Whither the First Freedom? Debating the Current State and Possible Future of Religious Liberty in America

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About the Religious Freedom Project

The Religious Freedom Project (RFP) at Georgetown University’s Berkley Center for Religion, Peace, and World Affairs began in January 2011 with the generous support of the John Templeton Foundation. The RFP 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. Our team of interdisciplinary scholars examines different understandings of religious liberty as it relates to other fundamental freedoms; its importance for democracy; and its role in social and economic development, international diplomacy, and the struggle against violent religious extremism. Our target audiences are the academy, the media, policymakers, and the general public, both here and abroad. For more information about the RFP’s research, teaching, publications, conferences, and workshops, visit http://berkleycenter.georgetown.edu/rfp.

About the Berkley Center for Religion, Peace & World Affairs

The Berkley Center for Religion, Peace, and World Affairs at Georgetown University, 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 inter-religious 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.
On October 9-10, 2013, the Religious Freedom Project convened a major conference at Georgetown University that explored the significance of religious freedom for societal flourishing. In a fascinating and often amusing keynote debate, three brilliant public figures discussed the present and future of religious freedom in the United States.

Our distinguished speakers were Judge Ken Starr, the president and chancellor of Baylor University, a constitutional law professor, and former solicitor-general of the United States; E.J. Dionne, a Georgetown professor, fellow at the Brookings Institute, and columnist for the Washington Post; and Ross Douthat, an op-ed columnist for the New York Times and author of Bad Religion: How We Became a Nation of Heretics. The conversation was moderated by Jane Little, former BBC religion correspondent.

The group’s discussion explored hot-button issues like the contraceptive mandate of the Affordable Care Act, gay marriage, and the broader implications of such issues for individuals, businesses, politics, and American society as a whole.

Judge Starr and E.J. Dionne agreed that American society continues to place considerable store in freedom of conscience and of worship. Ross Douthat, however, worried about a decline in the freedom of individuals and of groups to exercise their religious beliefs in the public square.

By the same token, Starr and Douthat were troubled by the deterioration of civil discourse in American society and the exclusion of religious voices in the public square. Dionne made a case for appealing to public reason rather than religious arguments when discussing public issues.

Read on, and you’ll find that the conversation featured unexpected points of agreement and predictable moments of disagreement, all underscored by humor and filled with useful insights.
JANE LITTLE: Welcome, everyone, to our keynote conversation in which we are going to take on the modest task of covering the past, present, and future state of religious freedom in America. In 90 minutes.

We’ll be asking whether religious liberty really is under threat. What, for example, do ongoing battles over the contraception mandate in the healthcare law say, if anything, about the state of religious freedom? And if it is in the sort of decline that some are suggesting, what can—and should—be done about it?

I am Jane Little, and I used to be the religion correspondent for BBC, working out of the BBC Washington bureau. I write on religion quite often.

Joining me, are three people who are very well known and have made public and distinguished contributions to the debate already. They need little introduction. Judge Ken Starr is the president of Baylor University, a constitutional law professor, former solicitor-general of the United States, author and expert on the religious clauses in the First Amendment.

We also have E.J. Dionne, familiar on campus as a professor in the Foundations of Democracy and Culture. He’s a fellow at the Brookings Institute, author, columnist for the Washington Post, and writes and speaks frequently on religion in US politics.

And next to me, we have Ross Douthat, who is a columnist for the New York Times and author of the recent book Bad Religion: How We Became a Nation of Heretics. Ross has written a lot about recent controversies on the contraception mandate, gay marriage, Chick-Fil-A, and how they infringe on religious liberty.

I’m going to invite each of them to spend just a few minutes sharing their thoughts, and then we’ll discuss, and after that we’ll invite questions from the floor. So, Judge Starr.

KEN STARR: It is a great privilege to be here. My thanks to Georgetown, the Berkley Center, and the center’s Religious Freedom Project for this opportunity.

I would like to get the ball in play by saying first, I am a cheerful optimist. There are always tensions, there are always threats to liberty. We are to be vigilant. Liberty is not always a given. We have to earn it, or at least protect it. But the reason is—at least in the United States, especially when we consider what has been said during the course of this conference—that there is a societal consensus in the United States on freedom of conscience and belief, as well as freedom of worship.

When we go back to the soaring language of Justice Robert Jackson in West Virginia Board of Education vs. Barnette—the two Barnette sisters kicked out of school because they would not, as young but nonetheless devout Jeho-
vah’s Witnesses, participate in the flag salute ceremony—I think of our constitutional culture. Justice Jackson said, “If there is any fixed star in our constitutional constellation, it is that no official, no matter how high or petty,” can “prescribe” and “coerce” “that which is orthodox.” And he added, “not just in religion but in politics and so forth.”

Now, even though there were three dissenting votes, including the truly remarkable dissent by Justice Frankfurter—a dissent in sorrow, a very eloquent lamentation—I think that settled it in terms of the constitutional culture, which I think has seeped into the broader culture. This is the Supreme Court as teacher.

The second thing where I think there is perhaps a grudging consensus is equality, the non-discrimination principle as applied to the religious voice. “Thou shalt not exclude the religious voice from the public square.” There are those who think the public square will be a lot better off without the religious voice, and to let the policy debate go on without it, but this is bedrock in our constitutional jurisprudence. And here, there is unanimity. The Supreme Court is unanimous on this, and it’s gotten a little bit out of sorts with those who didn’t get the message and read the memo. Don’t discriminate against religious voices.

Now, note “equality.” I could talk about neutrality, but let me cease and desist by saying the equality principle demonstrated by, among other cases, the Bridget Mergens case, is
essential to religious liberty. When the courts rule in a way that is seen by the Congress of the United States as cutting across political lines, Congress steps in and smashes, to the extent it can, that decision as illiberal. The Equal Access Act smashed down those exclusionary decisions in the lower courts that said, “If you want to start a Bible club in the local public school, forget it because of the Establishment Clause.” And the Supreme Court, building from free speech jurisprudence, said the equality principle applies here as well.

E.J. DIONNE: I want to honor my friend, Tim Shah, the associate director of the Berkley Center’s Religious Freedom Project. Tim Shah and I are great friends. Tim wrote most of his Ph.D. thesis outside my office at Brookings, so I hope some of his brilliance rubbed off on me.

Now, I feel like I’m sitting between Edmund Burke and Thomas Aquinas. I guess it would kind of make me Tom Payne or Gene Debs except that’s unfair to Payne or Debs. But I’m really looking forward to this conversation.

