and saw a bar of chocolate, he or she didn’t have to haggle. The Quakers got rid of the need for oriental bargaining. Now, I’m from the Orient. I know bargaining. [Laughter] So they were innovative. See, their faith enabled them to be innovative. They set a price, and they were innovative. And they succeeded, wildly succeeded. They were very successful—British rail, the whole works, you name it!

But you may say, “Ah, that’s centuries ago.” But I’ve seen from the hundreds of entrepreneurs that I’ve interviewed recently in this country and in emerging economies, that they are using their faith-inspired principles to put their faith and their principles before profit, and people before profit. [Applause] Thank you.

I’ve interviewed these business owners, and one of my entrepreneurs has given me permission to mention his name. He’s a wonderful civil engineer whose name is Nehemiah. He runs a very large corporation in Malaysia building walls, Nehemiah’s Walls. He decided, because of his faith, that he was not going to bribe. He was not going to bribe at all. Imagine not bribing in the construction industry in Malaysia or in India—unimaginable, right? But he decided not to bribe. It hurt him in the short run, but he absolutely stood by it. He’s transforming this industry. He used the time when he was not getting any customers because he wasn’t bribing to develop an excellent product. We can call it the moral imperative of good design. Fancy, but he put his energy into building a fabulous product. He’s now a leader in the field of civil engineering in Malaysia.

But religious freedom enabled these entrepreneurs—and I’ve met numerous ones. I haven’t interviewed the Greens, and I’d like to once they’re done with their business up the road. But I’ve met many of them in this country, in this wonderful country where religious freedom has allowed them to be innovative. I just can’t imagine if they didn’t have that freedom. And it’s fast eroding for people like my friend Nehemiah in Malaysia. I can’t imagine what he would do, what the country would do without someone like

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Rebecca Shah
him. Religious freedom has done much for the industry, for business. So that’s what I’ve learned from entrepreneurs. I’ve learned a lot.

**BYRON JOHNSON:** I don’t think you will be disappointed when you get the chance to interview the Greens.

**REBECCA SAMUEL SHAH:** I won’t be. I’m looking forward to it.

**BYRON JOHNSON:** Our last question before we open the floor. I was reading articles about Sister Dede because she’s famous. There are so many quotes, but there is one of them where she describes herself not only as a pro-life doctor but a pro-eternal life doctor in the work that she does for the poor. Tell us about that.

**DEIRDRE BYRNE:** Believe it or not, the Hippocratic oath, which physicians swear, said in 300 BCE that we would not procure an abortion. It was a very lengthy quote that said doctors would not procure an abortion. Sadly, when I was graduating from medical school at Georgetown, we actually voted on whether we wanted to keep or delete that quote. Sadly, a little over 50 percent said take it out. I was crushed. I privately said that I would not ever do an abortion. I realized in those earlier years that there was going to be a big problem.

So I say that I’m a pro-life physician, and I say that sadly because you have to really find that out with a lot of medical students and doctors. So I want to educate that life begins at the moment of conception, not at the point of implantation, which now the American College of OB is trying to say. It’s a human life. As a Christian Catholic, life means not only the beginning of the beauty in which we are all made—the image and likeness of God—but it means we now carry the image of Christ with a soul. We are made in a remarkable way. So to take that life away is murder at the earliest form. So I wanted to be a defender of those most vulnerable, whether it’s the poor or the unborn. I want to really share that with any medical person or anyone who’s in the battlefront of the pro-life movement. So I’m pro-life.

I am pro-eternal life in the sense that life is actually very easy. That I want to do the best I can to save my soul and to bring as many people as I can with me. So in the clinic where I work I’m a general surgeon, and I take care of all the surgical problems. But I also do a lot of teaching of chastity. We have a lot of people who are not living in chastity. Many of our patients are Christians. If they’re Catholic they’re in big trouble because I tell them, “Yes, you get bargain basement surgery from us at the Spanish Catholic Center. So you get to hear my lecture. But I’m going to take care of your hernia first. When you come back I’m going to tell you why living with your girlfriend is wrong in the eyes of God.” And so I do a lot of that teaching. Because life is more than just what we have here. There’s an eternity, this life that is with God. I pray we’ll be there together, celebrating together. So I’m pro-life and pro-eternal life.

But I can’t give what I don’t have. It’s like being in an airplane. When the oxygen drops, they tell you first to put the oxygen on yourself, then you can take care of others. So I cannot give and teach faith without my own life. So I’m blessed as a religious sister to be with a wonderful community that’s very traditional. We live a community life. We pray together at morning mass. We pray four times a day so that I can keep my batteries recharged. We have Eucharist adoration. And I’m able to try to share the faith, not proselytizing but really just throwing a little cold water on them to say that they’re going off on the direction that’s not life-giving for Christ.

I get a lot of people that will go on to confess. That’s part of my prescription if they’re Catholic. If you’re not Catholic you’re in better shape with me because I don’t try to push my Catholic faith on anyone. But I do think that many Christian faiths do believe that living together is not right, and abortion is wrong. The contraceptive thing, I don’t push that on our non-Catholics. I explained to them though how the birth control pill works, how the intrauterine device works. That it takes away the life of a baby. We don’t really know how the birth control pill works. So I educate them, and they can come to their own conclusion that this hormone in their body is not a good thing for them. It increases the risk of breast cancer and uterine cancer. It separates their marriages. It puts a big wedge in the relationship between husband and wife. So I go through all that, which is why I’m usually backed up in my clinic. [Laughter] So I’m pro-life and I’m pro-eternal life, and I can’t wait until we are all together celebrating.

