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HEADLINE FORUM
Matters of Conscience:
When Moral Precepts Collide with Public Policy

Moderator
Russell Pearce
Fordham University School of Law

Panelists
Nadine Strossen
New York Law School

Mac D. Stern
Co-Executive Director, American Jewish Congress

Douglas Kmiec
Pepperdine University

Robert Vischer
St. Thomas Law School

PETER STEINFELS: Good evening. It’s my pleasure to welcome you to “Headline Forum, Matters of Conscience: When Moral Precepts Collide with Public Policy.”

I am Peter Steinfels, Co-Director of the Fordham Center on Religion and Culture, which is sponsoring this evening’s forum.

The topic this evening is one that raises very concrete, practical questions of law and public policy, touching on many of the so-called hot-button issues of the day: abortion, same-sex marriage, physician-assisted suicide, morning-after contraception. But our topic also raises far-reaching questions about how a society like ours honors its democracy and its diversity of beliefs and behavior.

Before tonight’s extraordinary panelists are introduced, I would like to say a word about our usual format.
We begin with the opening prayer, or if you prefer the opening command, to please turn off your cell phones or any other noise-making devices. If you really feel like it, you can tweeter or tweet, but it has to be done silently.

Each of this evening’s panelists will make introductory remarks of no more than eight minutes. They have all agreed to be debarred if they go beyond that. Orchestrating after that will be this evening’s outstanding moderator. During that period of discussion they will exchange ideas among themselves, and then they will address your question.

You will have found a pencil and index card at your place. Feel free to write your question or questions at any time in the course of the presentations or discussions. Raise your hand with your index card and a student assistant will collect it.

Can the student assistants wave their hands so that you know that they are around here?

Please, please write legibly and as briefly and to the point as possible. I always feel bad when questions turn out to be either unreadable or seem to reflect some entirely different panel discussion.

It is now my privilege to turn this podium over to this evening’s moderator, Russell Pearce, who holds the Bellet Chair in Legal Ethics, Morality, and Religion at the Fordham University School of Law. Professor Pearce teaches, writes, and lectures in the field of professional responsibility. He has delivered important lectures on law, religion, and ethics at the law schools of Loyola University Chicago, Pepperdine, and Case Western University. He is the founder and faculty director of the Fordham Law School’s Institute on Religion, Law and Lawyers’ Work. He has received the Sanford D. Levy Memorial Award from the New York State Bar Association in recognition of his contribution to understanding and advancement in the field of professional ethics.

Let’s begin our discussion this evening by welcoming Russell Pearce.

RUSSELL PEARCE: Thank you very much, Peter, and thank you to Peter and Peggy.

Tonight’s panel will be discussing issues that are very literally cutting-edge questions in law and public policy today. We have here with us one of the best panels that I could ever think of to lead us
through thinking about these questions.

Now that our fourth panelist is here, let me ask you a quick question just to do the transparent business. Marc, you are slated to be the first — you wanted time — all right. That’s Marc Stern. More in introducing him later.

I would have to say for myself, as someone who spends my entire life thinking about questions of religion, morality, and law, there are a lot of issues that I have in figuring out the answers here. Like you, I look forward very much to learning from these wonderful panelists.

We will get started tonight with our first speaker, Douglas Kmiec. Doug Kmiec is professor of constitutional law and Caruso Family Chair in Constitutional Law at Pepperdine University. He also served as dean and St. Thomas More Professor of Law at the Catholic University of America and on the law faculty of the University of Notre Dame. He is the co-author of three books on the Constitution — *The American Constitutional Order, Individual Rights and the American Constitution*, and *The History, Structure and Philosophy of the American Constitution*. Under President Reagan, Doug was head of the Office of Legal Counsel, frankly sort of the chief legal advisor within the United States government. He has devoted many, many years to advocating for the pro-life cause, and recently has been engaged in great controversy as a result of his support for President Obama in the campaign.

Let’s welcome Douglas Kmiec.

DOUGLAS KMIEC: Good evening. It’s nice to be with you. I’ve never done anything in eight minutes, as my students can attest, so it’s good that Russ is sitting nearby so that whenever I stop it will be at his command, and whatever mid-sentence it is I will complete during the discussion period.

I have a list of propositions that I think are largely background propositions that I hope will bring us into the more specific parts of the debate and the discussion as it proceed.

The first proposition is that good citizens are expected to obey the law.

The second is that virtuous nations enable their good citizens to pursue religions freedom.

The third is that law is always premised upon someone’s conception of the good, someone’s morality, and, more often than not,
that moral understanding is traceable to religious belief.

Unfortunately, in this temporal exile of ours, the fourth proposition is also true: the good is always disputed, and some mechanism in a pluralistic society is needed to resolve the differences in the conception of the good.

The fifth proposition, in America we decide in most cases to depend upon reasoned argument, persuasion, and ultimately democratic choice, to determine the good.

Now, here is where the difficulty comes in. The church I love, the faith of my fathers and grandfathers, the American Catholic Church, has in modern times often chosen not to accept the democratic outcome as the conclusion to be guided by. Now, in some ways this is unproblematic, and one can find constitutional scholars across the land who dissent from various propositions when the Supreme Court of the United States, for example, undertakes to do something — like Roe v. Wade from my perspective — that is usurping of the legislature authority and structure provided for in the Constitution. So the Church, when it echoes those arguments, is not particularly controversial.

But the Church makes a broader claim than that. It is a claim I am quite fond of, but it has great difficulty to it in terms of application. That is that democratic outcome can never trump the truth, that, as John Paul reminded us in Veritatus Splendor, a democracy not well aimed with the truth of the human person in mind is very well on the track toward totalitarianism. The problem is that truth claims, like other claims of the good, are always disputed.

Then we come to really difficult times in our current Church circumstance, and that is some of our leaders guide us internally by intimidation and sacramental denial, or the threat of sacramental denial, and by practices of shunning, most recently Professor Glendon. She is the shunner, Notre Dame is the shunnee, in case you haven’t been following the stories.

Now, the irony of this practice of not abiding by political outcome is that the modern Church has largely defined itself, not in terms of the conversion of the heart, but rather in terms of its political victories. So that when I was here just a few weeks ago, when your lovely new archbishop, Archbishop Dolan, who seems like a splendid man, was saying his first Mass at St. Patrick’s in the presence of your governor, the
governor having announced his desire to pursue same-sex marriage in legislation that morning, of course the archbishop immediately engaged him the way that you would expect a Catholic to engage him these days — namely, “I will defeat you in Albany.”

Now, some of us remember a church that tries to defeat the disorder in life in the heart, in the pews, in the parishes, in the witness of faith that we give to each other. This is a nice proposition, it’s romantic, it’s one I still enjoy in the evening as I read the blogs.

So my eighth question and proposition is: How well situated is a church that proceeds in this fashion to ask for an exemption from generally applicable laws that we ask others to abide by? I would suggest that it tends to weaken its position in terms of asking for that exemption, and that in itself presents its own problems.

So ask the question: Is our church entitled to exemptions from laws that pose morally problematic exercise? As a constitutional matter, the answer is no, because all constitutional law students learn that Justice Antonin Scalia, for a 5–4 Court, wrote an opinion called Employment Division v. Smith, which basically said even though we used to think religion was one of those first rights in the Constitution and that demanded a special justification from the government when religious practice or belief was interfered with, now generally applicable laws don’t require any special justification whatsoever, even though they substantially burden religious practice. So we can’t count on the Constitution of the United States as interpreted by a Georgetown graduate to protect religious belief and freedom.

How about as a matter of statute? Well, of course, as a matter of statute this is an assertion that conscience should be protected. Now, the word “conscience,” in itself, comes, as I recall, from conscientia, from the notion that one is in concert with someone else over a proposition. So that conscience is not a matter of libertarianism or just simply absenting yourself from the general laws; it’s one that says the good has been found in this consensual way and that conscience should be observed and protected.

So when should conscience be protected then under the statutes? Here are some considerations that I suspect our panelists will elaborate much more soundly than myself.

It cannot be absolute in protection, because we are talking
about conduct, and conduct that has external effects on others. If you are talking about departures from the generally applicable laws, it has to be more nuanced than that.

With respect to institutional claims for conscience exemption, I suggest that there should be a presumption against giving those, largely because they are anti-democratic. By contrast, in terms of individual claims of conscience, I suggest the law should be highly sensitive to those, for among other reasons, as I have been told over and over again because of my sin of “Obama meisting,” that I have a lot to answer for with St. Peter and for whom he works, and some metaphysical consequences of individually engaging in intrinsic evil are more profound for the individual than for the institution, which may or may not continue into eternity. The law should be particularly sensitive about it.

The time is up. I will have a lot to say about the breadth of conscience clauses in the discussion. That’s the teaser. Be excited.

RUSSELL PEARCE: Thank you very much, Doug. I look forward to learning more about the breadth of conscience clauses.

