

THE BROOKINGS INSTITUTION

SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY:

A RECONCILIATION

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P R O C E E D I N G S

MR. GALSTON: Let me begin by briefly introducing myself. I'm Bill Galston, a Senior Fellow in Governance Studies here at Brookings. And I'd like to welcome you to the fifth event in the second year of our hit series, Governing Ideas. One more year and we'll go into reruns, I'm told, and I'll begin collecting residuals, which I'll distribute to all of the panelists.

The idea behind the Governing Ideas Series is that there is a whole lot of detailed and important policy analysis that goes on in Washington, D.C. from a number of different disciplinary points of view. This is important and vital work. If you're trying to figure out which way to move on the budget, or tax policy, or cap and trade legislation, you name it, that kind of detailed disciplinary, technical work is absolutely essential.

It's the thesis of the Governing Ideas Series that this kind of analysis takes place in a context which is often tacit, unexpressed, undiscussed. It is a context of theories about the way the world works, a contest about the constitutional order within which policy-making takes place, and also a context made up of history, culture, morality, and religion. And it is the purpose of the Governing Ideas Series to address topics that implicate this broader context within which so much discussion inside the beltway and outside the beltway takes place.

There is a large theme in that connection that the Brookings Institution, the Governance Studies Program, Brookings, in partnership with the Hoover Institution out on the West coast has been investigating for a number of years. That topic is political polarization. The widespread impression, which in our analysis turns out to be backed by fact and history, that our political system is more polarized along partisan and ideological lines than it was when I was a boy in the 1950's, or a young man in the 1960's.

And one dimension of that increased polarization, of course, is around cultural issues. Compared to the 1950's and the 1960's, our political agenda is now crowded with cultural issues which have forced their way back into the public arena.

And that raises a very important question. Everybody knows that when you're talking about how Senate conferences, where the House says four billion for a particular line and the Senate says six, it's not too hard to see where the compromise might come from. And if you're talking about a big federal program, where the question is, how is the money to be distributed among the states, should it be done by population, should it be done by poverty rates, should it be done by a variety of other criteria, it's usually possible to find a meeting of the minds, it's not always split the difference, but there is a quantitative compromise that is in view, if not always within reach.

But when you get to these contested cultural issues, the following question emerges: is morally serious compromise possible, that is, can people who represent very different points of view, and who take those points of view seriously as a moral matter, is there a way that, consistent with moral reflection and moral integrity, people who disagree on such issues can come together? That is not a rhetorical question, it is one of the leading questions for American politics today.

Well, I don't need to tell you that one of the hottest and most widely and deeply contested of these issues is gay marriage, and more broadly, the relationship between public law and public regulation on the one hand, and the gay community on the other. And as you probably know, two very well known scholars and public intellectuals, Jonathan Rauch and David Blankenhorn, stepped forward, bravely, in the lead op-ed in the *New York Times* a couple of weeks ago to try to answer my non-rhetorical question in the affirmative.

And we are now gathered to probe the terms of this morally serious compromise, first, to hear what it is, and to hear a defense of the compromise by the two authors, and then to hear a range of perspectives on what they have I think bravely and productively put on the table, not just for the people in this room, but for the country as a whole.

Let me introduce them briefly, then introduce our panelists in the order in which they will make their presentations. I'll then tell you a little bit about the procedures for this session, and we're off to the races.

Let me begin with my colleague in Governance Studies, Jonathan Rauch. He's a senior writer and columnist for *National Journal*, a correspondent for the *Atlantic Monthly*. He's the author of a number of highly regarded and justly highly regarded books. His latest book, not entirely by accident given the topic of this panel, is entitled *Gay Marriage, Why it is Good for Gays, Good for Straights, and Good for America*. The wonderful thing about that title is, for the lazy, it spares you the burden of actually reading the book. But for the morally serious, I can recommend it highly as the most compelling single book ever written on the question, in my opinion.

I've known Jonathan for a long time, and I've known David Blankenhorn for about the same length of time. He's the Founder and President of the Institute for American Values that most of you have probably heard of. It's a non-partisan organization that focuses on strengthening families and civil society.

David, in addition to being a major public intellectual, is a widely acclaimed author. His three most recent productions are *Fatherless America*, *The Future of Marriage*, and an incredibly timely tome entitled *Thrift: A Cyclopedic*. David has an unerring nose for the next

big thing in American culture, and he published this just as the savings rate went to minus one percent, and it's now surged up to four percent.

MR. BLANKENHORN: Because of the book.

MR. GALSTON: Yeah, absolutely. I find it quite amazing that when times are good, Americans can't save, but when they run out of money, suddenly they can save, go figure. Okay. Now, the first of our three discussants is Professor Robin Fretwell Wilson, who got her JD and BA degrees from the University of Virginia, where at the School of Law, she served on the Editorial Board of the Virginia Law Review. She clerked for the United States Court of Appeals, for the Fifth Circuit. She is a specialist on family law and also health law. She is the editor of three volumes, one of which, *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, is conveniently on sale in an eminently affordable paperback edition at the back of the room. And if you're really nice to her, I bet she'd even sign copies after this event is over.

Fourth is Nathan Diament, someone who is very well known to the Washington community, because he is the Washington, D.C. based Director of Public Policy for the Union of Orthodox Jewish Congregations of America, where he develops and coordinates policy research and initiatives on behalf of the traditional Jewish community. He's an honor graduate of both Yeshiva and the Harvard Law School, and he is a ubiquitous and tireless participant in policy debates and in congressional hearings and testimony in Washington.

And our fifth presenter is Lara Schwartz, who joined the Human Rights Campaign as Senior Council in 2002. I'm sure just about everybody knows what the Human Rights Campaign is, but it is a very, very prominent research and advocacy organization dealing with questions of equality in general and equality for gays, lesbians, bisexuals, and transgender people and their families in particular. She is involved in public advocacy and also legislative work in that area and is a highly skilled lawyer and advocate, and we're very grateful that you made time to join us, as well.