I’d like to begin by suggesting the following: that any country that has a court case about whether you can say prayers before a football game is a country that really honors and cares about religious liberty. Now, some might say that also shows how much we revere football. But I think that there are times in this discussion where we totally forget who we are. And when I hear overheated language about threats to religious liberty in the United States, I ask, compared to whom? Compared to what other country on earth? There aren’t many countries that actually have a First Amendment that invites a series of arguments about what the definition of religious liberty is, but which clearly enshrines it as a central principle in our republic. And so, I worry a lot at this moment that an issue on which there is quite a lot of consensus among Americans gets defined instead by those areas where we don’t agree. Many of our arguments are rooted in legitimate disagreements over how each part of the religious clause of the First Amendment fits together.

“I think both sides would do well, whatever your views on traditional marriage, to please at least respect the motivation and intentions of the other side as being in good faith. And it’s one of the dangers, I think, too, of religion, because those who favor a particular social policy are essentially putting a pox on the entire house of religion.”

—Ken Starr
One of the questions I used to ask students in my religion and politics class was, basically, “Does the Establishment Clause reinforce or conflict with the Free Exercise Clause?” And I think you can have a very interesting argument about whether they reinforce each other or whether they are sometimes in conflict. I think a lot of court cases are based on a concern that they sometimes conflict, and we have to make choices.

When you go back to the Clinton presidency, one of my favorite documents ever to come out of that presidency was a document on religious liberty in the schools. The administration called in all kinds of people ranging from the ACLU to a lot of groups among religious conservatives to say, “Look, where can we agree here?” A lot of school principals and teachers were so worried about the First Amendment that they were enforcing restrictions on religion, on religious practice, on religious displays by students that are nowhere demanded by the courts, nowhere demanded by the First Amendment. The document thus reflected a broad consensus on the religious liberty rights that students did have in school—you could bring a Bible and you could wear religious garb or a cross or a Star of David. And I think that we might begin not by starting with a religious war but by starting with a search for the consensus that I think is quite broad.

Two other quick points. I know we’re going to talk about the contraception mandate at some point. Just so you know, when the administration came out with its initial rules on this, I was very critical of the administration because I thought the exemption was too narrow. So, for about two weeks of my life, I was a hero to the right wing. That only lasted about two weeks because— [LAUGHTER]

ROSS DOUTHAT: I sent him fan mail every day. Every day, a new envelope, different color. [LAUGHTER]

E.J. DIONNE: But when the president then began to offer an accommodation, I got very upset with my temporary conservative allies because I thought this is a genuinely difficult question of rights in conflict. I did believe that our religious institutions were entitled to a more robust exemption, but I also thought that we needed to take seriously the religious rights of employees of large religious institutions who expected to have contraception coverage in their health plans.

I also got very disturbed by the way in which contraception got aligned with abortion. Now I’m Catholic and I understand how the Catholic Church links the two, but I believe these are two quite different things, and there was a very robust exemption on abortion. And I think when the bill was passed, no one who voted for the robust exemption on abortion expected a really tough exemption on contraception. So I think that is an issue where some consensus ought to be possible in principle.
A last quick point, I do think we need to talk about the religious liberty of Muslims and other religious minorities in the United States. Because when you think about the First Amendment, it’s designed to guarantee everybody’s religious liberty, but it was particularly designed with religious minorities in mind, like those Baptists around the country who were struggling with established churches in the states. While I do believe our Muslim brothers and sisters in the United States have substantial religious liberty, I worry about the ease with which people can say things that are openly anti-Muslim. The controversy over the community center in Lower Manhattan, “the mosque near Ground Zero,” I thought was very disturbing. That didn’t feel like who we are as Americans, a nation of religious liberty. We want to set an example on this for the world, not only for the formal religious liberty we allow, but also for the spirit of liberty and pluralism that we embody. I think episodes like that are not good for religious freedom, and they’re not good for us as a nation.

ROSS DOUTHAT: Well, first, thanks so much for having me. It’s an honor to be in such distinguished company on this panel. E.J. asked me before we began, he said, “We’ve done a lot of events together, but I’m genuinely curious what you’re going to say on this front,” and I said, “Well, that’s why I asked to go third, so that I could see whether I should play the optimist or play the pessimist.” I can take either track, but since Judge Starr and E.J. both waxed positive, I guess I’ll be slightly more negative and then try and turn in a slightly more optimistic direction at the end.

I think that while I agree, and indeed deeply agree that the United States has an unparalleled historic commitment to religious liberty that endures and is in overall very good shape to the present day, I do think it is worth thinking about it in political philosophy terms for a minute. There is one kind of seam within that understanding of religious liberty that goes all the way back to, in certain ways, the father of Anglo-American liberalism, John Locke, which is this question of whether individual religious freedom also applies in corporate terms.

And Locke, of course, was famously a champion of religious toleration. He wrote eloquently on that front, but was not a champion of religious toleration for all groups, and in particular he was not a champion of political toleration for Roman Catholics in late seventeenth-century England for understandable reasons, given the political and religious disputes of the time. The implicit and explicit arguments that Locke made about Catholic loyalty to the Roman Catholic Church and how that played out in political terms have remained as a kind of buried element in our religious debates that tends to bubble up to the surface when the Catholic Church in the United States in particular comes into conflict with civil authorities.

This was true in a much more pro-
nounced way in the late nineteenth century debates over the Blaine Amendment and educational policy. But I think it’s also been true over the past couple of years in the debates about the contraception mandate, and I think it may well become even more pronounced in ways that extend in broader ways to encompass Protestant and Jewish institutions even more as well, and future debates about marriage law and gay rights and how the possible constitutionalization of gay marriage ends up impacting religious institutions, schools, and so on.

The issue here is the question: What is the religious liberty that the First Amendment guarantees? And I think everybody, or practically everybody left, right, and everywhere in between, agrees that the First Amendment guarantees a freedom of worship, right? It is simply unimaginable to me that we will ever live in an American republic in which people are—with the exception of, obviously, religions that demand human sacrifice and these sort of crucial First Amendment gray areas—that we’ll ever live in a country where the right of congregations to hold to particular theologies and hold particular liturgical celebrations is ever challenged.

The question is going beyond that. What does the free exercise of religion mean, and in particular, does that Free Exercise Clause guarantee something broader to religious institutions that are not necessarily churches holding worship services but are, let’s say, large employers running hospitals and charitable institutions and so on?
From that perspective, I think what was troubling to a lot of religious conservatives, and to E.J. originally, before the Obama White House changed its position in some form, was the distinction that the White House policy was drawing. And we can talk about whether they continue to draw that distinction after they changed the policy, between churches who had one particular set of rights under the First Amendment and, say, Catholic hospitals or ultimately perhaps evangelical colleges or charitable organizations and so on, who had a more restricted form of religious freedom. I think the reason that distinction was troubling is because America is a country as religious, arguably, as we’ve ever been, but less institutionally religious than we’ve ever been.

And so, in the popular conception where a sort of do-it-yourself spirituality has more play and sort of institutional religious commitments have less influence, I think the argument that the First Amendment protects freedom of belief, freedom of sort of intellect, and freedom of worship, but not necessarily freedom of religious activism through hospitals, charities, and so on, is more powerful today than it would’ve been a couple of generations ago, and may yet become more powerful.