Now we will hear from Marc Stern. Marc is acting co-executive director of the American Jewish Congress, has long served nationally as a leading expert on church-state issues. I think it’s fair to say generally in the Jewish community, he is either the or one of the two leading experts and advocates on these issues. As the American Jewish Congress’s general counsel, he litigated, prepared amicus curiae briefs, drafted legislation, gave public testimony on religious freedom questions for three decades. He is the author of Religion and the Public Schools: A Summary of the Law, co-author of Your Right to Religious Liberty: A Basic Guide to Religious Rights, and contributor to the book Same-Sex Marriage and Religious Liberty.

MARC STERN: First, I would suggest that Russell spend some time worrying about the status of the New York Yankees, which are clearly in greater trouble than our religious liberties at the moment.

Second, as is obvious, I am not an authority on Catholic approaches to conscience in the context of abortion or same-sex marriage. Just to note here quickly that Jewish law has its own set of rubrics, mostly interpreting the biblical verse about placing stumbling blocks before the blind, about how far one can go in the course of
assisting somebody that one knows is going to sin. As a general matter, Catholics take a more stringent view about that than the generally accepted view of Jewish law, which as you'll see will color, I think, some of my positions.

This is an old subject for me. It happens to be my law school note. Little did I know that we would still be dealing with these things thirty-five years later.

It's interesting to see how much the world has changed in thirty-five years. Buried in *Doe v. Bolton*, which is the companion case to *Roe v. Wade*, passing on a Georgia statute that was more liberal than the Texas statute in *Roe v. Wade*, there was a conscience clause, that denominational doctors and hospitals did not have to provide abortion.

Justice Blackmun, no mean advocate of choice, said in describing this statute: “A physician or any other employee has the right to refrain from participating in the abortion procedure. These provisions afford appropriate protection to the individual and to the denominational hospital.” No objection from anybody on the Court. This is sort of taken as a given.

As Professor Kmiec has explained, this is no longer the law. *Employment Division v. Smith* makes it entirely a matter of legislative grace, more or less. If you have a competent legislature, which is a big if — Justice Scalia, by the way, once said in my presence when he was asked what was his favorite, most important decision, pointed to *Employment Division v. Smith*. I said, “Well, gee, I wrote the statute that overruled that.” He said, “We overruled that statute.” I said, “Yes, and I wrote the statute that limited that decision and you upheld it.”

There’s a wonderful story that O’Gaffney tells. He met Justice Scalia shortly after the decision at the airport. Justice Scalia was there with is wife. Ed said to him, “Justice Scalia, how could you do that?” His wife asked, “What did he do?” Ed described it. She supposedly said, “You didn’t!” Nevertheless, we will leave the Scalias to the side tonight.

So there we are. We can talk about the details of the law later, if it comes up. But I want to talk about the larger phenomena that have gotten us from the point where Justice Blackmun, who went to his death thinking that *Roe v. Wade* was his major contribution to American jurisprudence, could take it as self-evident that you could not compel
somebody to participate in an abortion, to the point where many so-called choice groups think there probably ought to be no right of conscience at all, or a very limited one.

I would point to four factors.

• First, the very success of anti-abortion groups, pro-life groups, in getting doctors not to perform abortions, sometimes as a result of sheer intimidation and the availability of RU46, the morning-after pill, and the like. The fact that lots of pharmacies will not prescribe it leaves an unanswered demand that I think Justice Blackmun could not have conceived of. We already talked about the changes in the freedom of religion doctrine.

• As I’ve just mentioned, technological changes that mean that abortion, at least on some views, is available at the pharmacy, not just at the doctor. So that makes a difference.

• One cannot ignore very rapid changes in the hospital marketplace. Hospitals are dying at an incredible rate. The community I live in used to have three; they’re down to one, it’s a Catholic hospital. It probably will not survive. The nearest hospital will be another Catholic hospital. That means the only alternative for people seeking certain reproductive health services will not be in the position to provide it. That changed. There used to be two or three hospitals in a community, and now there will be a hospital in every community or every second community. That has changed radically, and that has added to the pressure.

• Finally — and I think this may be the guts of it — there is a growing gap in theory and in practice between two views of how our society determines morality. One is a view of pure rationality. The other is one that has some room for revealed truth.

Now, in both the Catholic and Jewish traditions, less so in some evangelical traditions, this distinction between reason and revelation is not quite as sharp as it sounds. That is, the methods of Catholic canon law, Jewish law, are intensely rational within their own system. But at some point there is a revealed truth which trumps wherever one might go.

So if you press on gay marriage, to use another topic, at the end of the day religious groups opposed to gay marriage will point to some sort of authority outside of reason, and proponents of same-sex
marriage will say, “In our society the only basis for lawmaking is pure rationality.”

Now, in the 1950s, when I grew up, I don’t think I heard the word “homosexual” as a kid, but everybody would have thought that that was a purely rational ban. That gap which has opened between where reason leads you and the question whether revelation has any place in setting one’s value system is now a huge gap and getting wider day by day. That makes for intense pressure.

The fight over accommodation, conscience clauses, some room for opposing same-sex marriage and the operation of one’s business or a not-for-profit corporation — these are, in effect, not only technical legal questions or questions of legislation, but questions of two views of the good that are fundamental to one’s world outlook.

Another important way of looking at these disputes is that they represent a clash between visions that emphasize personal liberty and visions that emphasize equalities. It is most clearly seen with regard to same-sex marriage, but many of the writers on conscience clauses oppose them as sex discrimination. In fact, there are conscience clauses with regard to end of life, which has nothing to do with sex. There are some things in our society that have nothing to do with sex. There aren’t many, but dying is apparently one of them.

Nevertheless, opponents of conscience clauses find it convenient — and I don’t mean that in a cynical way — and they think of it in terms of sex discrimination; it’s a denial of equality. That is a change that Brown v. Board of Education wrought on our society. Most of us would not change — well, every law professor would change all of Brown v. Board of Education — but none of us would change the result. So that deep commitment to equality plays out in these areas.

Finally, another way of looking at this, which I think is very much on the table, is whether individual autonomy, personal liberty, in a very deep sense means that I make my own moral decisions and you haven’t got the right to question them. This is brought home in a letter to The Times, when there was some editorial about conscience clauses, and one of the representatives of reproductive rights groups said: “Look, a woman makes the decision. Who is her doctor to question that decision?” Well, of course, we could turn the question around and say: “The doctor has made a decision. Who is the woman to question it?”
Nevertheless, this notion of autonomy and personal liberty means that nobody can question my morality is also a very popular idea that is floating around.

Before Russell takes the hook out — so much for accommodation and bending rules — I think the best that can be done is a “live and let live” policy. That is, both sides have to agree that these are debatable moral propositions, there is no way of telling who is right; therefore, to the extent possible, we ought to maximize each side’s liberty. There will be cases where that is not possible. If a woman will die on the table if an abortion is not performed or a hysterectomy is not performed — these are real cases — I don’t think conscience can or should be accommodated.

But beyond that I think there ought to be very broad protection for conscience. I would not draw the line between individuals and institutions that others would.

RUSSELL PEARCE: Thank you to Marc and the other speaker for being so cooperative with our equality rule of eight minutes, which I have been charged with. I have to say it is hard for me to see, Marc, the conscience exemption related to time. But we will have more time to talk further.

Our third speaker is Nadine Strossen. Nadine is a professor of law at New York Law School, was president of the American Civil Liberties Union from 1991–2008, and probably for our era is really the preeminent spokesperson for civil liberties. She has written, lectured, and practiced extensively in the areas of constitutional law, civil liberties, and international human rights. She is the author of Defending Pornography: Free Speech, Sex, and the Fight for Women’s Rights and Speaking of race, Speaking of Sex: Hate Speech, Civil Rights and Civil Liberties.

NADINE STROSSEN: Thank you so much. I’m delighted to be here.

Whenever I speak at a Catholic institution, I really like to cite my favorite example of the ACLU’s frequent advocacy on behalf of Catholics, namely when John F. Kennedy was seeking to become the first Catholic president of the United States, some of you will recall that too many people argued that he should be disqualified because he would be beholden to the Pope, whereupon the ACLU strongly opposed that
argument, and we were accused of being agents of the Pope.

So, following in that tradition, I am especially happy to be here in Pope Auditorium defending religious freedom for Catholics, among others.

The ACLU’s signature mission is to protect all fundamental freedoms for all people, and those certainly include freedom of religion and conscience. In fact, we have been championing much more protection for religious freedom than the U.S. Supreme Court has granted, thanks to the 1990 decision that both of my previous co-panelists have mentioned, authored, ironically, by that Catholic Justice Antonin Scalia. I really have to underscore so much for stereotypes, right?

I have Scalia stories, which I will hold out there as my teaser.