So without further ado, here's the way things will proceed. Each of the presenters, starting with the co-authors, Jonathan Rauch and David Blankenhorn, will have between five and seven minutes to make an opening statement; likewise, for the commentators.

I then have some questions prepared for the panel. But I'm at least as interested in the flow of conversation among the panelists, and so we'll do that first with me having as light a hand on the reigns as possible. And after the cross talk phase is completed, we'll go to questions and comments from the audience, and we should be done a little bit after 11:30. So without further adieu, Jonathan.

MR. RAUCH: Thank you, Bill; thank you all for coming. We're all really here for the discussion, so I'll try to just put a few thoughts on the table as to why I did this. I'll speak for myself and not for David, who's following me on the panel. Obviously, thanks, it's a tremendous honor to be up here with this group of people.

I am a long time advocate of gay marriage, since the mid-1990's, and for most of those years I have been opposed to civil unions and other versions of what I call marriage-light, so it may seem a bit surprising that I would join with David Blankenhorn on a proposal to do exactly that.

Why compromise and why now? Well, to begin with, I used to think that civil unions would damage marriage by giving heterosexual couples an easy out, but we have civil unions in a number of states now, and heterosexual couples don't seem to be very interested in them.

More important to me was, as we began to see the emergence of actual gay marriage in one state and then civil unions and so on, I became much more sensitized to the hardship suffered by gay and lesbian people because of the denial of any kind of federal recognition of their relationships. There are over 1,000 critical components of recognition that flow from the federal side of things, not least important of which is immigration rights. You cannot visit your partner in the hospital room if you cannot even get into the country where the hospital is located. I know so many gay couples that are actually living in exile because one of them cannot get into the United States. I could go on and on in that vein, but it became more and more obvious to me that some sort of federal recognition would be a huge day to day improvement in the lives of ordinary gay people.

I also started to worry particularly in the wake of Proposition Eight, the initiative battle to revoke same-sex marriage in California, that we are headed toward a scorched earth, abortion-type debate, where one side says "Gay marriage now, forever, and nothing less," the other side says "Gay marriage never, not on one square inch of U.S. soil," and you get one of these polarized arguments which drags on for decades, and that seemed to me undesirable for a lot of reasons which we can get into later.

Finally, it seems to me, and this is something about which many of my gay and lesbian friends disagree with me, but they'll say, you know, just wait ten years, this won't even be an issue anymore -- you know, young people, they're all for gay marriage. I don't see things that way. I think that the consensus around the meaning of marriage in this country has broken down, it's fractured, and I think it's going to be decades -- not years, not centuries, but decades -- before we have anything like a broad national consensus on what marriage means.

If you ask people the best kind of question about marriage, do they favor gay marriage, or civil unions, or nothing, a three-way choice, it's basically a third, a third, a third, a very divided population.

If you look at people age 29 and younger, yeah, more of them favor gay marriage, 40 percent instead of 30 percent, but it's really not all that different, they're also very divided. So my working assumption is, we're in this for the long run.

So my goals in trying to set out a compromise proposal and deal with this is two things: first, to make good policy, which I think the Blankenhorn/Rauch proposal would do, but second, to try to model a different kind of discussion that David and I, by reaching across this divide -- and we take very different views on gay marriage, per se -- might be able to contribute to changing the tone of the discussion to something a little bit more constructive.

What our proposal does, in brief, is tie federal civil union recognition to legislation that would provide religious organizations with an opt out so that they don't have to recognize same sex couples. More specifically, if there is a state which has civil unions or gay marriage, and there are five of them now, the federal government would recognize those as federal civil unions for federal purposes if, and only if, the states would pass legislation protecting religious groups from having to recognize these relationships, and the federal government would, similarly, pass its own federal level religious conscience exemptions.

What we're doing here, the structure of this uses federal civil unions as bait to get the states to change their policies. It does not set up a separate federal civil unions program, something some people on my side don't like.

I'll let others talk about the disadvantages. It's pretty obvious why the advocates on both sides would view this as a second, third, fourth choice, or totally unacceptable. But I'd like to mention a few of what I think are the advantages of what we're trying to do here.

The first is that I think this kind of proposal increases the comfort zone on both sides of the debate. That's hard to do, increasing the comfort zone on both sides. But for gay and lesbian couples, this would allow us many of the perquisites which go with federal recognition. We would no longer be legal strangers to each other in our relationships in the federal government's eyes, and that's a big quality of life improvement. On the side of faith based organizations, this gives them some comfort that the gay marriage debate can go on, some states will have gay marriage, some will not, but it will not be rammed down their throat, and I think that will give them some comfort. Which I think leads to a second advantage, which is, I think this kind of discussion will increase goodwill. I think it will lower the temperature of the culture war, which this country badly needs.

A third advantage is that this leaves the locus of decision-making to the states. We don't set up a separate federal program, and I think that's important to letting this debate continue.

A final and fourth, to me, important advantage of this -- some people think it's a disadvantage -- but the proposal David and I make makes no effort to foreclose the whole debate, to end the discussion, to say here's the final settlement. It says, you know, we're going to be debating marriage for years to come, but let's do what we can in this particular sector without trying to foreclose the rest of the debate, and that I think is what we accomplish with the kind of proposal we set forth.

MR. GALSTON: Thanks, Jonathan. David.

MR. BLANKENHORN: Well, good morning. I want to thank Jonathan Rauch for his leadership, his vision, and his friendship.

MR. RAUCH: Thank you.

MR. BLANKENHORN: Now, if this proposal of ours has any value, and, of course, the jury is out on that, I think the main value will be in helping to create the possibility of a different tone in the discussion, perhaps even a new direction in the discussion.