And you can imagine a kind of feedback loop—and I think you actually saw this in the contraception issue, where the Obama White House’s policy would’ve been unimaginable politically in a world where the Catholic Church hadn’t just passed through ten or fifteen years of self-inflicted wounds from the sex-abuse crisis that dramatically weakened the Church’s public witness and political influence. I think, to go back to the Clinton era, you can’t imagine President Clinton picking that kind of fight with the Catholic bishops because, as an institution, the Catholic Church was stronger then.

You can imagine this sort of feedback mechanism where institutional religion gets weaker, the claims of the state advance to fill that gap, and that further weakens religious institutions, and so on. And I think all of us—liberal, conservative, secular, religious—have good reason to see the particularly important role that institutional religion has played in the United States over the last 250 years
and to worry about any kind of cycle that weakens churches’, synagogues’, and mosques’ ability to play that role in the future. That’s the case for a modest pessimism.

To end on a slightly more optimistic note—particularly for religious conservatives who leap from that pessimism to a sort of deeper vision of real persecution—I do think that the history of the Catholic experience, not only in the United States but going back hundreds and thousands of years, should be instructive; that actually there’s a lot of space between perfect religious liberty and “back-to-the-catacombs” persecution. And I think even if we get into this sort of negative cycle, from a Catholic perspective, we have to realize that the Church passed through centuries dealing with kings appointing bishops and handing dioceses to shiftless nephews of dukes and all the rest of it. I mean, the Catholic Church has dealt with these kinds of challenges before in ways that have not necessarily led to martyrdom and persecution. I think that’s more what we’re likely to see if my pessimistic scenario is correct, that is, a sort of low level church-state struggle that doesn’t necessarily lead to truly negative or truly disastrous outcomes.

KEN STARR: Ross, I think you should be more cheerfully optimistic, notwithstanding some of the pressure points.

ROSS DOUTHAT: This is not a dynamic I expected, I will say. [LAUGHTER]

JANE LITTLE: Me neither.

KEN STARR: The struggle right now on the contraception mandate and the Hobby Lobby litigations over exemptions and who creates them raise very profound issues of democratic theory. Do we want the courts in that business? Many people say, “Yes, we sure do.” And that’s true for traditional liberals of yesteryear—William Brennan, Thurgood Marshall, would say, “Yes, that’s what we’re here to do.” Moderates, like Justice O’Connor, would agree. But it really was the judicial conservatives who said, “We’re really worried about this, especially creating these special tests, strict scrutiny, and the kind of lawyer talk that people engage in.” But what that process means is that it’s judicial power and it’s the judgment of five justices who determine whether a particular activity will be exempt from positive law. Well, that’s huge.

Congress steps in all the time with respect to these exemptions, and so what’s a little odd about the conversation over the HHS mandate is that we have the administration—the Article II branch—acting under delegated authority, right? They’re acting under the Affordable Care Act, but we really haven’t had a full conversation. Now, Congress did, not so long ago, pass the Religious Freedom Restoration Act, which the Supreme Court ruled unconstitutional. And so, Congress once again, cutting across bipartisan lines, came together and signed into law religious freedom restoration—it didn’t matter what party you were in; you supported it. The courts have gotten
it wrong. So, what do we do? We step in. And see, that’s what I think the Hobby Lobby litigation is all about.

JANE LITTLE: Which is the for-profit case we’re looking at now that the government’s taken to the Supreme Court saying, “Look at this. This man wants an exemption for a corporation.” So it’s taking it into a whole new area Ross touched on earlier.

KEN STARR: That’s right, asking, “Who has religious freedom?”—Does the Religious Freedom Restoration Act apply at all?

But the final thing I want to say in response to Ross’s guarded pessimism is that parachurch organizations enjoy robust liberty protected by the Constitution as reflected by the Supreme Court’s unanimous decision just last year in the Hosanna-Tabor case involving a very evangelical Lutheran Church which fired a teacher who had invoked her federal civil rights under the Americans with Disabilities Act. Now, that’s a pretty serious conflict, isn’t it? Yet the Supreme Court embraced what had developed in the lower courts.

Now, interestingly enough, the EEOC and the Justice Department took quite a secularist position, and this is where there are tensions in the polity, not just in the culture. How did the government lose nine to nothing? How did that happen? Well, it was an unwillingness to take a bit more seriously the great weight of both the Establishment Clause and the Free Exercise Clause. The government had managed, in its enforcement of the civil rights laws, to violate both clauses, according to a unanimous decision of the Supreme Court in 2012.

So, we struggle in the polity, we struggle in the culture, but in the Supreme Court right now there is—as some would call it—“ceremonial deism,” or just acknowledging God in our culture. William O. Douglas says, “Let’s let the kids out of public school early so they can have religious training.” The secularists said, “Well, gee, that sounds like a violation of the Establishment Clause.” That was 6-3. But what Justice Douglas says is, “We are a religious people whose institutions presuppose a Supreme Being.” Justice Douglas, whatever his faith journey was, understood that that’s part of our culture, and we’ll see what the Supreme Court does in the Town of Greece case which will be argued next month with respect to town prayer at a town council.

We do struggle with it, but it’s the appropriateness of acknowledging religious views and so forth, whether in football games or other kinds of public gatherings. But my closing point is, the Supreme Court is very protective of religious liberty as it pours itself into parachurch organizations.

JANE LITTLE: E.J., just to follow on from this and to go back to the contraception mandate, you at first objected to it, and then you said, “The compromise looks good. Obama shifted the burden of providing contraception to the insur-
ers and away from religiously affiliated institutions, and that’s enough.”

And you also had a go at that time with Catholic bishops for suggesting that we don’t want the Catholic Church to become the Tea Party. I’m wondering if that’s still a concern for you.

E.J. DIONNE: More importantly, it seems to be a concern of Pope Francis. And I think my favorite line in the interview in *La Civilta Cattolica*, translated by *America* magazine, is a rebuke to pundits such as Ross and myself where the Pope says, “He who claims to have all the answers, God is not with that person.” And it made me want to go on a talk show once and just say, “I don’t know the answer to every question,” but I might never be asked again to a talk show.

I always like to joke that the Catholic Church’s job in public life is to make everybody feel guilty about something, which proves that I’m a Catholic. Because I do think, over the years, the Catholic Church challenged people who were liberal to think hard about their views on abortion and on the family. For contraception, they haven’t done so well in terms of Catholic opinion. But it is to force people to examine their consciences.