The ACLU also protects some equally fundamental rights that would be jeopardized if freedom of belief or conscience were absolutely protected in all circumstances. Therefore, again picking up with points that were made by both of my previous two panelists, as with all rights, we recognize that freedom of conscience may be limited if, but only if, the limitation is necessary to protect other basic rights or public interest, such as health and safety.

I am going to focus on one important example of this general challenge to accommodate not only freedom of conscience, but also the other rights and concerns at stake, including reproductive freedom, freedom from gender discrimination, and public health.

Specifically, I am going to address so-called refusal clauses in the reproductive health area. These are laws that permit entities and individuals to refuse to provide or cover health services to which they object on religious or moral grounds.

The most recent example is a new regulation that the Bush Administration issued just one month before leaving office. This so-called “midnight regulation” was opposed by leading medical organizations, including the American Medical Association and the American Hospital Association. In this audience I want to stress that one of the many other opponents is an organization with which the ACLU often collaborates, and that is Catholics for Choice. Right now the ACLU is representing a number of health organizations in bringing a challenge
in federal court to this midnight regulation.

This sweeping regulation really rejects the careful balance that prior refusal laws had struck among various individual rights as well as public health concerns. For example, the midnight regulation authorizes health care provider to deny patients access to any health care services to which the provider objects, including even in emergencies. Moreover, it authorizes health care providers to withhold from patients basic information about their treatment options. Worse yet, it doesn’t even require patients to be told that their health care provider is withholding information or services. So, in short, the midnight regulation absolutely protects health care providers’ freedom of choice at the cost of absolutely denying the patients’ freedom of choice.

The ACLU strongly supports freedom of choice and other rights on all sides of the situation. As in any situation involving multiple rights and public interest, we called for an accommodation that will maximally protect all of them, not automatically privileging some over others. That means there are few, if any, bright-line rules. Instead, you have to consider how each such refusal clause is written and also how it applies in any particular situation.

Accordingly, the ACLU has laid out an analytical framework, which you can easily find on our Web site. This framework applies any time a refusal clause exempts any health care provider from what would otherwise be a legal or professional duty to provide the health care in question.

Our primary concern is whether the refusal burdens people who do not share the objector’s religious beliefs. The more the burden falls on such people, the less acceptable any claimed right to refuse treatment.

Critical to this analysis is who is exercising the refusal. So here I apparently agree with Doug and disagree with Marc. The categories of who would be exercising could include a public institution, a sectarian institution, or an individual.

Now, an institution’s refusal is more likely than an individual’s to harm people who do not share the pertinent religious beliefs. When institutions operate for the benefit of the general public — such as hospitals, pharmacies, or insurance companies — their refusal directly affects patients, customers, and employees with diverse beliefs.
When an institution operates in the public world and accepts public funds, it should play by the public rules.

It is a different story, though, when institutions engage primarily in religious practices, for instance, churches and seminaries. Such sectarian institutions generally fold and employ only people who do share their religious beliefs. So these institutions are less likely to impose their religious values on people who don’t share those values. Therefore, sectarian institutions generally should not have to provide services that are repugnant to their beliefs.

Likewise, an individual health care provider should also be entitled to religiously based refusal, so long as it does not impose undue burdens on others. This means that the provider must take appropriate steps to ensure that the patient can still get the care.

All health care providers should always disclose their refusal in a respectful manner — and there are many incidents where this has not happened — and I think it goes without saying, but it does not. They should always give complete and accurate information, make appropriate referrals, and provide care themselves in an emergency or if no alternative is reasonably feasible.

The clock is running, so I am going to cite just a couple concrete examples of how these principles play out in practice.

On the one hand, a doctor, nurse, or pharmacist who cannot in good conscience participate in abortion or contraceptive services should be allowed to opt out so long as the patient is ensured alternative access to these services. On the other hand, though, every rape survivor should be offered emergency contraceptive to protect her from becoming pregnant, no matter where she is treated.

In conclusion, since I have to end now, for any of you who might want more clear-cut answers to these challenging questions, let me quote H.L. Mencken. As he said: “For every complex problem there is a solution that is simple, elegant, and wrong.”

Thank you very much.

RUSSELL PEARCE: Thank you.

I think we are going to have quite a bit to follow up on in the conversation within the panel and then when we open it up to the floor. Thank you very much, Nadine.

Our last panel member is Robert Vischer. Robert is an
associate professor at the University of St. Thomas Law School. He has written extensively on law, religion, and public policy, focusing in particular on the religious and moral dimensions of professional identity. I would have to say from reading his work he really represents the leading wave of new thinking in the legal academy about these issues. He is one of the real brilliant young stars of the legal academy. That allows me to also pitch to you, whether you agree with his views or not, his forthcoming book, which I believe is coming out with Cambridge Press, *Conscience and the Common Good: Reclaiming the Space Between Person and State*, which addresses the communal dimensions in which the dictates of conscience are shaped, articulated, and lived out.

Just a final thing I have to say is that really Robert is offering one of the first really powerful alternatives. Thank you, Robert.

ROBERT VISCHER: I appreciate the invitation to be part of this discussion.

I have never met anybody in my life who says, “I am opposed to liberty of conscience. I think it’s a horrible idea.” But there are very real differences in what we mean when we say we support it, and that is playing out here.

For those of you keeping score at home, if you follow my comments, you will see the sharpest demarcations between what I am saying and Professor Kmiec and Professor Strossen, most alignment probably with Marc Stern. But there is still some room for conversation on all these points.

Did that count?

RUSSELL PEARCE: Yes.

ROBERT VISCHER: That was sort of a throat-clearing exercise.

I think there have been important points made by everybody, persuasive points. There are important public values in both sides of the debate about conscience. That’s why I am hesitant to have the government choose one particular set of values and push the other values to the sideline.

In cases like this, where values clash, I think the default position for a society that takes conscience seriously should be to resist the temptation to use state power to close down the conversation. Increasingly, I think, the default position is: Let’s see which side can
harness state power to its chosen values first.

Traditionally, when we talk about liberty of conscience we are talking about points of conflict between the individual and state power. The paradigmatic case is the conscientious objectors to the military draft, or the Jehovah’s Witness students objecting to being forced to participate in the Pledge of Allegiance.

Increasingly, we are seeing liberty of conscience claims arising at points of conflict between the individual and non-state groups and associations. There are many examples. Just to name a few in recent months: you had the State of New Mexico fining a husband-and-wife photo agency for refusing to shoot a same-sex commitment ceremony; you have California and Massachusetts requiring Catholic charities to cover contraceptives for their employees; you have Massachusetts forcing Catholic charities to include same-sex couples in their adoption services; you have state universities all across the country revoking recognition of Christian student groups that exclude non-Christians from leadership.

All of these efforts by states I would say are well-intentioned, but together they represent a trend that I think will ultimately reflect what is lacking from our conversation about conscience — that is, its relational dimension. By that I mean that the dictates of conscience are defined, articulated, lived out in relationship with others.

Conscience is shaped externally. Our moral convictions have sources. Our sense of self comes into relief through interaction with others. Conscience by its nature directs our gaze outward to sources of formation, to communities of discernment, to venues for expression. If we keep the relational dimension of conscience in focus, it becomes apparent, to me anyway, that group freedom is not always a threat to conscience and individual rights are not always supportive of conscience.

A vibrant liberty of conscience depends on the existence of morally distinct venues in which individuals can gather together and express and live out the dictates of their conscience in relationship.

Let’s take the pharmacist wars for example. On one side, you have folks invoking conscience to justify legislation that would enable individual pharmacists to refuse to fill prescriptions on moral
grounds without suffering any negative repercussions, whether state penalty, employer reprisal, third-party liability. On the other side, conscience is invoked to justify legislation that would enable individual customers to compel pharmacies to fill any legal prescription without any hassle or delay or inconvenience.

My view is that, instead of choosing sides, the state could allow all sides in the pharmacist controversy to live out their convictions in the marketplace, allowing pharmacies to craft their own particular conscience policies in response to the demands of employees and customers. Rather than making all pharmacies morally homogeneous via state edict, the market allows the flourishing of plural moral norms in the provision of pharmaceuticals. Even a pharmacy can serve as a moral venue, as we’ve witnessed the rise of several small pro-life pharmacies, especially on the East Coast, in recent years.

Diametrically opposed consciences can simultaneously thrive in the moral marketplace. So you replace the zero sum contest for the reins of state power with a reinvigorated civil society, allowing the commercial sphere to reflect our moral pluralism.

In the pharmacist debate, what we have on the customer side is you have the cause of reproductive rights evolving from one of negative liberty, that is, seeking to prevent the state from criminalizing abortion or contraception; to an extreme form of positive liberty, asking not only to have the full range of legal pharmaceuticals available at every pharmacy, but, in the words of Governor Blagojevich, “to provide those drugs without any hassle, any delay, without any lecture.”