And, of course, there are many excellent, wonderful people participating in this gay marriage debate now, but I do think, as Jonathan suggested, that, you know, too often -- frequently the discussion is largely defined by its most zealous voices. Very often the discussion, what should be a discussion, consists of a kind of endless loop repetition of sound bites.

And most disturbingly, for me, there seems to be a general assumption on both sides that the other side is motivated by bad faith. So if there's to be a little bit of a shift in the tone and direction, for my money, it would be toward a conversation where what is prized is less the purity of position taking, less the clarity of station identification, and more the goal of some kind of compromise and possibly even reconciliation, where there's a little bit more debate, a little bit more conversation, rather, as opposed to debate.

And if I had a litmus test for this new direction or whatever one would call it, it would be this, that if you are against gay marriage, you can, at the same time, concede that there are good reasons to be for it. And if you're for gay marriage, you can concede that there are good reasons to be against it. That would be my test for myself and I hope for others that may wish to participate and even help to lead, more than Jonathan and I perhaps, a new, or a different emphasis in the conversation.

And I think there are some good signs that have emerged since we wrote the piece, and I think a lot of people want this shift. And while it may be true that this conflict in one way or another is simply going to continue until one side or the other prevails, largely on its own terms, it still seems possible to me, and the goal much to be desired, that not just one compromise, but perhaps a number of compromises might be possible along the way, each aimed at lowering the temperature, if only a little bit, and each aimed at bringing us closer together, even if it's only a little bit closer together.

In fact, some proposals that are out there percolating now may turn out to be better than the ones that we proposed. And Jonathan ably mentioned some of the strengths of our proposal, let me mention, in the spirit of a different kind of conversation, let me just add to what Jonathan said by mentioning what I personally view as a couple of weaknesses in our proposal. And I'm speaking only for myself here.

The first is that our proposal may suggest that opposition to gay marriage is necessarily or kind of logically or inextricably religious in nature. It's the religious people who, for religious reasons, don't like gay marriage, and therefore, we have to give them this exemption from participating in the humane ways of the larger polity.

Now, marriage is a natural human institution, it exists in all known human societies, and it is not an outgrowth of Christianity, Monotheism, or religion in general, it's just not. And while there are plenty of people of faith who are against gay marriage, I would not want our article – I would not want our proposal to be seen, as I think it could be seen, as somehow it's just the religious people who have a problem with gay marriage, that is a weakness.

The other thing has been mentioned. You know, in our proposal, civil unions are sort of relatively close to marriage without the name of marriage, and I've never thought that was a particularly good idea. I would be much more in favor of civil unions that are a little bit different from marriage.

Ryan Anderson and his colleagues at Witherspoon sent me this thing a couple of weeks ago, they're proposing a kind of civil unions idea that would broaden the category of civil unions to include a wider range. So I'm saying that there – I'm just saying that there may be proposals better than ours, but all of them will have weaknesses, just as ours does, all of these proposals have weaknesses.

So the final point I would make is really, well, why do it at all? Why compromise on a principal? Why let down your guard? Why dilute the purity of position taking? Why do it? And I think it's because there is a big principal at stake, and the principal is that we have to

figure out a way to live together, that's the principal. And so whether I like it or not, the people who want gay marriage have gone out in the public arena and they have persuaded a lot of people that it's a real good idea, they have persuaded a fair number of people that it's one of the premier ethical, moral issues of our generation, and they've won the allegiance of a lot of Americans to this, and therefore, it seems to me that people like me who are on the other side have to think about the question of, how can we live together.

And so, you know, I take second place to no one in my passionate, personal opposition to gay marriage. A lot of times people in debates and discussions, they'll come up to me afterwards on the other side, and often they'll tell me about their kids, and they'll say, you know, this is really personal for me, and I usually say to them, I understand, I understand that it is, but what I'm actually thinking in my head when I say I understand, I'm saying, of course, it is, as it is for me.

As a father of three, as a husband, as someone who spent 20 years trying to put in a good word for marriage as a social institution, I take this very personally. And so – but I do think that there is perhaps another principal at stake which ought to outweigh that for me at this time. That's a hard thing to say, that ought to outweigh that for me at this time. And that principal is that we have to find a way to live together. We're Americans, and we're diverse people, and we value and treasure that as part of the strength of our society, and rather than – even as we continue to argue this issue out, I think Jonathan is right, this is probably a long term discussion, with strong feelings on both sides, but can we take this principal that we have to try to live together and look for ways, maybe better than ours, I think ours is a good one, I think the world will be a better place tomorrow if we were able to make this change.

But maybe there are others. But the point is, can we take this principal of, we have to learn to live together, and make that what we prize a bit more than what has been prized in the debate up until now. Thank you.

MR. GALSTON: Thank you, David. Robin.

MS. WILSON: I want to begin with some of the blowback that we have seen with respect to the proposal, the Blankenhorn/Rauch proposal, which is that the devil is in the detail, so what exactly does a robust religious liberty exemption look like. And I want to start by describing something that we've already referenced, but haven't fleshed out, which is what the moral clashes over same-sex marriage have looked like. And then I want to suggest to you that our experience navigating similar clashes over abortion can actually point the way to live and let live solutions, as David and Jonathan both I think sincerely want.

So the moral clashes over same-sex marriage have ranged from lawsuits over refusals to serve same-sex couples, to cancelled social services contracts, to firings and resignations, and I'll give you just two specific examples.

On the heels of Massachusetts' same-sex marriage decision, Goodrich, the State's Justices of the Peace were told by the Governor's Chief Counsel that they must "follow the law whether you agree with it or not", and anyone who turned away same-sex couples could be held personally liable for up to \$50,000.

In New Jersey, a tax exempt church affiliated group was sued by two lesbian couples who wanted to hold their commitment ceremonies on the group's boardwalk pavilion. When the group refused, New Jersey pulled the group's tax exemption under a public program, public lands, Green Acres program. But the key for me is that local taxing authorities followed on, and they yanked the group's exemption from local property taxes like we pay on our houses, and then billed them for \$20,000.