**BYRON JOHNSON:** We are going to open up for questions. I see some hands going up in the back. Please identify yourself so we can get that on tape.

**JOHN CARR:** My name is John Carr, and I’m the director of the initiative here in Georgetown on Catholic Social Thought and Public Life. I very much share the premise of the panel that religious freedom is good for the poor and good for business. I share the experience that faith-based groups treat people with greater dignity, and often use money more effectively. But I am profoundly uncomfortable with the moral equivalence between
religious freedom and economic freedom, and between the rights of religious groups and the rights of businesses. One is protected by the Constitution. For the other, in fact, regulation is mandated by the Constitution. We can have a debate about what’s right and what’s wrong at another time.

But you quoted, Tony, Cardinal George on the Catholic bishops in a pursuit of healthcare. This is a religious community that provides healthcare for millions, pays for healthcare for millions, picks up the pieces of a system that doesn’t provide healthcare for millions, and has every right to add its voice to the debate of how to cover 50 million people without healthcare. To pretend that our voluntary efforts can actually provide that is not based in either reality or, frankly, anything else. The easy equivalence between religious rights and commercial rights, I think, is a very bad idea for religious rights.

In my own experience, a lot of people talk about how business helps protect religious freedom. But I find American business quite comfortable doing their work in Saudi Arabia and China where religious freedom is thoroughly and completely outlawed, where a bishop just died after 20 years under house arrest. So I think there is a lot to be said for the ways in which religious freedom creates an environment, and which many institutions, including economic ones, can thrive. But I think it would be a terrible mistake to reduce religious freedom to one more page in the libertarian handbook.

The idea that the market is the answer to all of our problems, whether it’s religious, economic or political, is not one the Church has embraced. And it is certainly not one that Pope Francis is offering at this time. He thinks our faith—which ought to be protected because it comes from God, and is protected because it’s part of the Constitution—allows us to advocate for a different kind of economic life that leaves fewer people behind.

ANTHONY GILL: A couple of points on that. Don’t be disappointed when you start advocating for a bigger state and it comes down to say “you have to do this,” because that’s what you want. You get the government that you advocate for. In terms of individuals not being able to provide or these private institutions, including commercial enterprises, not being able to provide for individuals, I have a much more optimistic view of human nature. I see the work of Sister Dede, and Becky and Brian have talked to a lot of individuals. It’s amazing what people can do when they’re given freedom. I’m very concerned that we want to aggregate or concentrate power and tell people how to do something, because it’s a small group of people deciding the decisions for a wide array of people, even when they don’t know how those people actually live or what they want. That disturbs me. As far as the Catholic thought that’s in there, all I say is subsidiarity, baby!

BRIAN GRIM: Let me say something about China. China and Saudi Arabia are both excellent points, places I’ve spent a lot of time and continue to spend time. One thing in common between the two is that they’re living off of resources from the ground. Saudi Arabia’s economic success has been from oil and China’s is from cheap labor. That’s been the drivers of their economies.
I take your points very well, but I have a question for China: Is China the place that companies want to put their R&D departments? Is that the place where people can imagine the future of development that’s going to carry us into the next century? Most business people say, “No. That’s the place where we can make gadgets pretty cheaply.” These other sort of locks on the minds of people and communications and speech and thought actually are costs that are going to inhibit the future of business.

So I think that’s a discussion that’s worth having. That’s the kind of work that I think needs to be done, and I think this project is doing it, just to bring these things up and let people talk about them. For instance, the next World Expo is in Milan in 2015. We’ll be having a business, faith, and freedom global forum with business leaders.

And I really like this panel—it’s such an interesting panel. But I feel a bit like the oddball here. In contrast, the idea in Milan is to have religious leaders, business leaders, academics, politicians—I’ll just pseudo-represent them all for the time being—sit together and talk about these things. Because that’s part of what religious freedom is, just being able to talk about this and find our way forward.

Byron, Tom, and Tim, congratulations for putting this very interesting panel together. I’ve enjoyed being part of it. Your questions really are the kinds that need to be embraced and discussed.

**BYRON JOHNSON:** Next question. The gentleman right here with the blue shirt.

**MARTIN WAUGH:** My name is Martin Waugh, and I’m with Amen Clinic. I have to give a disclaimer. I go to the Catholic Church now where Sister Dede’s brother is the priest. But I grew up Methodist in a little town in western Kansas. I went to Oral Roberts because the founder himself was Methodist; I didn’t know he was Pentecostal. That’s where I met my wife 31 years ago, so that was a good pick. [Laughter]

But I’d like to ask Professor Grim a question. There’s no defense against love. I hope you can add on your questionnaire how many people feel loved by the Catholic Church. I’ll tell you why. I went to Billy Graham’s house not too long ago and I said, “Boy, you and John Paul changed the world.” He said with a gleam in his eyes, “I love John Paul. Did you know he invited me to Poland to do a crusade?” I said, “No. Do tell it.” And he talked all about it. And you know, I submit that maybe he was converted like I was. It was like John Paul coming to the Lutherans and saying, “It is in death and resurrection whereby we are saved.” And I saw him do it in 1999. I just asked, “What’s going on?” And then further, I heard Benedict say, “We do believe Christ is in your places and tables.” So I see a conversion going on that’s not recorded well. But I see it and have it myself. We’ve taught Sunday school for the last eight years, and I think there ought to be a better way to ask a question. Do you feel loved by the people of faith around you? Something like that. What do you think about that?