The problem in a society that values liberty of conscience is that positive liberty claims equate legality with universal availability. The fact that the state does not forbid a drug’s sale is taken to mean that every licensed pharmacist must sell that drug to every customer legally entitled to purchase it. This equation renders the moral convictions of pharmacists and the moral identities of pharmacies irrelevant. Customer access is an important public value, I’m not denying that, but the elevation of universal customer access at every pharmacy is not costless to impose.

On the provider side, what do we have? On the provider side, the desire to exercise moral agency has led pharmacists to seek not just a negative liberty, to protect themselves against coercive state
requirements that they dispense certain drugs, but a positive liberty, to restrain employers from punishing them for their workplace conduct, including conduct that defies the employer’s own moral identity. As with customer access, there are costs to what I would call an absolutist defense of a professional’s conscience.

If we care about the pharmacy’s potential as a moral venue, we not only have to limit the power of individual customers, we also have to limit the power of individual pharmacists. But I do not by any of this mean to offer some recycled libertarian talk on the culture war. The government is a market actor and they have a role to play, primarily to address market failure.

There are two market failures. One is a lack of information, so they could force a pharmacy, for example, that wants to stake out a distinct moral identity to publicize that identity to customers so they know about it. The second is a lack of access, and, especially in rural areas, that might be a very real concern. I’m not saying the state shouldn’t have a role in mandating access where there is an access problem, but access cannot be trotted out as the bogeyman every time you have a morally distinct organization that wants to stake out a claim that defies what the majority’s norms are in that stake.

What I am trying to do is reorient the broader conversation to what is at stake when we talk about conscience.

The conscience-driven practices of providers are not inherently less legitimate than the conscious-driven needs of customers, provided that the goods and services the customer seeks are available elsewhere.

Just to put it in stark terms, if Tom Cruise wants to open a pharmacy that does not sell antidepressant medication, it is one thing to let him try and realize that the market is not going to support that sort of pharmacy. It’s another thing for the state to close him down from even making the attempt. That’s what’s at stake when we talk about the liberty of conscience.

Thank you.

RUSSELL PEARCE: Thank you.

Hopefully, I can make some amends with my fellow lawyers here as we now move to some conversation within the panel. You are going to have an opportunity, as Peter said, on some of the points that
Let me start with Doug and your invitation to talk about the breadth of conscience clauses. I wonder if as you do that you would be willing to situate it perhaps in the pharmacy wars that Rob introduced us to. Give us your theoretical proposal and then give it a specific application. And if that doesn’t fully work, the pharmacy wars and also some of the same-sex marriage examples.

DOUGLAS KmieC: I’ll do both of them at once.

I actually think Rob’s proposal is a helpful one. But let me start out with the scope of the conscience claim.

My partner, Marc, mentioned that in many cases the Catholic claim for conscience is quite broad, and one of the reasons it is quite broad is that we have very loose conceptions floating around of what it means to materially cooperate with evil.

When you are dealing with the scope of claims for conscience, one wants to pay attention to what exactly is being claimed in terms of exemption. It is one thing for a doctor to say, “I am not going to participate in the performance of an abortion, an intrinsically evil act.” It is another thing, it seems to me, for either a hospital or an individual doctor to say, “I won’t give notice in advance of the fact that I don’t participate in these intrinsically evil acts” or “I don’t make references to other doctors who do” or who don’t counsel with regard to these subjects.

Oftentimes there is the claim on the part of at least some within our faith that if you engage in referral, or even if you give notice of these things, that you are materially cooperating because you are facilitating somebody acquiring an abortion service. In the context of a pluralistic society, where religious beliefs differ about the morality of abortion, it seems to me that that is too broad a claim to make.

I was going to suggest for my own way out the way in which things are currently sought to be arranged and then some general thoughts. So let me try and do that.

The solution that is often offered is one that requires the person declining to give notice and to make referral. By and large, I think that is a good compromise. Now, it’s not a perfect compromise, because you still will find some rural remote places where there won’t be anybody to refer to. At that point, you have the uncomfortable reality of
someone — obviously, the most powerful claim is if there is an emergency need, but also just the claim of not being able to have access to health care by virtue of where they are located. The notice-and-referral option doesn’t really solve that problem, it just mitigates it.

The notice-and-referral issue doesn’t totally satisfy everyone, however, because it still puts a burden on the patient to then go searching, oftentimes with a medical condition, for somebody else. But nevertheless, I still think it is a reasonably good opportunity.

That leads me to my general observation about scope, which comes from Thomas Aquinas, that we ought not to be trying to enact every virtue or prohibit every vice.

You invited me to talk about same-sex marriage, and since that is a big topic in California, let me talk about it just momentarily.

In California the Supreme Court of California about a year ago found a fundamental right for same-sex marriage in our constitution. Not all of us could see it there beforehand, but they found it, because they are wise people. They also found as a matter of justice that homosexual persons have for a long time been discriminated against and oppressed, and therefore fall within, according to the justices of our state supreme court, a “suspect classification,” namely that if you are going to draw a law in such a way that you classify them as a class and single them out, you have to have a compelling justification to do that. That was a landmark thing for the California Supreme Court to do.

It is something that is, of course, at odds with Catholic teaching, because Catholic teaching says, of course, same-sex marriage is not permissible. But also it says that homosexuality is wrongfully disordered and homosexual conduct in wrongful. This is Catholic teaching.

So what happens after the Supreme Court of California issues this ruling? Well, the Catholics get together with the Mormons and they pool their resources, which means that there are a lot of resources being pooled, and they put on the ballot so-called Proposition 8. The wording of Proposition 8 says: “The State of California may only acknowledge a relationship between a man and a woman as a marriage.” Now, the constitutionality of that has just been challenged.

What does that mean? Some folks behind Proposition 8, I am certain, thought it meant that they were abolishing any state
recognition of a same-sex relationship. But of course that's not what it says. One of the things that has happened in the argumentation in California is that people have pointed out that what the wording of Proposition 8 does is merely say that the word “marriage” may not be used by the State of California to describe any relationship other than that between a man and a woman.

It does not say the State of California cannot officially recognize same-sex relationships. And, as a matter of equality, in terms of the California Supreme Court’s ruling, that is exactly what they have to continue to do, in my judgment, because the proposition didn’t revoke that, and there is a debate as to whether or not you could even revoke that, because it would effectively be targeting a discrete class for a discrete disadvantage. Under the federal Constitution, that is not normally permitted. That wasn’t an issue litigated in our state because it wasn’t addressed in our state because it wasn’t addressed in the briefing.

But notice what it does. It basically allows the State of California, if it wants, to get out of the marriage business, because it then can treat all citizens and all couples alike, basically giving them something called — well, give it a name: “quark” or “civil union” or “domestic relationship,” or whatever you want to call it, something that Hallmark would approve of — the state can give that license for purposes that the state has, making sure that everyone has equality before the state, before the law. And at the same time, since the word “marriage” has been put off limits, it now can be where it belongs, in the synagogues and in the churches and in the mosques, a couple that in addition to wanting the state benefits wants the richer, fuller understanding of, say, Catholic marriage, in all of its unitive and procreative beauty, can in fact belong to the church in a faithful way and ask for the church to bless its relationship.

That seems to me to be something of the model — and I’d be interested to know if Rob thinks it’s something of the model of the market that he is talking about — because it simultaneously allows the state to accomplish its civic order purposes, where there is consensus, and at the same time gives the fullest amount of religious freedom for churches and synagogues, etc., to engage in their religious practice.

RUSSELL PEARCE: Let me give Rob an opportunity to answer that, and then I want to follow up on same-sex marriage with
Marc and some of the work he has done around exemption in that regard.

Go ahead, Rob.

ROBERT VISCHER: The limitation of my marketplace model is in the context where someone doesn’t have an exit option. So under my model the strongest argument an opponent to same-sex marriage would have is if they could demonstrate that child rearing by same-sex couples is less optimal than child rearing by opposite-sex couples. I am not expressing an opinion on whether they can demonstrate that or not, but that would come at my model by saying: Kids don’t have a market of choices, so, just as the state should express preferences on family forms, if there was some evidence that family forms mattered in the same-sex versus opposite-sex couples as to child rearing — not to a lot of the other arguments, but as to child rearing — that could come, even under my model, that the states should have a role. That would be the limit.

RUSSELL PEARCE: Okay.

Marc, to take this in the direction of those states, other than where California perhaps may be going, but those states that now have —

MARC STERN: California can go wherever it wants.

RUSSELL PEARCE: Wherever it wants, right.

Those states, most recently Iowa and Vermont, that by law provide marriage for people of the same sex — you have written and spoken about the challenge of conscience exemptions under those circumstances. I wonder if you could address that.