Now, for me, these clashes differ in one important way. The first involves access to the status of marriage, so that the refusing party could potentially act as a choke point on the path to marriage. And the second, we have a group that's in the stream of commerce, but that group cannot actually block the couple's access to the legal status of marriage.

And I believe that this different impact should matter to how we think about the question of whether there is a duty to assist or a right to refrain, in other words, whether we're going to hand out a religious exemption.

Now, these clashes over same-sex marriage actually follow a familiar pattern which was charted over 35 years ago, thank you, with respect to abortion. So in 1973, the U.S. Supreme Court's decision of *Roe v. Wade* actually precipitated a significant demand for abortion, and almost immediately the question arose, do health care providers have a duty to assist a patient who now seeks an abortion and to which she has a constitutional right, or can they simply say, no, thank you, not me. Now, it's not surprising that family planning advocates jumped in with both feet, and they worked very hard to extend the rights that were given to *Roe*, namely, the right to have the government stay out of one's reproductive decision.

And they wanted to extend that negative right into the positive entitlement to another person's help, and they did this with private lawsuits brought against doctors and facilities which urged, at least with respect to the facilities, that the receipt of public benefits or the free ride on taxes by the state or the federal government meant that a hospital that refused to perform an abortion acted under the color of state law. And these lawsuits were very

successful at the front, until Congress stepped in with the first health care conscience clause called the Church Amendment.

That legislation prohibited any court, or local government, for that matter, or federal government, from using the receipt of certain federal monies as the basis for making a private hospital or individual physician perform an abortion or a sterilization service that was, for them, against their religious convictions or moral – moral convictions or religious belief. Now, today nearly every state in the United States has carved out a space for medical providers to continue in their roles without participating in acts that they find immoral. Now, many of these statutes balance both the legitimate access concerns that women do have with the religious concerns of the providers.

Some, for instance, say that the moral objections of physicians must yield to a patient's need for an emergency abortion, but that they do not need to yield to the patient's desire for an elective, non-emergency one. In other words, these statutes show that conscience clauses or religious exemptions need not be winner take all propositions; instead, they can be calibrated to balance competing interests, and I think that's been missed in the discussion about robust exemptions.

Now, I believe these statutes provide a road map for finding a live and let live solution to the moral clashes over same-sex marriage. So how would that work? First, we can get in front of these collisions and tackle them proactively, like we do with objections to abortion. We can make potential objectors disclose those objections ex ante in writing, which would give state authorities and private employers time to react to the objection ahead of time and perhaps the staff around it. For example, a state's clerk's office could put in place a procedure that allows the objecting clerk who doesn't want to fill out the paperwork for a same-sex couple simply to step aside without the same-sex couple even knowing that it ever happened.

Now, it's true that in rare instances it is possible that permitting a religiously based refusal may create a hardship for the couple who's seeking a marriage license or a reception hall. When would that occur? It would occur if every clerk in the registrar's office or every reception hall in a town had an objection. It might also occur in really remote areas.

So imagine, for example, that a couple lives like in nowhere Montana, a million miles from anywhere else, and that there's only one town clerk who will actually be able to complete the paperwork for that couple. Now, by refusing to assist the same-sex couple, that clerk acts as a choke point on the path to marriage and effectively bars the couple from the institution of marriage, which in the hypothetical that I've posed, state law has just said the couple is entitled to. Now, in this instance, because a real and palpable hardship would occur, I

would argue that the religious liberty of the objector must yield. But outside this case of a hardship, where there are other clerks who would gladly serve the couple, and no one would otherwise lose by honoring the religious conviction of the objector, then I believe we should do so. So what do we do with other objectors who are not choke points, for example, the baker, the photographer, the wedding advisor? If you read Miss Manners on Wednesday, apparently there's a huge industry of people making web sites. All kinds of folks are going to be asked whether they want to assist same-sex couples.

Now, I have a harder time saying that every vendor in the market place must serve every person who presents, just as I have a hard time saying that every doctor in the United States must be an abortion provider when Planned Parenthood alone has 850 clinics across the United States to provide these services to women in need.

Now, in part, I am less willing to trample on religious beliefs here, because I believe the hardships are likely to be fewer; there are simply more vendors in the market place. But I also believe that the service being denied is not nearly as important as blocking a person's access to the legal status of marriage. Moreover, the right that is given in same-sex marriage decisions is the right to have the government stay out of your private business. It is not necessarily the right to the assistance of others. And then finally, as a practical matter, when push comes to shove, many providers will exit the market rather than provide what is, for them, a morally objectionable service. And in my view, this is and has been a loss for the community. And I can give you examples in the questions.

So even though I believe the hardship rule protects the interest of both sides when it comes to state representatives, I also believe that any rule would be better than no rule at all. Governments are not going to get to be neutral in these clashes over same-sex marriage, and between religious liberty on the one hand and the rights and quality needs of same-sex couples on the other.

But if these governments do not weigh in soon, it is likely that we will see a stream of litigation, like we did after *Roe v. Wade*, and that would be a shame.

MR. GALSTON: Thank you, Robin. Nathan.

MR. DIAMENT: Thanks, and good morning. Thanks to Jonathan Rauch and to Brookings for the invitation to participate, and my compliments to Jonathan and David for their proposal and for catalyzing this important conversation. Jonathan and David have made a proposal, and it has to do with marriage or unions. My basic reaction to their proposal is this, it's premature to consider a marriage proposal because we have not yet dated. What I mean by that is that it's entirely correct that we desperately need a serious discussion about the interplay

between religious liberty and gay rights, but the major conflict which David and Jonathan say they seek to avert through their proposal is there because we've leapfrogged in America the smaller issues and gone directly to the ultimate and most fraught question of marriage.