**BRIAN GRIM:** That’s a great question. Part of my own spiritual pilgrimage, which I won’t go into, echoes that. A lot of what has motivated me—this may sound strange—as a social scientist is this idea that love is the answer. It sounds trite but that’s really the key ingredient to many things. So I’ve tried in my work on all these topics to keep that in mind, that that’s the element, that’s the glue. So I think that your question is really thought-provoking. Becky, you have some surveys coming up. Maybe we can talk about that.

**REBECCA SAMUEL SHAH:** We do actually ask about love. We do ask people from different faith traditions in my study—Muslim, Hindu, Christian—do you feel that God loves you personally and has a plan for your life? Obviously, I was told that I shouldn’t ask too many things in my questionnaire, but we did three waves of surveys with that question. But we always got the same answer from the converts: “Absolutely,” or *kandipa*, in Tamil. You know, it’s a sort of an exclamation. “Absolutely!” Or “yeah, maybe” in some of the others. So yes, we do ask this question. The belief that there is someone, the transcendent, who loves you for who you are is a radical thing.

**BRIAN GRIM:** Becky asked me the other day if I have any questions for your survey. This gets at it, but it’s in the social science way. The best measures of religious freedom among a population are when you ask these two questions in tandem. First, is it important for you to live in a country where you can practice your religion freely? And then, followed up with a second question, is it important for you to live in a country where others can practice their religion freely?

That difference between those two questions when asked back-to-back is very revealing. I’ve called that the intolerance gap, but it could actually be a love gap. So I think there are some ways to get at this idea of love. When you love somebody enough to say, “I care about you and what you want to do,” that is an act of love.

**BYRON JOHNSON:** Please join me in thanking our great panel. [Applause]
Immediately after the Supreme Court handed down its decision in *Burwell v. Hobby Lobby*, the Religious Freedom Project’s blog, *Cornerstone*, hosted a forum titled, “Hobby Lobby: The Ruling and Its Implications for Religious Freedom.” Many legal scholars from across the political spectrum provided entries for our blog. All of their blog contributions can be found at http://berkleycenter.georgetown.edu/cornerstone.

Below is a sampling of the responses.

**RFRA Worked in Hobby Lobby; What’s Next?**

Thomas C. Berg, *James L. Oberstar Professor of Law and Public Policy, University of St. Thomas*

In ruling that Hobby Lobby Stores do not have to cover contraception in employees’ health insurance, the Supreme Court resolved some big questions—correctly—and ultimately reached a narrow result that exemplifies how the Religious Freedom Restoration Act is supposed to work in balancing religious freedom against governmental interests. Justice Alito’s majority opinion rules that for-profit “closely-held” corporations can raise religious freedom claims, and it makes a number of other points in support of broad religious freedom. Justice Kennedy, the crucial fifth vote, joined the majority opinion but also wrote a concurring opinion emphasizing the decision’s limits. (See my previous *Cornerstone* post “Kennedy, the Perennial Swing Vote, and the Likelihood of a Narrow Ruling,” in which I correctly predicted what the Court and Kennedy were likely to do.)

The key point, for Kennedy in particular, was that the government already had a mechanism for accommodating objections to contraception by nonprofit religious organizations. The organization tells its insurer—or a third-party administrator (TPA) if the organization self-insures—that it objects to covering contraception, and the insurer or TPA provides that coverage directly to employees in a separate contract, with no financial or administrative involvement by the employer. The insurer can do this because contraception coverage, by the government’s own calculations, saves net costs by avoiding costs from pregnancy. Given this, the Court sensibly held that the government could extend the accommodation to for-profit objectors. Presumably, it’s cost-neutral for their insurers, too.

The case shows RFRA working as Congress intended. The statute says that it is meant to “strike[s] sensible balances between reli-
gious liberty and competing governmental interests.” There may well be a strong interest in ensuring contraception coverage, but the fundamental question was who would pay for it. If insurers are willing and able, why coerce the employer who has religious scruples? The Court pointed to the solution that could protect both sides.

Hobby Lobby’s aftermath involves three big questions. First, will the decision start a cascade of exemptions from coverage mandates and other commercial regulation? I seriously doubt it. For-profit businesses should be able to make RFRA claims, but most judges recognize that the commercial context involves distinctive government interests: ensuring that everyone can participate in economic life and preventing businesses from seeking unfair commercial advantages. In Hobby Lobby, the cost-neutral nature of contraception not only meant that insurers could pay, but also that businesses had little financial incentive to make false religious claims. The Court also made clear that a business’s religiously based claim to discriminate against employees or customers presents a different situation—although the only laws it specifically endorsed were race discrimination laws. A small photography or florist business might still win a religious freedom right not to provide services at a same-sex wedding when many alternative providers are at hand. But I doubt that commercial discrimination claims will get further than that.

Second, the “insurer pays” accommodation itself is being challenged by some nonprofits who claim that still it makes them impermissibly complicit in providing contraception or abortifacients. They object that the opt-out process requires them to “designate” their insurer as the provider of contraception, and more broadly, that it still means their insurance contract triggers contraception coverage (albeit by someone else). Passages in Hobby Lobby provide some ammunition for these arguments: the majority held that if a claimant honestly believes a certain degree of involvement is impermissible, courts should not reject that connection as too attenuated. On the other hand, if the nonprofits’ claim is that no form of the insurer-paid accommodation can ever be permissible, I have doubts that will prevail. Justice Kennedy, the crucial fifth vote, seemed particularly focused on this accommodation, in some form, as the solution. The government should come to the table by adopting a more basic opt-out process that does not involve the employer “designating” or communicating with the insurer.