Similarly, on matters of social justice and treatment of the poor, including what the state’s role is in lifting up the poor, the Church challenges conservatives. It struck me that over the last decade or so, the American Catholic hierarchy has moved sharply toward making one kind of Catholic feel a whole lot more guilty than the other, which is to
say that there has been an imbalance in the way many of the bishops—not all—were talking about public issues. And that’s what I saw the Pope as saying: not that he changed the Church’s teachings on these matters, but when he said that there has been too much emphasis on the culture war issues, I think he’s calling us back to where the Church was for a very long time.

I just want to take up something Judge Starr said on the football case, because I think the football case is really interesting. The issue was a prayer that was voted on that would be said at football games. I always thought that court got that right, because the essence of religious liberty is that people in a religious minority should have their rights protected. And if in a given jurisdiction, the overwhelming majority are Catholic or Baptist or LDS or whatever, a set-up like that will almost certainly lead to a prayer that could offend the conscience of a “minority” person.

The other reason I find publicly prescribed prayer problematic is that it can easily turn into an affront for all who are in any way orthodox. You get to the point where the only prayer that could get through a majority vote would begin, “Holy Mother, Father, life force.” That’s when you start asking, “Why are we doing this?” And I think people who are quite orthodox would have an objection to that prayer. But I think the football case is, again, so American because of the whole process of voting on a prayer before a football game—perhaps it happens in other countries, and I’m not aware of it, but I’d be very surprised. Maybe you can tell me there’s deep prayer at a cricket contest.

JANE LITTLE: I’m interested in taking Ross back to the Free Exercise Clause and corporations. Because I think it’s very interesting in the Hobby Lobby case now before the Supreme Court with David Green, the owner, not wanting to provide contraception to his employees due to his religious conscience argument. Do you think corporations should be accorded religious exemption the way individuals might be afforded?

ROSS DOUTHAT: Maybe I’ll invoke

“[E]ven if it is a minority position, that’s precisely the kind of case where you should worry about state power being exercised... I worry more about an issue like contraception precisely because there isn’t a big constituency in defense of Humanae Vitae in the United States Congress as far as I know.”

Ross Douthat
Pope Francis in that I don’t know. Actually, it is a very interesting area, and I suppose my instant answer is that I don’t know. I don’t have a clear, defined view on that, but my impulses lie with Hobby Lobby mostly. I think, for the reasons that E.J. actually so eloquently expressed. Earlier in your remarks, you were talking about the contraception mandate, and you said it’s unfortunate that the focus was on contraception and that the mandate had exemptions surrounding abortion because abortion and contraception are very different issues, and public policy should approach them in very different ways. I completely agree with that.

I worry about that idea, though, in the context of religious liberty debates, because I think it runs up against your point about the centrality of protecting religious minorities. Because in the case of contraception, you are dealing with something where, let’s say, the Catholic monks running a small Benedictine college who don’t want to pay for contraceptive coverage are the definition of a small religious minority. And they are a minority within the Catholic population, as you would point out; let’s say that 70, 80, 90 percent of American Catholics disagree with the Church’s teaching on contraception, until you are dealing with a very small population. But often, what I saw happening in those arguments surrounding the mandate was that fact being invoked, not by you, but by other liberals making the case for the mandate as sort of evidence that this was not actually a religious liberty issue because this was such a minority position even within the Catholic Church.

And the fact is that even if it is a minority position, that’s precisely the kind of case where you should worry about state power being exercised. I think this is where—to the extent that I have a difference with Judge Starr—I have a lot of confidence in the American Congress not forcing Catholic hospitals to run abortion clinics, for instance, because that is an area where the issue itself is so politically divisive, where you have such clear political constituencies that would mobilize against that kind of thing. I worry more about an issue like contraception precisely because there isn’t a big constituency in defense of *Humanae Vitae* in the United States Congress as far as I know.

When we look ahead at the future of debates about gay marriage and so on, I think a lot of people in the middle on that issue and on these debates are pretty sanguine about what will happen in a world where gay marriage becomes a constitutional right, which I think is quite likely to happen, because historically it’s been a very divisive issue and you can’t imagine legislatures not pushing back if you have overreach. But given trends and public opinion on gay marriage, we’re quite possibly headed towards a world where that becomes something like the view on contraception, or maybe it’s 20 to 25 percent of the American public who’s still opposed to gay marriage and 75 percent who aren’t. And again, those are the kinds of issues where you want the First
Amendment to be as capacious as possible, because you’re protecting minority convictions.

And so that’s the case for Hobby Lobby. I don’t have a firm answer on this sort of for-profit corporation versus charitable organizations, but I do think there is a case for erring on the side of expanding protection as far as possible.

KEN STARR: Two very brief points. Corporations do have First Amendment rights. That’s long settled. And you say, “Oh my goodness, who wrote that one?” Justice William Brennan. Now, what about that which seems to be more individual than a corporation? The Hobby Lobby case is quite intriguing because while it is a for-profit, for-profit corporations have First Amendment rights. Do they have religious freedom rights?

Very, very intriguing question. Does IBM have First Amendment rights? Yes, it does. Does it have religious freedom rights? We’ve got to think that through. Hobby Lobby is different because not only is it a privately held corporation, as I understand, it is a closely held corporation. My dear friends, this is “mom-and-pop.” It is completely held by the family. So, I think we have to drill into the specific facts and appreciate that whatever the Supreme Court may not tell us about whether an IBM or another corporation has religious freedom rights. It’s kind of hard to imagine a publicly held corporation asserting such rights, but strange things happen.

E.J. DIONNE: I feel much more comfortable now because I can disagree with Ross on two fronts. The first is that this exemption could open a door that would allow employers to claim all sorts of other rights: Why is contraception coverage different than something else? What if you have a traditional view of marriage and women should stay home, and an employer, therefore, has the religious liberty to make absolutely no accommodations for female employees because he doesn’t think they should be in his workplace? He can’t discriminate against them in hiring, but could he discriminate later on? The labor law in terms of the First Amendment makes distinctions about
what employers can do during union elections in order to protect the rights of employees. And so, I think if this is allowed, we open up a vast potential area of abuse where people can claim religious exemptions for all sorts of things.

And, again, it’s not consistent with Catholic theology, but I think a distinction between contraception and abortion is just very, very important.

I’ve been thinking about how we are going to get through the gay marriage debate. Because I do think it’s inevitable over the next thirty years that gay marriage will become common because of the generational distribution of opinion on this. Young people are overwhelmingly in favor of it and the opposition comes from older people who will eventually pass on to their eternal reward. And so, the question is, how do you, as a society, protect minority rights in that circumstance? And I do think that the way in which we can settle this peaceably is to offer sufficient protections to religious institutions who do not believe gay marriage is sacramental or legitimate. These institutions and traditions can then have their internal arguments over whether they decide to accept.

JANE LITTLE: Sorry, just to clarify, so if a minister isn’t coerced into performing a gay marriage ceremony, therefore, religious liberty isn’t threatened in any way?

E.J. DIONNE: Correct.