And I'm not suggesting we can put the genie back in the bottle, but nonetheless. What do two people do when they date? First they need to see if they can agree on what movie to see, whether to go for steak or seafood, and maybe whether one of them opens the door for the other. But more seriously, dating is not just about those decisions, it's also when two parties to a relationship build mutual respect and trust upon which a long term relationship might be built.

There are many issues where religious liberty and gay rights interact that have little or nothing to do with marriage or civil unions. And so far, in those contexts, not only has mutual respect and trust not been built, but just the opposite. There's a good deal of distrust or mistrust between the religious liberty and gay rights camps, and I want to give a couple examples. For decades, the proponents of gay rights have had the Employment Non-Discrimination Act, ENDA, introduced in Congress. The bill would prohibit private sector employers from discriminating in hiring and firing and promotions, et cetera, on the basis of whether or not a person is gay, and for more than ten years, and it contained a very straight forward exemption for religious employers, which read, "This Act shall not apply to a religious organization", period.

On the basis of that very simple exemption, which would ensure that churches and synagogues and parochial schools and other religious institutions would not be liable under ENDA, on the basis of that exemption, my organization, along with the U.S. Conference of Catholic Bishops and a number of other prominent religious organizations, were neutral on the ENDA bill. We neither opposed nor supported the ENDA bill.

After the 2006 elections, when the Democrats took majorities in Congress, the ENDA coalition, presumably thinking that they had a freer hand in what they could do and could achieve, redrafted the ENDA bill. And I was told by a reliable source that there were many gay rights groups in the ENDA coalition that wanted to eliminate the religious exemption entirely.

While that drastic view did not prevail, what they did do was rewrite that one sentence exemption into three paragraphs of legislative lingo, whose net effect was to cast a lot of doubt and uncertainty on what kinds of religious institutions may or may not be exempt and for what positions, et cetera, and which ones would face a choice between their religious principals or a federal lawsuit.

So after my organization and the Catholic Bishops Conference and the Seventh Day Adventist, et cetera, engaged with congressional leaders and informed them that our previous neutrality to the ENDA bill might have to change unless the exemption was restored, we succeeded in that result, and the exemption was restored to a broad and acceptable exemption.

But what did we learn in the religious community from this experience? Those of us in the religious community who previously had expressed no objection at all to the ENDA bill and to this gay rights measure, that given their druthers, and thinking they could get more of what presumably they really want, many, not all necessarily, but many in the gay rights activists community did not respect religious liberty or religious institutions' rights.

A second example, having nothing to do with marriage, a couple of years ago in Chicago, a condominium tower, a condo association, passed a rule saying that no tenants could post anything on their doorways in the apartment building hallway, with no exceptions for Christmas wreaths or those nice little decorative door post ornaments, which inside of them contains biblical versus that observants view as a religious requirement to have on the doorway to your home.

A Jewish condominium owner asked for an exception for her mezuzah and was refused, and like all good Americans, sued. Last summer, the case made it to the Federal Appeals Court in Chicago, the United States Court of Appeals, and a majority ruled – that court ruled over a very strong dissent that even though the Federal Fair Housing Act bars religious discrimination in housing, since the condo association's rule did not explicitly prohibit religious items, right, it was just a general rule saying you can't put anything on your doors, that it was not religiously discriminatory, and the tenant could not win a right to post her mezuzah on her door, even though, from her point of view, the condo rule basically said "no Jews, thank you very much."

So we drafted legislation to clarify that under the Fair Housing Act, when the Fair Housing Act says no religious discrimination in housing, it means you can't have a rule prohibiting people from posting religious symbols, and we were very careful to put in a qualifying provision saying, of course, there would be exceptions if the posting of the symbol would damage property, or harm persons, or somehow cause a nuisance, or create some other kind of undue hardship, sort of leaving a broad out.

We had the bill introduced by the, dare I say, very liberal Congressman Jerry Nadler of New York, and very conservative Congressman Trent Franks from Arizona,

Republican, and we were, in fact, on the fast track to have it put on the House floor as a suspension bill, which is what they do with non-controversial bills.

That was until an organization in town, not Lara's, an organization in town with gay rights high on their priority list weighed in with House leaders saying that despite the exceptions that we put into the bill for nuisance or harm, the bill might protect a person's right to post a sign on their door that would read God hates gays. Now, our legislation was, thus, derailed, despite the fact that its lead sponsor, Congressman Nadler, and many organizations supporting the bill had impeccable gay rights credentials, and that, moreover, that that scenario was not viewed as remotely likely either under the terms of the legislation or just in reality.

Again, what this episode reinforced, among many, is a lack of trust towards gay rights advocates who went out of their way to block a bill of minimal importance and impact to the gay community, but of greater concern to a faith community.

So I believe Jonathan and David's proposal is creative and courageous and has already generated useful conversation about the interplay of gay rights and religious liberty. But I also think before the two camps, even those in the religious and gay rights camps who might be willing one day to forge compromises on the ultimate issues about marriage and unions, even before those parties can get to their proposal, we need to date. We need to tackle some smaller issues where the two critical interests intersect, we need to work out mutually acceptable arrangements, and more importantly, mutual trust and respect, and maybe we can take in a dinner or a movie.

MR. GALSTON: Lara.

MS. SCHWARTZ: Well, that blows my plans to propose after the panel. Thank you, Brookings Institution, for inviting me to participate, and Jonathan and David for writing your compelling article, and your compelling proposal. It was interesting. I will mention shortly why I disagree with it, but the thing that I appreciate both about this panel and about your article is that it was smart, civil, and honest.

And I think the ultimate question outside of just marriage of this panel is, you know, can we forge a solution, and the answer is only if we are civil, honest, and smart.