Finally, what will happen to RFRA and parallel religious freedom laws in 15 states? Already one hears calls for amending the federal statute—although a White House source has disclaimed any interest in doing so, and the gridlocked Congress seems unlikely to act. Opponents may try to amend other federal laws to exclude RFRA from applying to them and to amend or even repeal RFRAs in blue states. Those attempts should be resisted. In an increasingly divided society, RFRAs provides a means for protecting dissenters from serious burdens while still allowing government to accomplish its important goals. The Hobby Lobby decision is controversial, but no less so than the decision to mandate contraceptive coverage in the first place. RFRA actually guided the Court toward a decision that can protect the interests of both sides. Let’s remember that in the coming months.

Hobby Lobby Spells Doom for Mandate 2.0

Kyle Duncan, lead counsel representing Hobby Lobby Stores in Burwell v. Hobby Lobby

This week’s Hobby Lobby decision has unleashed a torrent of reaction, ranging from dancing in the street to gnashing of teeth. I represented Hobby Lobby, so put me in the dancing camp. Instead of adding to that commentary, however, it’s worth considering what the decision portends for challenges now percolating through lower courts by religious nonprofits. Hobby Lobby gives those organizations solid grounds for hoping their suits will succeed too.
The nonprofits—which include the Little Sisters of the Poor, the Eternal Word Television Network, and schools like Wheaton College and the Catholic University of America—are operating under a version of the HHS mandate slightly different from the one invalidated in *Hobby Lobby*. Call it Mandate 2.0. Under this “accommodation,” religious organizations need not cover contraceptives *directly* in their health plans. Instead, they must execute a form that authorizes their insurer or administrator to deliver that same coverage to their employees.

The problem for the non-profits is that the contraceptive coverage goes into effect *only if* they execute the form. Their signature is the triggering event—the starter’s pistol, the ringing-the-opening-bell-on-Wall-Street—that initiates the revamped contraceptive delivery system. Once they grasped how Mandate 2.0 works, most objectors said to themselves, “This is just as bad as Mandate 1.0. It’s just an extra layer of paperwork.”

Some will say, “Signing a form is no big deal.” Really? How about signing a mortgage? A living will? What if the President signs an executive order? What if a governor signs a death warrant? The physical action of signing these pieces of paper is trivial. The consequences can be life-altering. So, one need not consult Thomas Aquinas to grasp a religious organization’s objection to signing *this* particular form. By doing so, they would authorize an agent to deliver on *their behalf* the same services they object to in the first place.

*Hobby Lobby* did not consider Mandate 2.0. So how might it help the nonprofits? The answer is that the Court explained when the government “substantially burdens” religious exercise. The government had argued that Mandate 1.0 was not a substantial burden because the business owners’ connection to contraception was “attenuated”: *they* didn’t have to take the drugs but rather only had to cover them. The Court rejected that theory. Whether the business owners were complicit, the Court explained, “implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.” The Court rejected the government’s “attenuation” argument as an attempt to “[a]rrogate[e] the authority to provide a binding national answer to this religious and philosophical question.”

That analysis dooms Mandate 2.0. After all, the government created the “accommodation” to buttress its “attenuation” argument. And so, in the non-profit litigation, it has claimed that Mandate 2.0 makes a religious objector even *further* “attenuated” from contraception. Before *Hobby Lobby*, that argument was specious; now it is extinct. The government cannot rewrite the theology of religious objectors by adding a layer of bureaucracy to its contraceptive delivery system.

Some, however, think *Hobby Lobby* implicitly approved the accommodation by pointing to it as an alternative means for delivering contraceptives. That is implausible. The Court clearly said it was *not* deciding the validity of the accommodation, provoking criticism from the dissent. And the Court specifically endorsed the injunction it had previously granted the Little Sisters that allowed them to avoid executing the government’s form. (For more on this, see here Ed Whelan’s “More on the Accommodation Alternative” in the *National Review*.)

The idea that *Hobby Lobby* spells doom for Mandate 2.0 was given a powerful boost not three hours after the decision. Relying on *Hobby Lobby*, the Eleventh Circuit granted EWTN an injunction pending its appeal from a lower court decision that had accepted the government’s “attenuation” argument. That is significant in itself, since EWTN had to show likelihood of success to get the injunction. But one of the panel members, Judge William Pryor, delivered a 26-page concurrence explaining why *Hobby Lobby* eviscerates the government’s case against EWTN. Of the “attenuation” argument, Judge Pryor said it “calls to mind the proverbial Mizaru, Kikazaru, and Iwazaru who cover their eyes, ears, and mouth to see, hear, and speak no evil. That is, the United States
turns a blind eye to the undisputed evidence that delivering Form 700 would violate [EWTN's] religious beliefs.” Judge Pryor’s sparkling opinion has been analyzed in detail in “After Hobby Lobby Comes Judge Pryor” by Quin Hillyer, featured in National Review Online, and the Public Discourse article “After Hobby Lobby, the Struggle for Religious Freedom Continues” by Matthew J. Franck, but suffice it to say that it may be the beginning of the end for Mandate 2.0.