ROSS DOUTHAT: No, I don’t think he was going with that. You would say there could be a threat to religious liberty beyond just the overt coercion.

E.J. DIONNE: Yes. I don’t think a church hall—a church shouldn’t have to rent out its hall to a gay couple.

JANE LITTLE: Sure. But in general, if it’s not coerced into providing services toward marriage.

E.J. DIONNE: Right. And that I think gays and lesbians are going to battle to have the state recognize relationships, and those who are religious are going to battle these issues inside their religious institutions.

The last point I wanted to make is a kind of plea to my friends who are conservative on this issue, who are reluctant to go to gay marriage. Depending upon how you argue about this, you can create enormous hostility that could actually threaten the very religious liberty rights that you are trying to protect. To hear some of the anti-marriage-equality arguments from the point of view of gays and lesbians, you can imagine and understand their saying back: “You don’t want to let us live our lives the way we think we should, but you are demanding that if the law changes, we let you live your lives the way you think you should.” I do think that to settle a question like this, we need some reciprocity.

I think a lot of people have changed their minds on this on conservative grounds.
They have changed their minds on the theory that if society wants to and should promote faithful committed relationships, perhaps it’s a bad idea to deny this opportunity to a segment of our population who happen to be gay or lesbian. So, I would like us to move down this path with as much respect for other people’s views as we can. There are ways of carrying on this debate that lead to that respect, and there are ways of carrying on the debate that lead to culture wars.

ROSS DOUTHAT: So, your argument is basically religious conservatives should watch what they say or they will be punished?

E.J. DIONNE: No. They should watch what they say.

ROSS DOUTHAT: I mean, I sort of agree with you, but I think it’s useful to have that clarified, right? Because I think that is sort of where we are.

E.J. DIONNE: I guess. And people could criticize my column¹ this morning by throwing it in my face, but a certain kind of meanness in public debate—yes, I was kind of mean this morning—calls for a response. We should all turn the other cheek, but we don’t.

ROSS DOUTHAT: But in terms of what we expect to happen though, given what we know about human nature, I think you’re quite right. But the history of these kinds of debates is that the side of the debate that is treated intolerantly when it finds itself in a position of power tends to behave intolerantly in return, right?

E.J. DIONNE: Right. And I’m suggesting I don’t want that to happen, which is why I would call on people to put themselves in the shoes of other people.

KEN STARR: I’m reminded of a comment by Gerhard Casper, then the president of Stanford University, who said at convocation, “At Stanford, our goal is that all arguments will be met on the merits.” And he talked about the dangers to civil society in the community of Stanford in engaging in *ad hominem* attacks. Regrettably, that seems to be the increasing order of the day. And that’s where E.J. and Ross will do well to remind us all to beat your rhetorical swords into plowshares and embrace the culture of civility, because it’s been sort of a yelling match. This hasn’t affected religious liberty, but it of course, as we all know, has deeply coarsened the culture.

Even in the state of Texas, I was shocked because there is this, believe it or not, real culture of civility. People say, “Yes, sir,” and “No, sir,” and they’re respectful. But now at town hall meetings, if you’re in favor of a bond issue in this particular jurisdiction, you get shouted down, you’re yelled down. Now, that is very, very dangerous, it seems to me, culturally for a liberal society.

So, I must say, since I argued the same-sex marriage Proposition 8 case in the
California Supreme Court, welcome to the world of invective. I think both sides would do well, whatever your views on traditional marriage, to please at least respect the motivation and intentions of the other side as being in good faith. And it’s one of the dangers, I think, too, of religion, because those who favor a particular social policy are essentially putting a pox on the entire house of religion. To say that is painting with, unfortunately, an overly broad brush, that the religious voice shouldn’t even be heard. So that I can’t even talk to you—this is my friend, Bruce Ackerman at the Yale Law School—I can’t talk to you. I’m not addressing this to Bruce but to this view—“So, you can’t talk to Martin Luther King, Jr. were he here when he speaks the language of the “Letter from Birmingham Jail”? You can’t even have a conversation until he changes his mode of discourse?” It’s completely inconsistent with human experience but it’s also just unkind.

E.J. DIONNE: I broadly agree with what Judge Starr just said, but I worry sometimes when civility comes up. Not that I’m anti-civility, I’m pro-civility, and I’ve even argued for it in a very uncivil way. But I think, just for this purpose, I’d like to draw a distinction, which is that when you enter the public arena in any way, whether as an elected official or if you just write a lot, you invite a lot of invective from people who disagree with you. I think there’s probably a little more of it now than there has been at other times. I’ve got to say, personally, it doesn’t particularly bother me because if people are really mad about what you say, they have a right to talk back, and if you don’t really like having people yelling filthy things at you, you might just stay out of the debate. So, I’m not complaining about this.

When we’re talking about gay marriage, we’re actually talking about something slightly different, which is groups of people demonizing each other. And that’s where I would really like the defenders of traditional marriage to try hard to see how this looks from the point of view of people who are gay and lesbian and vice versa. And that’s where—

ROSS DOUTHAT: Okay. Now, wait a minute. Wait a minute right there. Well, let’s concede that the history of the debate over gay marriage has been characterized almost exclusively by invective from the conservative, traditionalist side of the argument toward gay people, and that is sort of the basic fact underlying where we are today. Given that basic fact, when you look at how the debate is playing out in the public square right now, do you think that’s the case? Do you look at the dwindling band of religious conservative voices? I can’t think of a columnist

“We are to be vigilant. Liberty is not always a given. We have to earn it, or at least protect it.”

Ken Starr
for a major newspaper who has written in opposition to gay marriage. Half of Fox News has said they’re in favor of gay marriage. Right now, in the balance of play, who are you criticizing? Who are the voices? I mean, Jerry Falwell’s dead, Pat Robertson is probably in favor of gay marriage at this point.

E.J. DIONNE: The only other point I want to make is about the right of religious people in the public square. I agree very much that the difference between church and state is not the same as the difference between religion and politics. Religion and politics have always been intermeshed in the United States, and you’d go through a long list of causes I admire, from opposition to slavery, to civil rights, to social justice, where religious voices have been central and where activists have often spoken in a religious idiom.

I think, again, there’s another tension here, which is that in a pluralistic society, one has every right to base one’s conclusions on religious convictions and to explain why. But I also think there is an obligation to argue for your position in terms that are accessible to people who don’t have your religious convictions. That’s not a constitutional obligation. I just think it’s an obligation of a pluralistic society. So, I can’t say to a conservative, “You should vote for this welfare bill I am for because Jesus said so.”

ROSS DOUTHAT: That is actually like the only one that ever works on me, so I don’t know why you wouldn’t.
E.J. DIONNE: No, I'd have to make it more complicated, but I probably would disguise it. But I think that’s problematic. The same obligation I’d hold myself to on welfare programs I’d also apply to people arguing about abortion. People have a right to make whatever argument they want, but there is also an obligation that comes from a democratic, pluralist etiquette and—and it’s probably something more than etiquette.