And I encourage people in, you know, choosing how to make your decisions, choosing how to formulate your opinions, to ask yourself whether what you're hearing is civil, honest, and smart.

I do spend a lot of my time having less fun than this answering lies, no, preachers are not going to be sent to prison if there's a federal hate crime statute, you know, and that's not a point of conscience, and you know, grappling mightily with the demons in your

soul about an important social issue, that's a matter of truth or lies. But this is harder, isn't it, and that's why we're here. Is morally serious compromise possible? Yes, it's called the United States of America.

We have a Constitution, a very good one, a very old one, a very enduring one. We have a court system that makes many people angry many times, but it's worked. And I think the courts have generally gotten questions right, where someone's moral objections and someone's civil rights are at stake.

For example, a social worker who provides needed mental health services with public dollars, or a nurse who provides needed medical services with public dollars might feel religiously – could very well feel religiously driven and called to preach to an openly gay AIDS patient about the error of his ways, but the courts got it right when they said, no, not with the public dollar, not to someone who has this need and will not otherwise receive it. So I think the courts can get it right.

So while I'm optimistic about Jonathan and David's proposal because it is, you know, civil and smart, I believe it is ultimately a pessimistic proposal. I believe it is pessimistic about the power of the First Amendment to craft a space for people to live their beliefs and another space for people to exercise their rights. I believe it is pessimistic about the power of individual human beings to live their own values while also living my father's very profound spiritual, cultural, and economic philosophy regarding job duties, which can be summarized as follows, that's why they call it work, Lara.

What do I mean by that? Well, there's this compelling question that we've heard about the Justices of the Peace, and more recently clerks issuing marriage licenses. And in San Diego, clerks disagreed with doing that, and actually the city said, you know, okay.

But the thing is this, this is a question that we've already decided as a country in other contexts. When you go to Denny's and the waiter doesn't want to serve you because of who you are, the question that's been put to you and the issue that you're facing is not whether you're Grand Slam breakfast will be a minute late, it's whether you're going to have to stand for your society approving of people treating you as less; in this case, and in the county clerk's case, in public. Now, I agree, and I think we are going to be rock solid the same on how the choice cases, the access to medical service cases come down, and cases of religious conscience, it comes down to, and this is true with pharmacies and contraception, it comes down to, are you going to get the thing that you need and that you have a right to or not.

And when a pharmacist cannot hand me contraception consistent with her belief system, she's not saying, "you are a person who is beneath me," you know, duties to serve,

she's saying, this medication. When a clerk will not hand you your marriage license, he or she is saying, "you and your family are not good enough for my services." And more importantly to the person standing there, and I think that's why it makes it worse than Denny's, even though breakfast is yummy, it's not just that it's your license, it's your special day, and I just called the Dorchester County clerk the other day because I need to go get my marriage license in a month, and I got this glowing, chipper, and you'll need this and that, it'll be so great, when we will see you, she was not busy, but, you know, not just because this is a special thing, no one shows up to get their marriage license expecting to be insulted, but also, no one shows up thinking that their state is going to give someone permission to do this, by the way, with their tax dollars. So I come down differently on the JOP's and the clerks. I think that David has wildly underestimated his powers as a father. I know, as a mother, that my conceptions of what marriage means, what, oh my God, don't walk under that bus means, what, you know, be good to others means, what God means are going to be much more powerful in my daughter's life than anything in the law.

Her disturbing propensity to ask me about, you know, the anti-trust codes notwithstanding, I actually believe, she's five, that what I say and what she lives and what she sees is going to be instrumental in her growth and in her sense of who she is.

So I think that David is a much stronger father than one who needs the state to tell his children what marriage is. But, of course, there's no parent strong enough to tell their child what their orientation is.

So I think it's pessimistic because we have struck a morally serious compromise. You know, we've bound ourselves to the mast of our Constitution, we've bound ourselves to the sometimes unpleasant mast of our work places. I've done it. I morally oppose, not on religious grounds, the death penalty, but I've served, upon graduating from Nathan's alma mater, as a judicial clerk on the United States Court of Appeals for the Sixth Circuit that regularly receives petitions from prisoners who are likely to be put to death very soon if their petitions aren't granted.

I could not opt out of reading and studying and recommending that my Judge enforce the law consistent with precedent, nor would I have. It was my job, that's why they call it work, Lara, and that's why they call it the United States of America, where we are bound to the mast.

Finally, as a very specific criticism of the proposal, though I will say it's better than paying your whole life into social security and getting nothing for your family when you die,

it is better, so a good start, we don't need it. We could repeal DOMA. People are married, they don't need a civil union, they can be treated as married because they're married.

So I welcome this conversation, I'm very excited to be a part of it, but I suspect I might be a little bit off of where the rest of my colleagues are, but that's okay. Thank you.

MR. GALSTON: It's more than okay. Before we go any farther, I just want to express my appreciation to all five of you for not only presenting views so crisply and intelligently, but also for modeling the kind of conversation that I think we're going to need over the next decade or two if we're going to make any progress on this issue whatsoever. If there has been a better or fairer discussion of this issue anywhere in the last five or ten years, I'm not sure where that would be, and so thank you very much.

I'd like to invite Jonathan and David, only if they choose, to respond to anything that they've heard that they think rises to the level of something that needs to be commented on. I would then like to pose just one question to the panel as a whole, and then turn the conversation over to the room.

MR. RAUCH: Why don't you go first, Bill?

MR. GALSTON: There was something almost Barbara Jordan-esque, Lara, in your invocation of the U.S. Constitution. I am old enough to remember her magisterial voice on that subject at the heart of the Watergate debate, and I think that's a very important point of departure for our conversation, not the only one, but a very important one. And I'd like to connect that to what you said about the Constitution, namely that it represents a morally serious compromise, and also to what David said in his remarks, namely that there is an important moral principal at stake, that is, we have to learn to live together, right. The philosophers call that modus vivendi you might also call it the Rodney King principal, if you remember the LA riots. And we are now living in the age of Obama, who reveres President Lincoln second to none among his predecessors.