Hobby Lobby in the Long Run

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Prior to the Supreme Court’s decision in the contraceptive mandate cases, both of us published blog posts that emphasized the potential harm to women’s interests that a religious exemption for Hobby Lobby would cause. (See the previous Cornerstone posts “The Constitutional Costs of Religious Freedom in the Marketplace” and “The Flaws of Individualized Religious Exemptions,” in addition to “Symposium: Religious Questions and Saving Constructions.”) What we perceived as the central legal question has mapped onto the salient political question—whether religious objections to contraception should be allowed to trump women’s interests in access to contraception.

This way of understanding the case deeply informs the Supreme Court’s opinion in Burwell v. Hobby Lobby. In ruling that the government failed to prove that it used the “least restrictive means” to accomplish its purposes of advancing women’s health, the Court relied heavily on two alternative means by which the government may achieve the same goal:

1. Provide contraceptive services at the government’s own expense to women whose employers object to coverage, or

2. Extend the current accommodations of religious nonprofit organizations (schools, charities, hospitals, etc.) to for-profit firms like Hobby Lobby.

Indeed, Justice Kennedy’s concurring opinion took pains to emphasize that the government’s interest in the reproductive health of female employees is indeed compelling. His opinion also suggests that direct public payment for a separate program is unnecessary when the government already has in place an accommodation that “equally furthers the Government’s interest [in women’s health] but does not impinge on the [Hobby Lobby’s] religious beliefs.” In Justice Kennedy’s view of the case, both sides ultimately can satisfy their interests.

But “ultimately” may be a long time, and the path to satisfying all interests will be complex and full of legal uncertainty. If the federal government intends to subsidize contraceptive services for the employees of Hobby Lobby and similar firms, it will require congressional authority to make such expenditures. There is no reason to believe the House of Representatives would even consider it, much less approve it.

The more readily available alternative for the government is to include for-profit firms in the existing accommodation for objecting religious nonprofits. The existing accommodation—under which insurance carriers pay for contraception outside the insurance policy, rather than through it—cannot be extended overnight. Any such policy change will have to go through the regulatory process, with an opportunity for comments from affected parties (including insurance companies, some of which will balk at this new requirement). This process is likely to take a few years, not a few months; in the meantime, employees of religiously objecting companies will have no insurance coverage for the contraceptives at issue.

Moreover, the existing accommodation faces significant legal challenges of its own. A number of religious nonprofits have filed lawsuits, arguing that the accommodation fails to address their religious objections. If the existing accommodation is extended to Hobby Lobby and other objecting for-profit companies, they
may also decide that the accommodation fails protect their interests and sue under RFRA. No one knows if the government will ultimately prevail in the lawsuits filed by religious nonprofits, and it will take at least a year for the Supreme Court to decide whether the existing accommodation is legally sufficient. Even if the Court decides that the accommodation is insufficient for religious nonprofits, it could decide that the accommodation is adequate for commercial entities.

Fortunately, the fulcrum on which this case turns—the ability of government to satisfy both religious interests and the competing concerns of employees and their dependents—suggests that Burwell v. Hobby Lobby is not nearly so sweeping or radical as it may seem. Although it is true that for-profit firms can now bring RFRA claims, most claims by for-profit employers to escape their legal obligations will not fare so well. For example, the government has very strong interests in combating employment discrimination, and the government has no obvious alternative means to accommodate the interests of employees in not being the victims of discrimination. We suspect that the next round of RFRA cases (once the contraceptive cases are fully resolved) will involve religious objections by employers to paying spousal benefits for the same-sex spouses of LGBT employees. There is every reason to believe that a majority of the Supreme Court (though not today’s majority) would find a compelling government interest in ensuring that no discrimination occurs against partners in same-sex marriages, and that the government has no ready alternative to make up for the losses that such discrimination would cause.

Burwell v. Hobby Lobby is a dramatic chapter in the story of religious freedom and the ACA. And it will, for some time, impede the full realization of the women’s interests at stake. But the government will likely respond to fill that gap, and in the longer run, we suspect that Burwell v. Hobby Lobby will generate few, if any, additional victories for commercial employers seeking to impose the costs of their religious convictions on their employees.

Can We All Just Get Along? Yes.

Jennifer Marshall, Vice President for the Institute for Family, Community, and Opportunity, Heritage Foundation

The pitch of public controversy surrounding cultural issues—especially those related to women and reproduction—can give the impression that we live in an intractably divided society with incompatible differences.

But the Hobby Lobby decision suggests that such a tone is overwrought. The Supreme Court’s opinion in Burwell v. Hobby Lobby and Conestoga Wood Specialties v. Burwell correctly discerned in the Religious Freedom Restoration Act (RFRA) a way to navigate public life together despite our deep differences.

RFRA provides the kind of mechanism we need to balance contrasting beliefs and competing values in our pluralistic society. That explains why it passed Congress nearly unanimously and was signed by President Clinton in 1993 with the support of a broad coalition that included organizations from the Southern Baptists to the ACLU.

When conflicts emerge between government interests and religious freedom, RFRA enables those competing interests to be weighed in court according to clear criteria. The claim must be a substantial burden on religious freedom, and the government must show it has a compelling interest, pursued through the least-restrictive means. The Court concluded that, “under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.”

“If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price,” the majority opinion reasoned con-
Concerning the crippling fines—an estimated $1.3 million per day for one company—imposed by HHS for non-compliance. “If these consequences do not amount to a substantial burden, it is hard to see what would.”

The *Hobby Lobby* decision allows the Obama administration to pursue its policy objective of providing no-cost contraception through other means. Meanwhile, the evangelical Green family of *Hobby Lobby* and the Mennonite Hahn family of Conestoga Wood Specialties may continue to run their family businesses consistent with their faith.