MARC STERN: My own position, as laid out in a publication targeting the Orthodox Jewish community, is that in the relatively short term, say ten years, same-sex marriage will be universal, this is a lost battle in our culture, and that one ought to seek broad protection for conscience. Again, there is no way of resolving authoritatively whether same-sex marriage is a good thing or a bad thing morally, and there ought to be, as you say, a marketplace of ideas, of competition, on these moral principles. That requires not insisting on uniformity in one’s acceptance of same-sex marriage. Again, of course, that cannot be absolute.

I would be fairly generous in carving out exemptions. I would not allow big, impersonal corporations. The example I use in the
book is if the parents of Paris Hilton operate a hotel and some same-sex couple showed for their honeymoon night, even assuming that anybody who brought Paris Hilton into the world could with a straight face claim a conscience exemption to anything, I would not allow the Hilton hotels that exemption.

I feel differently — it’s hard to quantify — about a family-owned bed and breakfast. There are parallels in our fair housing laws for mom-and-pop — I’ve forgotten who, but somebody — Mrs. Smith’s Boarding House, I guess, is what the name of the exemption is.

DOUGLAS KMIEC: Murphy.

MARC STERN: I was trying not to call attention to —

DOUGLAS KMIEC: It’s an Irish thing.

MARC STERN: Exactly where one draws the line is not an easy thing. If one thinks of religion, it is not so long ago, even in this city, where denial of access to commercial opportunities, business opportunities, employment opportunities, kept large numbers of my ancestors in poverty, and certainly before they came across the ocean that was true.

So there needs to be some balance between the large commercial enterprise and the more personal endorsement. I think the photographer at the wedding, where it’s a small, two-person operation, poses a different question. The printer of invitations, if it’s one guy in a letterpress store, is different than The New York Times trying to keep itself afloat by also printing invitations. They may only be able to print invitations and get people to buy them the way things are going.

I want to take on directly, though, a point that Nadine made, and I think it is an important one, which is the bugaboo of burden. The fact is there are burdens whichever way one turns. People who advocate for narrow views of conscience typically ignore the burdens they impose, and perfectly happily so, on others. There is no escaping the problem of burden in these discussions. So to treat burden as if it were some sort of trump card that ends all discussion and ends accommodation it seems to me to end all discussion.

For example, Nadine spoke very forcefully about New York’s and California’s requirement that institutions, other than the Mother Church and maybe a parochial school, provide contraceptive coverage in their insurance policies for their employees. And she talked that the
burden on people who work for Catholic hospitals who might not be Catholic and do not share the Church’s view of contraception, as I do not.

But the fact is we know what the burden was in that case on individuals. It was about $1.50 a month. It’s buried in the record in the case in New York. There was an alternative policy that the State offered that any employee could have bought for $1.50. So all the talk about denying people access to contraception and great burdens and denials of equality came down to about $1.50. If that is enough to defeat conscience, then conscience isn’t worth very much. It’s not worth $1.50, apparently, a month.

The ACLU has single-handedly, more or less, stopped the enhancement of employee protection in the workplace in a variety of contexts outside of reproductive freedom, insisting that they will not enhance the protection beyond undue hardship. Now, undue hardship sounds like a lot, until you know that the Supreme Court said it meant more than a de minimis burden. More than de minimis burden has plausibly been contended, so far rejected by the courts, by employers that the burden of record-keeping of allowing somebody not to work on a religious holiday is an undue burden. There are actually claims like that made. So far rejected, but not very hard.

In the hospital context, in the contraceptive context, if you have to bring in another employee for five minutes, if a customer is kept waiting for five minutes, if a customer doesn’t like it — and there is actually a case I helped lose involving Costco with earrings. Costco said, “Oh no, our customers would get all bent out of shape if any of our employees have earrings.” While I was litigating this case I shopped at my neighborhood Costco. Everybody had earrings in there and nobody seemed to bother. But the employer successfully claimed that that would be an undue hardship.

So you can’t use burden as a conversation stopper and claim you are for conscience.

On the other hand, there are cases in which pharmacists have literally ripped up prescriptions. Now, there may be fewer of those that you would know by reading the blog talking about the same case a thousand times, but there are such cases. They rip up the prescription, they won’t give it back, because, after all, contraception or the morning-
after pill, which some people regard as an abortion drug — they are not going to facilitate you having an abortion, so they are going to rip up the prescription. That is a real burden, and that is a burden that we simply cannot accommodate. If somebody feels that strongly, then it is true they cannot be a pharmacist in a general pharmacy. They will work in a mental hospital, I suppose, and hand out antidepressants, because there you won’t have the contraceptive problem, unless you work for Tom Cruise, in which case you can have a problem. But then, if you’re working for Tom Cruise conscience is the least of your problems presumably.

So there are no absolute rules. But I think we need to be very careful about how we use particular concepts as if they were self-evident and conversation stoppers, because in the real world they don’t work very well. They are a polite way of saying, “No, we’re not going to accommodate that conscience. We think you are wrong. We want to suppress that idea.”

RUSSELL PEARCE: Turning to Nadine, I think this calls for giving you an opportunity. But I want to add — I hope you don’t mind — and if you get overwhelmed, which I don’t think you will, with the extent of the questions, come back to me and I’ll add to it.

In addressing Marc’s comments, the notion of the extent of exemption where you would see it, for example in the area of conscience exemption in same-sex marriage rights, the question of burden generally, what about the issue of Catholic Charities in Massachusetts refusing to provide adoption services for same-sex couples? Would that be something that would be acceptable in your view were there notice and referral, as you discussed earlier?

And there is a similar issue, again also related to the question of burden, that is being discussed just now with the new head of the U.S. Global AIDS Office, on the question of whether religious organizations that are providing anti-AIDS efforts but oppose condom use should be permitted to continue to provide non-condom services because of their conscience objection to condom use?

NADINE STROSSEN: Let me just say in response to Marc, first, two basic points.

Number one, I am glad that he thinks that the ACLU is as powerful as he apparently thinks, that we could single-handedly stop
something. That is absolutely not the case. In fact, the standard that Marc relied on is a standard that has been set out since 1964 under the 1964 Civil Rights Act, Title 7 of which prohibits religious discrimination in employment and requires employers to engage in accommodation unless the accommodation would impose an undue burden. Marc gave the Court’s definition of a burden, not the ACLU’s definition. We have never argued —

MARC STERN: Excuse me. There is an Act now, a proposal, to strengthen that standard. The ACLU — I’ll repeat what I said — has single-handedly stopped that legislation from going forward unless we carve out reproductive health services and homosexuality. That is the stated position of the ACLU. I can tell you from the members of Congress I’ve spoken to and their staffs that it is the ACLU’s objection that has stopped the bill from proceeding.

NADINE STROSSEN: Well, it is an inaccurate description. I commend everybody to the position that I set out and that the ACLU set out. It is in, among other places, “Accessing Birth Control at the Pharmacy,” the latest incarnation, but it is a consistent position we have taken going back to 1972, when the first federal conscience law was passed, which the ACLU supported, the so-called “Church Law.” That, no pun intended, was named after Frank Church.

The standards are remarkably similar, if not indeed identical, to the scope of an acceptable refusal clause that Doug laid out. I took those notes. For those of you who were taking notes during my presentation, you would have noticed identity, that there has to be notice, that there has to be referral, that there has to be information, and in an emergency situation and in another situation where there is no alternative, the service itself has to be provided.

I have never argued that burden should be a trump any more than conscience should be a trump, which is why these situations are so difficult, and why, by the way, we lay out criteria and give specific examples of how you apply those criteria in different factual circumstances.

I’m not going to debate Marc on the facts. If the fact were that the asserted burden was a trivial financial expense, I would completely agree with him that that should not trump an assertion of conscience. But that was not the finding of the supreme courts of either
California or New York in the Catholic Charities case.

About Catholic Charities and the Massachusetts case that Russ mentioned, there is a very important factual question here which has kind of come through in a number of the remarks that were made, I think most importantly Rob’s. That is, to what extent are these organizations really private associations, including private religious associations, and to what extent are they, rather, quasi-public organizations?

By the way, that does tie into another big debate that we haven’t yet mentioned, which is the whole faith-based funding issue. I know many devout religious leaders who have opposed getting government money to provide social services because they recognize that once you accept government money you subject yourself to government regulations.

Off the top of my head now, I’m going to make a generalization — there are probably exceptions to every generalization, but right now I can’t think of an exception to this proposition — that if you are a truly private association and you are eschewing government benefit above and beyond the basic police and fire protection, which I believe should be provided to any private institution no matter what, then you can do whatever you want, then you are a truly private association. But if you are going out there and receiving or accepting taxpayer funding, if you are holding yourself out as an organization that is providing services to the public and reaping all the benefit thereof — and I think this ties in with some of the remarks that Doug was making at the beginning — if you are actively involved in the political process, then you can’t really have it both ways. You can’t get the benefits of being a private association — that is, the freedom of choosing with whom you will associate, with whom you will not associate, and so forth — but at the same time be asking taxpayers to provide the funding.

Was there another question that I haven’t answered?