JANE LITTLE: Thank you. I think we’ll draw a line there. If you’re looking for the invective that you said is not out there anymore, I was just reading a piece Ross wrote on religious liberty in the gay marriage context, and your suggestion that we shouldn’t fight this as a war, we should negotiate terms—there were a lot of comments afterwards of people going at each other. One comment I even quoted here from the secularist side, which I thought was interesting given the tenor of debate and the way people are framing things: “Why is it when I hear arguments for more religious freedom, it’s always freedom to discriminate?” That, at least, is often the perception out there, don’t you think?

KEN STARR: Well, we need also—because you spoke of Pope Francis and evangelical leaders of the past generation—to speak of the growing cadre of evangelical leaders who are saying the preferential position of the poor has much to commend itself. Isn’t that sort of what we were taught: The evangelicals are creatures of the book or students of the book? There are books written by evangelicals such as Rich Stearns, head of World Vision, which does mighty and efficient work in getting relief to the poor and the needy. I cite the Haitian earthquake. Who was there quickest with the most? It was World Vision.

Rick Warren was here on this very podium speaking about the Catholic-evangelical dialogue with Robert George from Princeton, and this is who evangelicals are these days. Of course, you have views on morality that are grounded in biblical teaching, and we don’t apologize for that. But we also say something has been missing, and so this is why Rick Warren, his Saddleback Church, talks with President Clinton, talks with Tony Blair, why they work together in Rwanda. That’s the other side which I think evangelicals and Catholics need to talk about.

JANE LITTLE: Which is maybe not as emphasized as the culture war suggests that we’re talking about today.

ROSS DOUTHAT: To E.J.’s point, it’s bad policy for a columnist to respond to internet comments, but I’ll make an exception in this case and just say that the commenter has a point, right? That in fact, the big debates probably facing us over religious liberty in the next fifty years are debates about whether religious institutions have the right to not always discriminate, per se, but to do things in that vein, and to sort of set standards in their own community that do not match
with the more egalitarian and morally permissive aspects of our culture.

This is always the tension in a pluralistic society—that between these sorts of groups that have an egalitarian frame, but then the society also depends on groups that frankly set aside the issues of sex we’re talking about right now. Groups always depend on their ability to discriminate, whether it’s the Elks Club or the Knights of Columbus or the Masons or whoever. And that goes back to de Tocqueville. That’s part of the genius of America: our ability to maintain this sort of formal egalitarianism combined with pluralism, a multiplicity of communities.

And so, it’s natural that that’s where the debate happens, even though, of course, there are broader issues. To link my comments to Judge Starr’s, one of the pragmatic reasons that secularist voices should pay attention to and respect some form of discrimination within religious communities is precisely because of the contribution that those kinds of exclusive communities make and have made historically. Maybe instead of calling them exclusive communities, you could say “intentional communities,” right? Intentional communities of people bound together by a common purpose inevitably means excluding people who aren’t bound together by that purpose that has historically made a huge difference in sort of the ordinary lives of Americans. And, of course, there is a balance, and there are forms of discrimination that you can’t allow, and the question is where you draw the line. But again, I just don’t think it’s surprising that that’s where the debate will be.

JANE LITTLE: Ok. Let’s go to the audience for questions. If I could ask you to briefly introduce yourself, and then, pose it in the form of a brief question.

ROBERTA WILLIAMS: I just want to read something that appeared in the Catholic Register and ask the three panelists what they think that implies for the trend in our government.

“A May 13 letter from 72 members of Congress to Hagel, first circulated by Lamborn, expressed concerns about a growing pattern of hostility toward Christians in the military. It told of an Army PowerPoint presentation on equal opportunity that included evangelicals, Catholics, Mormons, Sunni Muslims, and some Jews on a list of extremist groups, along with al Qaeda and Hamas. The letter backed language in the National Defense Authorization Act that defends religious liberty in the military. President Obama, who said when signing the 2013 Defense Authorization Act that such language was unnecessary and ill-advised, has threatened to veto the 2014 version of the bill if the religious-liberty language is retained.”

Now, this was published in an article written by Wayne Laugesen in the National Catholic Register on the 18th of this month.
JANE LITTLE: E.J.?

E.J. DIONNE: Well, I should invoke Pope Francis, and say I am unaware of this controversy. But I’ve got to say that surprises me, and I am very curious what is actually underneath that. It sounds like a slightly distorted account to me because of my experience and knowledge of the military through my sister who served. And it’s funny you raise this, because just this week I was having a conversation with an Air Force major about a lot of people in the Air Force who have seen heavy pressure from the evangelical side—or have spoken of heavy pressure from the evangelical side. Every person has a right to be evangelical, to convert someone, but it gets very complicated in a chain of command because it can become a kind of pressure that’s illegitimate. And my Air Force friend was arguing that she did not see a lot of that, but she made the point that the overwhelming number of people she served with were religious, expressed religious views, and clearly did not see their religious rights as religious people under threat. So, I would be very curious.

Jane said I’d be very artful about adding my other comment. I’ll be very in-artful, because there are just three quick sentences I wanted to speak in response. Yes, I broadly agree with the commenter, but I think one question is: Do you emphasize a God of mercy or a God of judgment whose judgments always coincide with yours?

ROSS DOUTHAT: That’s not for the state to decide.

E.J. DIONNE: No, no. But I’m talking about the people in conversation. And the second is about Pope Francis, where it seems to me that he has shifted the emphasis somewhat to a God of mercy, and who in the world ever expected a pope to say, “Who am I to judge?” A lot of people thought that’s what a pope did for a living.

KEN STARR: Horror stories like this—I simply accept the text as you read
it—will happen. But I think you noted something very interesting. “X” number of Congress persons rose up in righteous indignation. American society continues to be very hostile to those who are hostile to religious liberty. Is that changing? I really don’t think so.

E.J. DIONNE: But crying wolf in this conversation is very dangerous. Now, again, I have to know more about this case. But we do know that there have been extremists in every religion including our own whom we, as members of that tradition, would disagree with. So, I don’t know what this regulation looks like, but I do worry that crying wolf actually ends up undercutting the rights of religious people.

JANE LITTLE: Another question?

RABBI DAVID NOVAK: David Novak, University of Toronto and Religious Freedom Project scholar. I’d like to present a much harder case to the panel. After all, we’ve been mostly talking about the question of Obamacare and exempting people. A much harder case is the question of what is referred to as ritual or religious circumcision. There was the recent ruling of a German court and the referendum about a year and a half ago in San Francisco. This is being presented as a civil rights issue that basically says that if my parents, when I was eight days old, subjected me to circumcision, that they committed a harm against me and, therefore, this is something that ought to be disallowed. And yet religious groups say that if we cannot circumcise our sons, then the question is, can we be a part of the society in good faith? This is going to be raised. The issue has already been raised in the German courts, I’m sure it’s going to hit the American courts. I’d like to hear what you three gentlemen have to say on that issue.