One need not share the religious convictions of the Greens and Hahns concerning the sanctity of unborn human life to conclude that they should not be coerced to violate their beliefs by including potentially life-ending drugs and devices in their health plan. Nor does one need to have the moral scruples of a Catholic nun to agree that the Little Sisters of the Poor, which ministers to the elderly and is involved in one of the nonprofit challenges to the mandate, should not have to facilitate health insurance for contraception.

RFRA does not allow religious claims to automatically trump any government interest. The government could assert a compelling government interest—such as the maintenance of public health and safety—pursued through the least restrictive means, and prevail. As the *Hobby Lobby* opinion itself stipulates, “this decision concerns only the contraceptive mandate and should not be understood to hold that all insurance-coverage mandates, e.g., for vaccinations or blood transfusions, must necessarily fall if they conflict with an employer’s religious beliefs.”

Overlooking such precision, and characteristic of the fraught discourse that attends these cultural debates, Justice Ginsburg’s dissent attributes “startling breadth” to the Court’s opinion. In her view, it establishes that commercial enterprises “can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.”

As the majority opinion notes, Ginsburg’s “dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself.” *The Washington Post* put a sharper point on it, calling for Congress to roll RFRA back, undoing the work that has served our nation well for two decades.

Even if we can’t agree, the American order has given us good tools for agreeing to disagree. RFRA is one such tool, and we should prize it.

**What Did RFRA Restore?**

Micah Schwartzman, *Edward F. Hourey Professor of Law, University of Virginia School of Law*

Although a lot of attention in *Hobby Lobby* was focused on whether corporations could claim rights of religious free exercise, the better argument for proponents of the contraception mandate was that corporations should not receive accommodations that impose significant burdens on third parties, including their employees. Until *Hobby Lobby*, and perhaps even after it, the Court has never granted an exemption to a for-profit corporation that shifted substantial costs onto identifiable non-beneficiaries.

In fact, prior to *Hobby Lobby*, there was clear Supreme Court precedent holding that under the legal standard established in *Sherbert* and *Yoder*—and later codified in the Religious Freedom Restoration Act of 1993 (RFRA)—for-profit enterprises are not entitled to impose their religious views on their employees by obtaining exemptions from comprehensive regulatory schemes. In *United States v. Lee*, the Court held that “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience...
and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."

The majority in Hobby Lobby disposed of this precedent in two ways. First, writing for the majority, Justice Alito said that Lee was a case involving income taxes. But perhaps because there is no obvious or persuasive factual distinction between the Social Security tax at issue in Lee and the healthcare regulations challenged in Hobby Lobby, the majority felt the need to offer an additional justification for disposing of its earlier decision.

So here is what the majority did: It claimed, for the first time, that RFRA marks "a complete separation from First Amendment case law." That is, even if following Lee meant that the Court had to reject Hobby Lobby's claim, that would not have mattered because Lee—like all other free exercise cases—was irrelevant for purposes of understanding the meaning of strict scrutiny under RFRA.

Although the issue of RFRA's relation to prior case law was not directly presented, briefed, or litigated in Hobby Lobby, the majority nevertheless reached out to adopt what might be called the "radical break" theory of RFRA—or the radical theory, for short. According to this theory, the application of strict scrutiny under RFRA is entirely unencumbered by any prior free exercise decisions under the First Amendment.

The radical theory is not a new one. Its most prominent advocate, Michael Stokes Paulsen, developed it in an article published shortly after RFRA's enactment. Paulsen claimed that RFRA was intended to restore the "high-water mark of free exercise accommodation, established by the cases of Sherbert v. Verner and Wisconsin v. Yoder," but not the decisions in any other free exercise cases, including those such as United States v. Lee, in which the Court had explicitly applied strict scrutiny. As Paulsen put it, "[s]o far as RFRA is concerned . . . the slate has been wiped clean (except, of course, for Sherbert and Yoder)."

To see how radical the Court's theory is, consider three more moderate interpretations of RFRA. The first holds that RFRA restores the Court's free exercise jurisprudence to the day before the Court decided Employment Division v. Smith, which held that neutral and generally applicable laws are not subject to heightened review when they impose substantial burdens on religion. RFRA's purpose was to overturn Smith and to restore the status quo ante. We might call this the turn-back-the-clock theory.

A second theory, which we can label partial incorporation, holds that RFRA restores only those pre-Smith cases in which the Court had applied the standard set forth in Sherbert and Yoder—the same standard that RFRA mandates in its operative provisions. On this view, in applying RFRA, courts can ignore free exercise cases in which the Court declined to apply heightened scrutiny. But they cannot dismiss as irrelevant constitutional decisions in which the Court applied the same standard that Congress codified in RFRA.

A third theory, which has been adopted by some federal appellate courts, holds that while RFRA does not incorporate free exercise case law, earlier decisions applying Sherbert and Yoder are persuasive authorities that should guide the application of strict scrutiny under RFRA. Even if the statute does not codify those earlier cases, courts should give them significant weight in their decision-making.

Here, then, are four interpretations of RFRA: the radical theory, turn-back-the-clock, partial incorporation, and persuasive authority. Which of these is the most plausible understanding of the law?

The statutory text and legislative history of RFRA provide support for the turn-back-the-clock, partial incorporation, and persuasive authority interpretations. There is, however, little to support the radical theory. In terms of RFRA's statutory text, Congress included a statement of findings that specify that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." Those "prior Federal
court rulings” are not limited to Sherbert and Yoder. They cover a broader range of cases, including United States v. Lee, which relied expressly on Sherbert and Yoder in applying strict scrutiny to challenged regulations.