RUSSELL PEARCE: I think that really from your perspective would cover both Catholic Charities and the AIDS.

NADINE STROSSEN: On the marriage point, I’m so amazed at what Doug said. The first time I heard that proposition was just about a month or so ago, maybe a month and a half, when his Dean, Ken Starr, and I were having a discussion, shall we say — we called it a discussion,
not a debate, and it really was an interesting discussion — before the National Religious Broadcasters Association. This was just a couple of weeks before Ken argued before the California Supreme Court in support of Proposition 8, and the ACLU was on the other side of that. 

Ken suggested this alternative of let’s get the government out of the business of marriage altogether. From a civil liberties perspective, I couldn’t agree more with that. I think what the government is in the business of doing is providing certain benefits in recognition of certain socially beneficial relationships, including the benefit of raising kids, as Rob referred to, and the additional association, all of the symbolism, is something that is up to religions, and I believe that is something that should be protected as a matter of free exercise of religion, and the government could bow out altogether.

RUSSELL PEARCE: Rob, I’m going to ask you to respond, especially on this issue of exemptions for organizations that receive public funding, but anything else you want to address. Then, before we go to questions from the audience, I want to ask a question about race and conscience and Bob Jones.

Rob, if you could quickly, if you have something you want to address.

ROBERT VISCHER: There is a lot here.

One, part of this is a definitional question of what you mean by “public” versus “private.” There is a connotation with private that you are sort of inward-looking — it’s a seminary training pastors — and you are just having a conversation with yourself or helping members. Most religious communities that I know of would consider themselves intensely public, in the sense of committed to the common good.

They, I think, would draw a distinction between public and governmental. To the extent we start conflating the terms “public” and “governmental,” I think we have really privatized conscience and privatized religious identity, sort of saying: “Okay, if you’re operating on the margins, that’s fine. Just stick to yourself. Don’t come into the public sphere, though, because then you give up everything.”

On the other question of whether these religious organizations are really hat in hand saying, “We want money, we want money,” you’ve also got to be cognizant of the market they are operating in. If every other provider is getting government funding, it is very hard
to be viable in that market if you have no government funding. For a health care institution or a higher educational institution it is virtually impossible.

As government’s role in the social services sector expands, I don’t know if that is a realistic — and, if possible, I would love for religious organizations to stay away from government money — assessment, given the current market conditions of government funding.

Let me say one more thing. Marc reminded me of this. In the Christian Legal Society (CLS) context, where they have been excluded from campuses of public universities, they are not taking any government money. They are just trying to maintain their religious identity on campus. Because of campus nondiscrimination norms, the fact that they want their officers to be Christians means that they no longer are eligible to be an officially recognized student group. I think the ACLU has supported public universities that kick off CLS.

NADINE STROSSEN: No.
MARC STERN: Yes they have. They just did in the Ninth Circuit.

NADINE STROSSEN: That’s not correct, Marc.
MARC STERN: It’s exactly correct.
NADINE STROSSEN: No, it’s not correct.
MARC STERN: The report is publicly available. It is true. That’s what the ACLU did.

NADINE STROSSEN: It’s not correct.

Speaking of the Ninth Circuit, there is another case that I made a note about in response to somebody else’s point — I guess it was Doug — about same-sex marriage in California. There is another case in the Ninth Circuit where the ACLU has strongly defended the rights of religious free speech for students. In this case it was a high school student who came to school wearing a T-shirt that had a Bible verse that conveyed some opposition to homosexuality. Interestingly enough, the student wore this T-shirt on the day after the school had sponsored a pro-gay rights or tolerance event. This student was disciplined and told that he had to take off his T-shirt. To my horror, a panel of the Ninth Circuit, including judges who usually support freedom of speech, said that this constituted harassment and violated the hate speech and anti-harassment policy of the school.
Somebody else made a similar point, that often what we are talking about here is a conflict between individual rights of freedom of speech, freedom of conscience, freedom of religion, on the one hand, and so-called equality rights, on the other hand. That is something where I personally and the ACLU have taken very unpopular positions, consistently sticking out from the many other progressive allies.

The two books that I wrote that Russ referred to in his introduction were exactly on that issue. We have consistently opposed hate speech codes against arguments that they are necessary to promote true equality, because we think that individual conscience should prevail. And likewise with respect to these current issues.

RUSSELL PEARCE: Can I ask the race question?

While I do that, I will ask the folks who are collecting questions to bring them up to me.

I am going to start with Rob. This also goes to your market as well. The first question is whether Bob Jones, commonly read to say that you can have a conscience exemption even for religious belief in racial discrimination or segregation, or at least being read on the blogs today from that point of view — in thinking about that, should we treat race differently? So that's the first question. Is the way in which race and issues like same-sex marriage, abortion, gender rights, where there are some statutes that permit segregation in schools for example — is race something that should be treated differently?

Rob, especially with regard to you and the market, how would a conscience objection to racial equality fit into your approach?

NADINE STROSSEN: Can I say something about that, Russ, before? Because the race point is important, I am really interested in hearing Rob’s answer.

But this is a tax case, so it goes back to the point that I made about public benefit. The Bob Jones case involved — and I wrote the ACLU brief in the case many decades ago — whether you could get taxpayer financing through the exemptions and deductions for a racially discriminatory racial institution. It did not hold that if Bob Jones gave up its tax benefits it could no longer engage in the discrimination.

ROBERT VISCHER: Great question. If I have not alienated anyone in the audience, I am about to do so now with my answer.

First, I think Bob Jones was the wrong outcome. I think
this gets to the core of how you view the role of the state and tax exemptions. I don’t think tax exemptions amount to a government decision to subsidize things they find publicly worthwhile. I think tax exemption is one way we express the fact that we are a society with a limited state role — to take it back to Catholic social teaching about subsidiarity, or if there are any Calvinists in the room it’s related to sovereignty — the notion that the state does not license or approve certain associations but can defer to them, except to the extent to which they pass certain boundaries without which a common life is impossible.

So I think the answer to Bob Jones is to boycott and to protest. It is not to start carving out areas of tax exemption law, where you say, “We really, really dislike what you are doing here, so you lose the exemption.”

What you see now is people already are starting to call, especially in the academy — which might be disconnected from the real world enough that we don’t worry about it — but in the academy people, anyway, are calling for eventually putting religious institutions to the same test of Bob Jones, only on same-sex marriage instead of interracial dating, which is what Bob Jones University’s policy was that got them in hot water with the IRS.

I think that you have to talk about race for some of these issues, and I would distinguish race and other issues based on the historical context in which it is arising. Part of it is timing. If you see how far, how fast, we have come on gay, lesbian, bisexual, and transgender rights in the last twenty years, it is astounding. It should be no wonder that there is a significant portion of the population that is saying, “Hey, wait, I’m not onboard yet.” That has to be a factor.

It doesn’t mean that there’s some bright-line formula for saying, “Okay, now is long enough.” What I mean by this is the conversation has to include a component of saying, “You know what? This is a conversation that is still in its early stages.” It doesn’t mean that the state doesn’t reach out to support marginalized groups, but it does mean that we allow greater space for dissent.

And then, on race, what we were trying to do with the civil rights laws, I think the Jim Crow South was hard-wired for the subjugation and exclusion of African-Americans in a way that we don’t see in the hot-button debates today. You have to draw some distinctions
and let the conversation play out longer.

RUSSELL PEARCE: Marc and Doug, do you have any response to that?

DOUGLAS KMIEC: I think the ACLU has had a consistent position, and there are many in the community who have taken the position, that a tax exemption is a tax subsidy. There is a whole academic literature.

NADINE STROSSEN: Economists take that position too.

DOUGLAS KMIEC: Some economists take that position. It is not solely a question of economics, though. It’s a question of values. Do we think that the government not taking something that belongs to me is subsidizing me or simply leaving me where I was?

But the hypothetical about same-sex marriage is not really a hypothetical. New Jersey has already taken away one tax exemption because of refusal to participate or to allow facilities to be used for same-sex marriage. The leader of the gay and lesbian rights movement in New Jersey has openly called for taking away the tax exemption of all groups.

Frankly, given the position that treats tax exemptions as tax expenditures, which is the doctrine that is used, it is hard to see that there is really any way to stop it, particularly on the California Supreme Court’s equation, using the same standard as you would use for race.

Doug Laycock, who is one of the leading academic lights, maybe the leading academic light, in the church-state field, when we debated this at a private conversation some years ago, quickly threw out, “Well, we fought a civil war about race, we haven’t fought a civil war about other things, and therefore race is different.” I don’t believe that that will hold.

The original litigation about tax exemption, which led to the Bob Jones University decision, arose out of the segregation academies in the South. It quickly migrated by IRS regulation, without a statute, to require affirmatively every tax-exempt school to demonstrate that they were integrated. That caused a great uproar under Jimmy Carter. We were told at the time — fortunately, Jimmy Carter was not reelected — that the next thing they would go after were single-sex schools on the grounds that they were separate and therefore not equal.