JANE LITTLE: I’m delighted you brought that case up. It’s a very interesting one from Germany.

KEN STARR: David, you win. The German courts—and we’re seeing this throughout Europe—are genuinely hostile to religious rights in practice. It’s at least a couple of centuries old in France. But in our country liberty is the baseline. I think that is the fundamental teaching of the First Amendment; liberty is the baseline, including the liberty of parents to raise their children. This includes the liberty to inculcate them unless there is a compelling public health reason that would justify, for example, Jacobson vs. Commonwealth of Massachusetts: “You must go get your smallpox vaccination.” I’m opposed to the German approach. But, I’m sorry, roll up your sleeves and get ready. Here it comes.

So, in this country, I am confident that at least in my lifetime, which may not be long, that kind of religious practice is rooted in sacred tradition. It’s not snake handling. It’s not starving the child, feeding the child only lettuce or whatever, or denying the child access to healthcare where real parens patriae issues become compelling. But the baseline is freedom. I think you’re
protected. I’m not familiar with the San Francisco ordinances, but those kinds of ordinances I think will fall at least at the Supreme Court of the United States, if not before.

E.J. DIONNE: Could I ask you a question? Because I agree with that, and I don’t think this would stand in the United States, but there is a more interesting case in New York City—as you know, it’s not a legal case yet—about a form of circumcision used by, I believe, certain Hasidic sects. Can you describe that? It’s partly because I’m trying to get out of describing it, but also because I don’t want to mis-describe it.

DAVID NOVAK: It is a practice that a certain amount of blood is drawn out by mouth. And it is a question. Fortunately, there is plenty of opinion in the Jewish tradition that this need not be done. But for those who claim in the Hasidic community that this need be done it is an issue. But the complaint about it is that it transfers disease. That is the point, not that it happens to be aesthetically unpleasing.

E.J. DIONNE: Correct.

DAVID NOVAK: So, in that sense, that situation would be an interesting question because then the courts would have to decide clearly, whereas, when it comes to circumcision, there is nobody within the Jewish community who would say, “Well, we can waive it,” unless it’s a question of a haemophiliac child or something like that. But in this question where there is debate within...
the tradition, then it’s very interesting because then the courts could say, “Well, everybody is within the normative Jewish tradition.” I’m not just talking about Jewish opinion. It could happen to others. That would be a very, very interesting case to see if it hit the courts.

E.J. DIONNE: Could I just say two things first? Thank you for describing it so I didn’t have to. If you were in the Catholic tradition, I would say you just got rid of many years in purgatory for that, so, thank you very, very much.

DAVID NOVAK: That’s very generous of you. [LAUGHTER]

ROSS DOUTHAT: E.J. hands out indulgences like they’re going out of style. [LAUGHTER]

E.J. DIONNE: Yes. Don’t bother to pay for them.

DAVID NOVAK: Absolvo te. [LAUGHTER]

E.J. DIONNE: The reason I raised that case is because I think the first case does not seem to me to raise any difficulty in asserting religious liberty, but the second one is really complicated. On the one hand there is a legitimate public health issue, yet this religious minority that makes this part of their practice would say that we who would say, “My God, this should be against the public health code, it should be enforced”—they too would make a case that this is a violation of their religious liberties, and it’s actually come up in the New York City mayoral campaign, as you know. And that’s the hard one, and that’s where I think the balancing act inherent in the First Amendment sort of hits us all the time.

DAVID NOVAK: Well, the interesting thing in terms of circumcision is that the argument against it is not just that this is optional, but that circumcision is actually a harm. I mean, there’s a whole anti-circumcision movement in terms of just medical circumcision irrespective of religion, and this becomes the problem. Are you going to exempt people from what is—at least some have tried to argue is—a harm to the child. Are you going to allow Christian Science parents not to take their child to the doctor?

KEN STARR: Well, that just becomes a matter of facts, if I may say so, because the Christian Science cases have all been: You can’t do harm to the child. So the question is, what is the harm, and that’s a question of fact.

ROSS DOUTHAT: But that’s where I would disagree a little in the sense that I think all of these facts—I mean, obviously there are clear cases where if you cut off your child’s legs or something, almost nobody’s going to argue you are not doing them harm. But the gray areas are conditioned by cultural attitudes, right? And this is why the rearing of children is, I mean, it sort of goes back to the point I started with: What does free exercise mean? That’s the whole ball game. And as
cultural norms shift, how people approach that will shift, and you’ve had arguments made in the European context but also in the American context that if you’re religiously conservative parents raising a gay child, that teaching them traditional Christian views about sexuality amounts to a form of psychological warfare against the child that has definitive harm.

So, I wouldn’t be so quick to say it’s just sort of the medical facts of the case, because, you know, if you’re dropped into a society that had never heard of Jews or circumcision or the law of Moses and said, “Hey, there is this religious sect that cuts off the tip of every male child’s penis. Do you think that that’s a public health harm?” I think a lot of people would just raise their eyebrows and say, “Well, yes, it is,” and I think that’s precisely why these issues are so fraught.

NICHOLAS WOLTERSTORFF: Nick Wolterstorff, retired philosophy professor. About the quip that why do the religious freedom cases always involve the right to discriminate, that strikes me as a wildly mistaken and pejorative description. Judge Starr can give a lot of examples, but just take one of them: the Rosenberger case at the University of Virginia, the right of a religiously oriented student newspaper to funds that are distributed to newspapers in general. That’s not the right to discriminate.

ROSS DOUTHAT: I think the commenter just meant the ones I tend to write about. [LAUGHTER].

KEN STARR: The University of Virginia case was one of those Supreme Court teaching moments. Now, the court was divided there, but it was divided on the principle of Madison’s Memorial and Remonstrance’s namely “three pence” should go to support a religious voice. And Wide Awake, the name of the journal, was indeed an openly religious voice. Clearly there’s absolutely no compromising that it was evangelical Christian in nature; it may have been broader than that, but it clearly was organized by deeply religious evangelical Christians. And the court struggled, even though the majority said, of course, “equality, equality, equality.” The student fund finances any number of student journals and, therefore, you cannot withhold funds from Wide Awake.
NICHOLAS WOLTERSTORFF: However the case was decided, the student newspaper was not pleading for the right to discriminate.
KEN STARR: No, no. It was just its voice, its worldview.
ROSS DOUTHAT: The student group that lost to the court recently, the Christian group.
KEN STARR: At Hastings Law School (*Christian Legal Society v. Martinez*).
ROSS DOUTHAT: Yes, right. They were asking effectively for their right to choose their own membership, and because they were an unofficial student group, that right was denied. And this is where the conflict tends to be right now. And it is precisely because—this goes beyond student groups—so many universities, charities, and hospitals are deeply entangled with federal and state spending in all kinds of ways. Even if you’re a private university—there’s a reason that Bob Jones University is always talked about as this example—because it is a big deal for colleges and universities to be cut off from public dollars. Catholic charities could not function without public funding. I mean, maybe that’s a problem for the Catholic side of Catholic charities.