The legislative history of RFRA is, if anything, even worse for the radical theory. Over multiple Congresses, drafters of the legislation never—not once—suggested that RFRA marked a “complete separation” with the Court’s free exercise jurisprudence prior to Employment Division v. Smith. On the contrary, the House and Senate Committee reports contain extensive statements supporting more moderate interpretations of the law.

The Hobby Lobby majority offers one additional argument for the radical theory, which is that Congress passed a federal law (the Religious Land Use and Institutionalized Persons Act) that amended RFRA by expanding the definition of the phrase “exercise of religion.” As I have previously noted on Slate, and as others have argued, this amendment was designed to clarify existing law, ironically enough to bring it into line with doctrine under the Free Exercise Clause.3 There is simply no evidence that later amendments to RFRA were designed to work a radical break from earlier case law applying strict scrutiny to claims for religious accommodations. (And, in any event, the fact that development of the radical theory predates amendments to RFRA suggests that those amendments are not the actual basis for the theory, but rather a post-hoc rationalization for it.)

In Hobby Lobby, a bare majority of the Court adopted the most aggressive and radical interpretation of RFRA with the least amount of textual and historical support. In doing so, the Court has dispensed with a long line of precedent, jettisoning principles that had been thought well established. Perhaps a future Court will revisit the question of how to understand the statute’s relation to free exercise doctrine under the First Amendment. Until then, however, the Religious Freedom Restoration Act stands in need of a restoration of its own.

Hobby Lobby: A Modest Comment on a (Prudently) Modest Decision

Steven D. Smith, Warren Distinguished Professor of Law, University of San Diego

Although Burwell v. Hobby Lobby (the contraception mandate case) has been one of the most passionately debated cases of the Supreme Court’s recent term, observers who were hoping for some major or “pathbreaking” pronouncement are likely to be disappointed. If they actually read the decision, that is; of course, this is not actually required of commentators or advocates.

The majority opinion announces no grand new doctrines or interpretations. It contains no visionary or oracular language. Rather, the opinion quotes the relevant statute—the Religious Freedom Restoration Act, or RFRA—and then carefully and methodically considers the various issues that the case raises under the statute. The Court emphasizes that its decision reaches only closely-held corporations, is “concerned solely with the contraception mandate,” and is not meant to resolve any number of other controversies that may arise under RFRA or the free exercise clause. The opinion concludes by remarking that “[t]he wisdom of Congress’s judgments on this matter is not our concern. Our responsibility is to enforce the RFRA as written...”

Given the decision’s modesty, it is odd that Justice Ginsburg’s dissent begins by describing it as “a decision of startling breadth.” By the end of her opinion, however, Ginsburg is enumerating a list of related controversies that the decision leaves unresolved and complaining that the majority opinion offers lower courts little
guidance. I will leave it to the justice’s admirers to explain the consistency in these criticisms.

The decision, to be sure, is not without implications for larger, more profound questions. Can business corporations “exercise religion,” and thus have any claim to free exercise rights? Critics often say no (as does Justice Ginsburg); in my experience, they sometimes attain high dudgeon in denouncing the gross ontological error of supposing that a bloodless, soulless legal abstraction can have the capacity to “believe” or to “worship.” The Court’s response to this objection is brief, calm, and commonsensical, avoiding any temptation to go metaphysical. Corporations are legal fictions, the Court acknowledges, but they are fictions “used by human beings to achieve desired ends.” Consequently, protecting the free exercise rights of closely-held corporations “protects the religious liberty of the humans who own and control those companies.”

At another point, the Court quietly observes that denying free exercise protection to corporations owned and managed by religiously-motivated families like the plaintiffs in these cases “would effectively exclude these people from full participation in the economic life of the Nation.” That observation, I am inclined to say, touches on the true underlying philosophical disagreement. Is our vision of the nation one in which people are invited to participate fully in the marketplace (economic, political, maybe even academic) as the people they are, complete with convictions, commitments and consciences? Or do we want to make it a condition of full public participation that people leave these central, constitutive commitments at home (at least if the commitments are “religious”)? The Court does not elaborate or expound on the point, though, but merely suggests that there is no evidence that Congress, in enacting RFRA, intended to require any such divestment as a condition of entering into the economic sphere.

“The fact remains, however, that religious freedom is a much embattled issue in our time. At least in some cultural neighborhoods, opinion has shifted dramatically since the early 1990s, when RFRA was enacted with overwhelming bipartisan support, and when self-styled progressives were among the enthusiastic supporters of free exercise exemptions. In other neighborhoods, the traditional commitment is still fiercely defended.”

Steven D. Smith

The modesty of the decision may disappoint different people for different reasons. Proponents of religious freedom might have wished for a more ringing endorsement. Critics of Hobby Lobby-type claims might have wanted an opinion that would provide more supporting material for indignant complaints about the decision’s devastating consequences for women, or for equality. (Of course, they can still quote Justice Ginsburg’s “decision of startling breadth” characterization.) Academics like myself might have appreciated a more adventurous or ambitious decision that would have provided subject matter for searching (at least in our own estimation) law review articles—or at least blog posts.