So these ideas have been around for a long time. They raise
some very important questions about what we think, not only about conscience, but really about whose money it is when the government chooses not to tax.

I should note, however, before this breaks down to a normal liberal/conservative argument, that the chief proponent of the idea that a tax exemption is a subsidy, the standard citation is to no less than Chief Justice Rehnquist, and he has written it several times. So this is an idea that does not break on traditional liberal/conservative lines and is not only about race. It is about a whole series of decisions about government authority to withhold quote/unquote subsidies from people or ideas it doesn't like.

RUSSELL PEARCE: I don’t know about the audience, but my head is spinning.

So I’d like to go back to the basic structure where we started. Remember, we started with the proposition that good citizens obey the law and that a virtuous nation, or a nation that wanted to be a virtuous republic, enabled its good citizens to follow its faith.

We also had the proposition that when we enact laws we are enacting some conception of morality into that law and that people disagree about what morality means and what should be enacted into the law. Then the question is: What happens when they do disagree?

Remember my proposition was that in a democracy we depend upon the democratic outcome — except that the claim of our church is that democracy does not prevail in some circumstances.

What I have been listening for in this discussion is: What are the circumstances where we should permit our church, or any church, to claim that a democratic outcome, a generally applicable law, cannot be asked of them, that they are not subject to that generally applicable law?

What is the criteria by which we would allow for that exemption, and where not?

I think what I have heard this evening is that this is a question that has largely been answered pragmatically: on the one hand, there is a recognition of the religious claim, without questioning the religion’s claim as to whether or not it is a valid or not, whether it is actually a belief or part of the belief system of the particular faith, weighed against the fact that there are nonbelievers, or different believers, who want access to a particular service. We have not
questioned the religious belief, so that sort of comes in as a matter of evidence, without being cross-examined; and then, secondarily, we have said, “We will try to accommodate this desire for the practice in as pragmatic way as we can, namely we will require the employer to have somebody without that particular religious objection available on the staff to provide the service, or we will require that the particular objector give notice of his or her unwillingness to perform the service and then some referral.”

Now, that’s a pragmatic answer. Is it a principal answer? Is it an answer that is sufficient to know when a particular religious claim of conscience should overcome the democratic outcome?

I am still of the belief that it is probably the best we can do. But I also in the discussion want to raise at least some concern that the first proposition, that we don’t examine what is a religious claim, I think is inevitably right, because we don’t want courts second guessing what is and is not a religious tenet. But then, that requires those who are asserting the conscience claim to keep the conscience claim as well considered and as close to the posit of the faith as required.

Think about it. As I understand the teaching of the Catholic Church, it is against the use of artificial contraception. I am not sure I immediately see the leap that says: If you are an employer in the marketplace, and you hire both Catholics and non-Catholics, an insurance requirement that contraception coverage be available is immediately automatically against the teaching of the Catholic Church.

I would at least like that question to be discussed and debated for the proposition that when you hold yourself out as a public institution, a public charity, and you employ people of many faiths and you serve people or many faiths, do you necessarily want to push the envelope of your religious teaching to its farthest point, recognizing that that puts a strain on the democratic system? Every time you do that you are saying, “I dissent from the democratic choice that was made by my fellow countrymen.”

Now, that’s okay to say, because faith is that important and we should allow that. But we should also be recognizing that those claims have to be reasonably stated.

NADINE STROSSEN: Can I make two brief points in response to Doug, with whom I again find myself eerily in agreement?
We’ve always debated each other in the past and I don’t think we’ve ever had this much agreement.

Number one, Doug, you speak of not having to defend your religious belief. I just want to make very clear that we are talking not only about religiously-grounded beliefs but also moral beliefs, that conscience can arise not only out of religious faith, at least in my view. They should all be equally privileged.

The second point I want to make is more in the sense of unity among all of the panelists. Despite all of our disagreements — I can’t say this strongly enough — we are giving infinitely more protection to freedom of conscience, freedom of religion, freedom of belief, than the United States Supreme Court has done for twenty years, all of us.

You know, for all of Marc saying that the ACLU is single-handedly the villain here, we are arguing — you know, Marc, we worked with you on the Religious Freedom Restoration Act and its successors, as you well know.

MARC STERN: No. You stopped the second one.

RUSSELL PEARCE: Let’s let Nadine finish and then Marc can respond.

NADINE STROSSEN: We didn’t go as far as you wanted to go —

MARC STERN: No. You —

RUSSELL PEARCE: Marc, Marc, I’m getting upset.

NADINE STROSSEN: — but it was significantly further than the United States Supreme Court.

Marc has raised one of the successor statutes, which did break down precisely on questions of conflict between certain civil rights laws and individual conscience. That said, it wouldn’t have even been an issue before the U.S. Supreme Court, which would not have even recognized a religious freedom claim in those situations at all.

RUSSELL PEARCE: Marc, your response?

MARC STERN: I’m surprised to hear Nadine say that if it is a purely private organization they ought to have greater scope. I can show you half a dozen cases offhand in which the ACLU has taken the position that purely private, non-funded religious organizations — for instance, Catholic Church schools — cannot fire teachers who get pregnant out of wedlock because that is sex discrimination. The ACLU
said, long before *Employment Division v. Smith*, there is no religious liberty claim there.

I think on clashes between equality and liberty, to my mind, the ACLU has gone over entirely to the equality side.

NADINE STROSSEN: And that’s why we oppose hate speech codes, that’s why we oppose [inaudible] pornography, that’s why we oppose campaign finance restrictions.

MARC STERN: Well, there are some exceptions. That’s controversial. And John Powell and others in the ACLU, including your current executive director, early on said he would not protect speech that denigrated minorities. That’s a matter of some debate. You can look at the *Truth* opinion in the Ninth Circuit. The ACLU, as the court clearly says, was opposed to allowing a private religious club to have Christian-only officers. That’s what the court describes the ACLU’s position as.

However, I really don’t want to linger too much on that, even though it sounds like I do.

I do want to go to one of Doug’s points, which for me, as a First Amendment litigator who is himself a practicing member of his faith and is frequently consulted, usually after the fact, by rabbis who have made grand pronouncements and put us in the position of defending the indefensible, that there really is a gap here between — I’m going to speak very broadly — members of the clergy, essentially, and people who function in a more political pluralistic world.

Understandably, members of the clergy — again, this is overbroad; it includes people it shouldn’t include; it doesn’t include other people it should — tend to want to construct an ideal world and live in an ideal world and carve out a space where they can live ideally.

But we don’t live in an ideal world. So there is this need to balance interests. It comes naturally to lawyers, because that’s what we do for a living more or less, aside from sending bills, we balance interests for a living.

It does lead to a clash. I will tell you that what gives me sleepless nights sometimes, which I think is a good thing, is the recognition that one needs to balance interests, that the religious claims that are made on us don’t exist in a vacuum in our pluralistic society. That is clear. It has been a hallmark of what I have said to the people who come to me for advice. Lots of people don’t come to me anymore for
advice for that reason, because there are people who will take absolutist
claims and push them.

The difficulty for me as a believer then is: Where do you
draw the line? What principles are worth fighting for? Where do you say
“this far and no further?” That is — I speak here very personally — an
intensely difficult problem.

I must say — and this I have said publicly and in print in
my own religious community — I get precious little help, I find — and I
sense from what Doug is saying that he gets not a whole lot more in the
Catholic community — from members of the clergy, who just seem to be
utterly unaware of the difficulty.

I will say that there are lots of people on the secular side of
the ledger who see only reason as they perceive it and everything else is
nonsense and just ought to be ignored. That is not an understatement
either.

But speaking about the problem that Doug and I are
addressing, it is a very difficult problem. I don’t know how to address it.

I will tell you one funny story, and with this I will close. I
got a call from a woman, a doctor, who held a good job at the National
Institutes of Health. She wanted Fridays off. Why did she want Fridays
off? Because there is an old Jewish custom that women bake bread for
the Sabbath on Friday night.

I said, “You know, you can bake it Thursday night, you can
buy it at the bakery Friday morning, you can make the dough Thursday
night and bake it Friday morning before you go to work.”

She said, “But I asked Rabbi X” — whom I have always
regarded as a fool; I know the man — “and he said, I am absolutely
right.”

I said, “Well, (a) you need another lawyer because I’m not
going to represent you. And (b), more importantly, you really have to
find another rabbi.”

[Laughter]

DOUGLAS KMIEC: Russ, I just think this point is so vitally
important because —

MARC STERN: You can also find another rabbi.

DOUGLAS KMIEC: I can find another rabbi and the bread
will be ready.
This notion of creating an ideal world through law is a forfeiture of the faith and the power of the faith. It is directly contrary, it seems to me, to Thomas's teaching, to the Thomastic teaching about not seeing to enact every virtue or prohibit every vice. The human condition is just simply not capable of that and it is more variegated than that.