And President Lincoln got to be President for a very simple reason, he delivered a speech known as The House Divided speech, and the thrust of that speech was that in a very important respect, the Constitution of the United States did not represent a morally serious compromise, but rather a morally flawed compromise because it said that there was room under the canopy of constitutional principals for abolitionists and slave owners to live together on terms of equal standing, and he said no, right, we have a crisis of the house divided, we cannot accommodate two clashing principals under the same roof, and he said that the idea of just leaving this up to the people of the several states, which is the Steven Douglas approach, was unacceptable morally, as well as politically. So here is my question to the panel, why – this is

not a rhetorical question, why is this issue different from slavery, such that we can think about, or at least some members of the panel can think about accommodating two fundamentally different principals in the same – and – well, I'll just leave it there.

MS. SCHWARTZ: Might I –

MR. GALSTON: Please.

MS. SCHWARTZ: -- well, it's different for slavery because slavery really oppresses the people owned. It is actually more like divorce. We have been here before when the family laws of the several states, and ultimately the United States in its many programs that recognize family status, we have been here before, that the family laws of the United States have departed radically from religious beliefs about what marriage is.

When no fault divorce became the rule of each state, you know, progressively, and the land, there still was a question, you know, is a Catholic clerk going to have to, you know, do the divorce papers, be the, you know, working in the court for the judge, is a Catholic judge going to have to preside over this, is a Catholic clerk going to have to issue the marriage license that someone reissues. You know, this is to the people who are remarrying, someone like me. This has been a question. We have dealt with the fact that the civil laws relating to marriage are often wildly, almost always wildly at odds with what is acceptable within a faith. A Jewish – I grew up Orthodox Jewish, it didn't take, but I grew up Orthodox Jewish, and there is no rabbi that I've ever met in my parent's community who would marry a Jewish person to someone who isn't. And yet the civil laws – I mean actually constitutionally the civil law could never be enforced that way, the divorce laws could never be enforced that way.

So to an extent I'm dodging because I'm saying, no, this isn't like this, this is like other matters where the family laws that are civil laws and some religious practices depart. But, quite obviously, I don't even think someone who is profoundly opposed to letting gay people marry would honestly say that the impact of marriage among gay people on religious people or other objectors, as David pointed out, imposes burdens like owning another human being.

MR. BLANKENHORN: Well, I would just say to that that the reason I posed my question is that in what is known as the pro-life community, as you know, the analogy between slavery and abortion is one of the classic analytical talk –

MS. SCHWARTZ: And just to follow up as kind of the liberal, and we are a pro-choice organization, you know, I'll surprise everyone and say I don't agree with that, but if you can agree that a fetus is a human, that's closer. There's just not a formulation of gay people, that you can have of gay people that makes their marriage result in a physical harm to someone else, to their bodily integrity, to their life.

I mean, I don't come down on the same view about an unborn, but honestly, that is intellectually a consistent idea if you characterize the fetus that way, it's just not with marriage.

MR. BLANKENHORN: A small point about Lincoln and then I'll try your question on the slavery and race analogy. Of course, that speech was given, and of course, it had a powerful effect, but one also needs to remember, as you well know, that Lincoln's actual policy, which he made crystal clear during the campaign and repeated at every opportunity, including, you know, days before Sumpter, was that there was no intention of the federal government to interfere with the institution of slavery in the states where it existed. The debate was over the extension into the territories, and so there wasn't this, you know, that has to be taken into account, too, as you well know.

MR. GALSTON: Long discussion.

MR. BLANKENHORN: Okay. I don't feel that the analogy with race obtains here, because I think that the conflict in the race issue was between a good thing and a bad thing, and the conflict in this current issue that we're talking about is a conflict between a good thing and a good thing, that's the difference.

One of the reasons that the race analogy doesn't hold is that when it comes to marriage, bringing in the question of race is a patently extraneous consideration. It's importing into the discussion of marriage a topic which is racial superiority that is not connected to the purposes of the institution. It's hijacking the institutions for an extraneous agenda.

I don't think anyone on either side of this gay marriage issue would argue that the male/female bond as the essential foundation of marriage as it has historically existed in the human species is somehow an extraneous consideration, something that's been imported in to do, you know, so the analogy doesn't hold. More fundamentally, the struggle over the race issue is a struggle between racism, on the one hand, and opposition to racism on the other. To me, it's good versus bad. What makes this issue that we're discussing here today so morally fraught is that, in my view, it's a competition between good versus good.

And as my teacher, Bill Galston taught me long ago when introducing me to the work of Isaiah Berlin, there are many things in our free societies that do not – cannot be reduced to a conflict of good versus bad, those are relatively easy to solve. But when the conflict is good versus good, so it is a good thing to recognize Jonathan Rauch as my equal in rights and dignity, and it is a good thing to recognize the equal dignity of his love for his partner as equal in dignity to my love for my partner, that is a good thing.

It is also a good thing to recognize the birth right of the human child to the male and female whose union brought that child into the world and is expected in all human groups not only to be the biological genitors, but to be social parents for that child, and the laws and customs and meanings that inhere in marriage is a way to deliver this good thing to the human child, which is my mother and father who made me and are there for me, that is a good thing. Now, what we see here in this conflict, I would suggest, is a difficult, morally agonizing conflict between two good things. So the analogy fails, I think, on the race question.

MR. GALSTON: Any other comments?

MR. RAUCH: Well, you know, indirectly, I suppose, Bill I'm so uncomfortable with the premise of your question, because it goes right to the nuclear example. I get this all the time, you know: why even talk to people who oppose gay marriage, isn't that like sitting down with Bull Connor or with a slave owner?