JANE LITTLE: Okay. We’ll have one more question here.

REBECCA DOWNS: I’m with the Institute on Religion & Democracy, and I wanted to mention the Hobby Lobby case. You know, we discussed if corporations have rights, but I think the heart of the matter is that people run corporations. That’s why I don’t think it would be so strange for them to have
religious freedom. I wanted to know if you wanted to comment on that.

KEN STARR: They have chosen to do business in a corporate form, and so the case is Hobby Lobby Corporation. You are invoking—and this is the argument of the other side—you’re invoking and welcoming all the privileges including limited liability for the corporate form, and, therefore, doesn’t that give the government more authority to regulate? And I think it’s a tough question. To me, it’s a fairly easy question with respect to large publicly held corporations, notwithstanding freedom of speech. I shouldn’t say it’s easy. It strikes me as easier than when you have a closely held corporation like Hobby Lobby. Literally, these members of the family and only these members of the family own the corporation. It’s mom-and-pop, and, therefore, I think they’re at the zenith of the right to assert their individual rights. If they started selling stock, it gets diluted.

JANE LITTLE: One last question.

JACOB RUDOLFSSON: Hello. My name is Jacob Rudolfsson. I come from Sweden and the Swedish Evangelical Alliance. I just find it’s very strange that the talk here, it seems, is that it’s only religious groups that discriminate. But secular groups discriminate also.

For example, in Sweden you have the discussion on why the Salvation Army won’t allow same-sex couples to be officers, but the Social Democratic Party won’t allow moderates to be part of their board. So you have secular institutions that also discriminate against other people that don’t share their ideology. So it’s kind of strange that we put such a negative stance on discrimination because we discriminate all the time.

KEN STARR: This is a wonderful way to end this conversation, not my comment but that question. We have worked our way through a lot of the religious freedom grounds and not all of them. There are always going to be questions. We have not worked our way through freedom of association. And Ross said something very powerful. One sentence was “the right to exclude.” That sounds really unfriendly. It sounds hostile; it sounds unwelcoming. What happened to the welcome wagon spirit? But the very nature of that organization cries out for the ability to say, “I’m sorry, you’re not welcome,” so I’ll use the silly hypothetical: the KKK member says, “May I join the NAACP?” The answer is “No. You’re not welcome here.” “Why?” “Because you don’t share our set of values and worldviews.”

That is fundamental to the freedom of association which is actually textually based in the First Amendment. It is tied to the right to peaceably assemble in order to petition the government for a redress of grievances, but we haven’t worked our way through that jurisprudentially very well yet. We need to do lots of thinking about the fact that the freedom of association means the LDS Church gets to define who its members are. The Roman Catholic Church, ditto. And please don’t tell me that you have a human right to
join that organization or institution. The right that we enjoy really is a matter of human dignity. It is the right to define the contours of the group.

E.J. DIONNE: Three points, one about people running corporations. People also work for corporations, and I think that this Hobby Lobby case raises some real issues for the people who work for corporations.

We have agreed that there are certain forms of discrimination that are not legitimate. I cannot and should not be able to, in my view, discriminate about whom I sell my house to. That’s a very personal decision, whom I sell my house to, but I cannot discriminate on the grounds of race or religion. I think it’s legitimate for the state to prohibit that sort of discrimination. On the other hand, these questions do not come up in, say, the case of the Social Democratic Party in Sweden which can expel a member who says, “I’m a supporter of the American Tea Party.” This is about freedom of association within a political party. But it would not be appropriate if a government run by the Swedish social democrats actively discriminated in illegitimate ways against this person because the state is then involved.

And that’s where I just wanted to get to Professor Wolterstorff’s question about the publication, and this is the last comment I want to make. This is almost a Baylor separationist kind of comment. The First Amendment treats religion in a special way. We, as a nation, have given special rights to religious institutions because we so value religious freedom.

ROSS DOUTHAT: Wait. Who has given them this right?

E.J. DIONNE: The state. The constitution gives, I believe, special rights—a specifically enumerated right in the First Amendment. The question is, do these rights come with certain obligations on the other side of the First Amendment? We also say that we do not want government’s subvention of my proselytization on behalf of Catholicism or someone else’s proselytization on behalf of evangelicalism and so on. And I think what we’re seeing sometimes is that people want to have it both ways on the First Amendment; we want all the privileges that the First Amendment accords, and we won’t accept any of the restrictions. And when you get to cases like a publication like this in public universities, I’d probably be pretty permissive about student funds because I’d also worry that this could let them exclude a Marxist publication, so I’d be fairly expansive. But it is public money and I think that raises a legitimate concern.

JANE LITTLE: Thank you very much. One last thing, Ross, you started this conversation as a cautious pessimist. Are you still a cautious pessimist on religious liberty?

ROSS DOUTHAT: I’m a huge pessimist. I’m a huge pessimist only because I’m looking forward to at least a decade of being on panels with E.J. quoting
Pope Francis against me in one way, shape, or form. [LAUGHTER]

E.J. DIONNE: Hey, I went through a long time on the other side of that. [LAUGHTER]

ROSS DOUTHAT: Just two small points, just that a point of agreement with E.J., particularly as it relates to my semi-agnosticism about the Hobby Lobby case, which is that clearly not everything a religious person does counts as the free exercise of religion. And as E.J. says, I cannot refuse to sell my house to an African American because it’s the free exercise of religion—the sale of my house. So, there is a gray area there that courts and legislatures and the culture have to adjudicate.

The only thing I would say as a sort of concluding point of rebuttal is that the reason that in some of these cases the rights of the employee get less shrift from the sort of people focused on religious freedom is because there isn’t as much of a constitutional issue at play. There is not a constitutional right to have your employer pay for X amount of healthcare. That is a matter of legitimate public policy debate, but it isn’t a constitutional question in quite the same way that the religious freedom of the employer is. It doesn’t mean that the two don’t need to be balanced, but there is a greater constitutional stress on religious freedom than on, since we are at Georgetown, the particular rights of Sandra Fluke to have particular forms of birth control provided by an employer or a university. And that’s just, I think, the tension that you’re sweeping under the rug a little bit, but only a little bit.

JANE LITTLE: Well, I think we have a conference right to lunch, so I’m afraid we’re going to have to bring it to a close. I wish we had another week for this, but it was fascinating. Thank you all very much.

End Notes

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