But it doesn't mean you give up on the transformation of the culture. It just means you don't expect the Supreme Court of the United States to be the chief catechist. You expect yourself to in fact embrace the Scripture and the Catechism, and through homiletics and through good works and your own personal witness and what happens in that parish community. That's where the ideal world gets constructed.

In terms of the conveyance of the significance of marriage and these other teachings on contraception, you don't need to stop the coverage of insurance for contraception for people who have no moral objection to it in order to convey to Catholics the significance of Humanae Vitae. Now, you are going to need a lot of help conveying the significance of Humanae Vitae, and people have been working on it for a long time. But you are not going to get help from this passage of the law.

NADINE STROSSEN: I actually have made that very same point with respect to I think related issues that I have already mentioned, such as hate speech codes. I remember quoting a statement from Mark Twain that relates to the fact that — you know, where do these laws come from? They come from lawyers, and our legislatures are dominated by lawyers. Mark Twain said, if the only tool you have is a hammer then every problem looks like a nail. I think lawyers are so used to dealing with problems through laws, it is really refreshing to take a non-legal approach occasionally.

RUSSELL PEARCE: Okay. Thank you.

We have had a lively interchange there. I have obviously taken a different view, in the interest of the information and entertainment.

We are running out of time. I know I promised audience questions. I am going to take two that I am going to put together. I'll then open to anyone who wants to take these.

One is a question about what would happen to tax
exemptions, presumably if New York State provides for freedom to marry for lesbians and gays. Would Orthodox synagogues that refuse to marry same-sex couples lose tax exemptions?

Related, could Catholic schools or Orthodox yeshivas refuse to employ teachers in same-sex marriages where such marriages are legal?

I don’t know if anybody wants to comment.

MARC STERN: Let me take a shot at that.

The narrow technical holding in *Bob Jones*, which was not a church but was a college, was that the exemption in the Tax Code reads something like charitable, education, social, public benefit, and so on. The narrow legal question was whether “charitable” applied to everything else in the list.

But churches are listed separately in those lists. So it is not clear. The main holding of the court, the statutory holding in *Bob Jones*, is the word “charitable” limits educational; so you’ve got to be charitable, which under old common law meant you were broadly available to everybody.

But churches are separately exempt. So at least as to the first question — and that’s true under the New York Constitution — the churches are separately listed. So you would have an argument, as least as far as the first part of *Bob Jones*, that the statute requires you to be open to everybody, that would be gone.

You then have, based on the *Green* case, which is the Mississippi case involving the segregation academies, that tax exemption amounts to government funding, and the Constitution forbids government funding of segregation, and by extension of churches that don’t accord equality to people who have same-sex attractions to each other.

We really don’t know if the Court would reach the same result today. The Court has cut back greatly on what it considers government action over the last thirty years. The *Green* case arose out of an effort to protect the desegregation of the South, because the segregation academies everybody understood were really public schools in drag, if I may use the phrase, and this was simply a way of protecting the Court’s jurisdiction. So we really don’t know.

Now, as to schools, the *Bob Jones* analogy would be pretty
close. I wouldn’t bet one way or the other on the outcome there. I don’t think it’s likely in the next couple of years. But if some of the arguments that have been advanced to knock out Proposition 8 are accepted, then anything that draws lines along lines of sexual attraction creates a suspect class, and therefore is presumptively unconstitutional. Then it’s a fairly easy case in California to try and knock out exemptions for institutions that discriminate on that basis.

As to hiring, there are two exemptions. There are a federal employment discrimination law and state employment discrimination laws.

The federal statute has a total exemption for religious discrimination in hiring by religious institutions. That means at least a school can decide not to hire a Catholic if it is a Jewish school or a Catholic school can decide not to hire a Jew. Whether it means that a school or a religious institution could refuse to hire somebody because they didn’t comply with the religious teachings of the institution is an open legal question. At least in the cases involving single mothers who want to teach in Catholic schools, who become pregnant while they are teaching out of wedlock, the courts have generally read the statute to mean only religious discrimination (not Catholics, not Jews) but not noncompliance with religious tenets.

Now, if you are teaching a religious subject, there is another set of cases that says that the state can’t regulate at all who you hire as a minister. So a church is entirely free to say, “We won’t hire blacks or women as ministers” and they can’t be sued under the employment discrimination laws.

New York State statute is on its face a total exemption for religious institutions to do anything they want in hiring if it is motivated by their religious needs. However, the court of appeals has added a gloss — which I think is nowhere in the statute, but they have added it — in a case involving St. John’s. St. John’s had a fellow who was Dean of Student Life. He was Jewish. They decided they wanted a Catholic to be Dean of Student Life and they fired the Jewish Dean. He sued. The school claimed that the statute allowed them to do anything to advance their religious needs. The court said: “No. You have to prove that having a Catholic Dean of Student Life advances the Catholic mission of the university.” I don’t know what happened to the case thereafter. It’s
not important. You have an appellate decision. What really happens in the world is of no significance to anybody.

It is somewhat up in the air. There are a couple of unreported decisions since. That was ten or fifteen years ago. We really don’t know the answer.

That’s a long-winded description of where we are.

RUSSELL PEARCE: Any others want to address those two questions?

NADINE STROSSEN: As Marc was talking about the government dictating what beliefs can be taught in religious schools, that again made me think beyond the issue of tax benefits to direct subsidies, namely the voucher programs that the Supreme Court upheld 5–4 to parochial schools.

The statute in that case and in other voucher programs does mandate not only strict nondiscrimination requirements to parochial schools, but also what they may teach and what they may not teach. That is again why I don’t understand why people with deeply held religious beliefs want that government money, if that is the price tag that comes with it, that you are told what you may teach and what you may not teach, even if that is inconsistent with the religious beliefs that made you want to create these parochial schools in the first place.

RUSSELL PEARCE: Rob?

ROBERT VISCHER: Just one quick point.

On this one I agree with Nadine. Just to clarify the tax-exempt status, in school vouchers you are asking non-state actors to fulfill a vital public function with public funds. I don’t think that is unconstitutional, but it is understandable that the state is going to put some strings with that money.

Tax exemption is not about the performance of a public function. In some respects you can view it as putting limits on state power by saying “We’re going to give the people an opportunity to direct their funds how they wish to pursue the common good as they see it.” This is an area that the state can’t step in.

But I agree school vouchers are different.

RUSSELL PEARCE: Doug, do you want to have a last word?

DOUGLAS KMIEC: Sure.

My last word is this. There has been this alarm and
hysteria in the land that President Obama, “the most anti-life president in the history of the universe,” as some bishops referred to him, sits up at night thinking of ways to eliminate conscience clauses from the law so that he can impose legal obligations that offend people’s religious sensibilities.

If nothing else from this afternoon, you recognize, I think, how thick the law is with considerations of exemption and the various places in which it arises. It arises in the context of the consideration of the application of the Bob Jones case and whether or not a tax exemption can be given to an institution that discriminates in particular ways because of their faith.

But just specifically on health care, one of the things that really mystified me about the recent public discussion, where President Obama did suspend President Bush’s, as Nadine put it, midnight regulation, he suspended it because this is a president who likes to read — go figure — and he likes to know what he’s signing.

When the American Medical Association and the American Hospital Association said, “You ought to really look at this because it seems to us that this is categorically way beyond protecting religious belief and extending it to circumstances that perhaps you didn’t contemplate before” — and again, this is an interpretive question, so there is debate here.

But the one thing it wasn’t doing was repealing the Church Amendment, which has been talked about, which provides for those who receive federal funds not to be mandated to engage in sterilization or abortion practices contrary to their religious belief; it didn’t repeal the 1976 Public Health Act, which extended those protections; it didn’t repeal the Weldon Act of 2004 where entities lose their federal funds if they start to require institutions or individuals to engage in health practices that are contrary to their religious belief.

NADINE STROSSEN: First Amendment on medical schools.

DOUGLAS KMIEC: Nadine and Marc and the others on the panel could give a comprehensive list.

The value of this panel, if it conveys nothing else, it conveys how important it is for us when we have these discussions to have the discussions as close to anchored in fact, rather than political —

MARC STERN: That’s ridiculous. Just stop right there.
[Laughter]

RUSSELL PEARCE: Thank you very much for this wonderful and enlightening discussion.

Now I’d like to turn the microphone over to Peggy Steinfels.

MARGARET STEINFELS: I want to thank you all for coming out this evening, the hottest day of the year so far. And poor Rob Vischer has just been so unfrozen from Minnesota, and we are grateful he came all this way.

I want to call attention on our flier we let you know that next September — September will come — on the 15th we are having another panel, called “Consuming America: What Have We Done to Ourselves?” We hope we will see all of you there.

Again, please thank Russ and the panel. Thank you.

[Adjourned: 7:59 p.m.]