The fact remains, however, that religious freedom is a much embattled issue in our time. At least in some cultural neighborhoods, opinion has shifted dramatically since the early 1990s, when RFRA was enacted with overwhelming bipartisan support, and when self-styled progressives were among the enthusiastic supporters of free exercise exemptions. In other neighborhoods, the traditional commitment is still fiercely defended. Regardless of which part of that battlefield you find yourself on, questions about how religious freedom should apply to business corporations are complicated and difficult. (This might help explain why Justices Breyer and Kagan dissented separately to express their unwillingness to join in the “business corporations aren’t people” part of Justice Ginsburg’s opinion.) Especially in these tumultuous times, we should perhaps put aside our disappointment and appreciate a Supreme Court that does what a court was traditionally supposed to do—unpretentiously decide the case before it based on the specific facts and a careful review of the relevant rules and precedents.
Concluding Reflections

The foregoing publication is the product of a conversation that was initiated through the partnership of two tremendous faith-based universities, Georgetown and Baylor. The conversation began in March 2014 at an event held in Washington, DC, but it continues online through Cornerstone, a blog managed by the Religious Freedom Project at Georgetown University.

The discussion of religious freedom is immensely important. Religious freedom protects the inviolability of conscience. Americans have traditionally interpreted the liberty of conscience in a capacious way. We have generally agreed with William Penn, the Quaker leader and founder of Pennsylvania, who wrote in 1670, “By Liberty of Conscience, we understand not only a mere liberty of the mind, in believing or disbelieving this or that principle or doctrine, but the exercise of ourselves in a visible way of worship.” In other words, our liberty is not simply to believe as we will but to act in accordance with those beliefs.

The commitment to this understanding of religious liberty was emphatically demonstrated when Congress passed the Religious Freedom Restoration Act in 1993. When signing the bill into law, President Clinton spoke enthusiastically about the broad coalition that made the legislation possible, a coalition that produced a 97-to-3 vote in the Senate and adoption by voice vote in the House.

What was Congress seeking to accomplish with RFRA? As the text of the act reveals, Congress recognized that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise” and that “governments should not substantially burden religious exercise without compelling justification.”

Thus, Congress unequivocally reaffirmed our nation’s commitment to religious liberty. As the participants at the March 2014 conference so powerfully demonstrated, religious liberty benefits not only religious adherents of all types; it benefits society as a whole, including those individuals who are not religious at all. The advantages are hard to overstate. Religious liberty and pluralism help establish peace and stability in society. These are certainly goods in themselves, but they also promote economic development and prosperity. Religious liberty permits the flowering of diversity, not just of religious faiths, but of cultures and ways of life. As Ilan Alon observes on behalf of the Religious Freedom Project, a society encourages creativity and innovation by welcoming individuals with diverse backgrounds.4
The great principle of religious liberty was the subject of *Burwell v. Hobby Lobby*, the case discussed at length in this volume. In certain respects, the Court’s decision represents a highly important victory for religious freedom in the United States. Conestoga Wood Specialties CEO Anthony Hahn observes that “Americans don’t have to surrender their freedom when they open a family business.” A family’s religious liberty rights do not disappear upon the filing of articles of incorporation.

This is no small matter. According to a recent study by NYU’s Stern School of Business, approximately sixty million people work for family-owned or closely-held companies. Indeed, “closely held” corporations include as many as ninety percent of all business enterprises in the United States. It is a triumph that closely-held corporations can indeed enjoy and claim religious freedom. RFRA has survived.

Thus, the decision does represent a victory. Nonetheless, the decision and its aftermath also raise significant concerns for supporters of religious liberty. As others have pointed out, the Court issued a narrow opinion. The decision applied only to closely-held corporations, and it only concerned the contraceptive mandate, thus leaving a number of issues unresolved. Rather than making a sweeping constitutional pronouncement, the Court relied on statutory construction. There is nothing inherently wrong with this. It follows the well-known doctrine of constitutional avoidance, which states that courts should reach decisions on non-constitutional grounds when possible. The doctrine recognizes the finality of constitutional rulings and therefore pays proper respect to our nation’s democratic form of government.

However, in our increasingly secular culture, the facts justify concern for our fragile religious freedoms. The Court was deeply divided in *Hobby Lobby*. The ideologically polarized 5-4 decision demonstrates a shattering of what I call the “great consensus” that once protected religious freedom, a consensus seen so clearly through a near-unanimous Congressional adoption of RFRA, the statute at issue in the case.6 The divisions on the Court reflect divisions within society. Following the Court’s decision in *Hobby Lobby*, there were immediate public appeals to amend or even repeal RFRA. Shockingly, included in this chorus was Senator Chuck Schumer, the very individual who introduced the legislation in the House back in 1993.

The furious popular and political reaction to the *Hobby Lobby* decision reveals that the tide of public opinion has shifted and continues to do so. A modest, narrow Supreme Court ruling, faithful to the words of RFRA, was harshly condemned. Various scholars have predicted that corporations will now “find religion” in order to escape regulation that affects their profits.

These are serious allegations mounted by serious people. I respectfully but firmly disagree. The urgent task before friends of liberty is to educate and persuade others of the great value of preserving religious freedom. Standing in the finest American tradition of defending this grand principle, RFRA itself needs our defense.

To draw from Professor Tom Farr’s excellent book *World of Faith and Freedom*, ours is—beyond the slightest doubt—a world of faith. From time immemorial, humans have sensed and sought the power of the divine. In the second decade of the twentieth century, and with the collapse of the great consensus, we now need to stand up for freedom—freedom for all human beings—to live and carry out our work peacefully in this world of faith. That is the new, long-term challenge to our culture and politics that is already the legacy of the *Hobby Lobby* case.
1 On June 30, 2014, the Supreme Court ruled 5-4 in favor of Hobby Lobby.