I think, in fact, that we are in the midst of a long national discussion about the meaning of marriage. I don't see this as a conflict between bigots and perverts. And what I would like to do is, for the time being, take at least part of the discussion out of the realm of sort of the ultimate nuclear questions: on the one hand, are we talking about the end of civilization and marriage, or, on the other hand, are we talking about the moral equivalent of slavery? We're not, in my opinion. But get away from that for a few minutes and put a very practical proposition on the table. That proposition would be, to Nathan and Lara, Nathan, you say you want to date first, well, here is a first date. If we do something like this, your side of the debate walks away with something very valuable in its pocket, a federal guarantee in federal law and a state guarantee in states that have unions that organizations like your members will be able to opt out to some considerable degree. Can we reach a deal on the specifics? I don't know, we have to talk, but that's what politicians do for a living.

My view would be that's a pretty good movie. That's what you want to do on a date, and it's solid, it's not just a conversation, it's actual legislation.

To Lara I would say, what I hear you saying is the Constitution is the compromise, let's keep working this through the courts, the courts will ultimately get it right. I don't share quite as much confidence as you have in the ability of courts to solve over the long term very difficult and tricky political questions. But in any case, it seems to me the courts are a pretty high friction path to where we want to go. We're talking decades potentially, we're talking about a whole lot of setbacks, and court decisions, as we know, tend to invite a whole lot of controversy and lack of consensus. So I would say here is something gay couples need right now, and we need it very badly, it's federal civil unions. If something like this could deliver those

with a 60 or 65 vote Senate majority, bipartisan -- right now, legislatively, instead of waiting for the courts to do it -- that's worth coming to some kind of agreement with the religious community.

MR. BLANKENHORN: You get a date on Saturday night and gas money, too.

MS. SCHWARTZ: I believe that the Constitution is the accurate compromise, but that doesn't mean I'm kicking it to the courts. Legislatively, we need to repeal DOMA, and we need to enact protection. I don't need to -- I don't think we need a federal hook to tell states what they have to do to strike the religious balance, I really don't at all, the states are comfortable, they're doing it. We don't need to kick it to the courts.

In large measure, this is a question of citizenship, if people are willing to bind themselves about marriage and about gay people to the same compromises they make at work, and they make in their lives every day, you know. There are not a lot of Mormon and Muslim bartenders in this world. We make these decisions. So, you know, this isn't a question of kicking it to the courts, this is a question of getting rid of discriminatory legislation and acknowledging that we have all of the legal and societal tools to provide for equal rights and provide for freedom of conscience expression and religious practice, we have them, we just -- we don't need to tinker with it.

And we do need benefits and protections right now, and they do need to come from legislation, and we do need to repeal DOMA, and we do need to recognize people for what they are, which is married.

MR. DIAMENT: At the risk of being accused of repeating what I've said, I'm going to repeat what I've said in the following way, and hopefully add a bit, too. I think that -- well, to one of the last points made, it's all fine and good to say, right, there aren't a lot of Muslim bartenders, and we should -- we live in an at will employment society, and yes, that's why they call it work, at the same time, we also live in a society which venerates the free exercise of religion, which views religious liberty as not something only confined to institutions, churches, and synagogues, and schools, et cetera, but also an individual liberty, and that, where possible, the Constitution and federal laws and state laws, et cetera, ought to promote the First Amendment value of religious liberty, and therefore, in reasonable situations, people should be able to get employment and take employment irrespective of their religious beliefs and forget about whether a Muslim wants to be a bartender. If a Sikh who wears a turban wants to be a metro conductor here in Washington, D.C., he shouldn't be told by WMATA that, you know, the turban is not part of the uniform code, and therefore, you can't work as one.

Or a Seventh Day Adventist who works at Home Depot and needs the shifts arranged so they don't have to be forced to work on Saturdays, the law ought to encourage that. And similarly, there are situations where conscientious objections – and I would have said to you, clerking for a federal court or working in a federal prosecutor's office, if it would be possible to accommodate your assignment to a death penalty case, such that the case could be handled properly, the judge could be served properly, but your conscientious objections to being part of the machinery of the death penalty could also be accommodated, that's a good thing, because your conscience rights would be protected, and the system of justice, so to speak, the wheels would turn on. So I think – and, by the way, without going into too much detail, the courts, federal courts over the past 20 years, or 15 years, have done a singularly terrible job of venerating free exercise of religion rights and Employment Division versus Smith and Justice Scalia is, you know, most responsible for that.

So there's a lot of work to do on the religious freedom front generally, both at the institutional level, and it is not just about institutions, you know, the analogy to the hospitals, whether or not they have to provide a service, it's not just about whether the catering hall at the church has to be available for the gay couple's reception, there are also individual issues at stake, as well.

The final point I'll make is that, again, I like the preview, I like the trailer to the movie, it's very intriguing, and maybe I want to see it in its full run some day, but again, the point I was trying to make was, we need – for this to be workable in a serious way, to actually go to Congress, right, and get those oh so brave elected officials to stick their necks out, I think asking them to do it on marriage, in the first instance, so to speak, which is what your proposal does here, is asking a lot. And it's also asking the advocates in both camps, again, and I'm not just talking about, look, there are folks on both sides in the advocacy community who are going to be in a religious community, not just a religious community, but speaking in terms of religion, there are going to be folks in the conservative religious circles which are going to be against every gay rights measure no matter what it is, whether it's ENDA, whether it's a hate crimes bill, whether it's marriage, it doesn't matter, for a variety of reasons, not the least of which, by the way, as they say, well, hate crimes is just opening the door for marriage, okay, which I'm not saying I agree with that, I'm just saying that's their attitude.

And similarly, on the gay rights side of the equation, I would dare to speculate, that there are organizations and interest groups that say, you know, the whole loaf of bread, and we're not going to compromise one bit, and there's nothing to talk about here.

Then you have the other folks who do want to have the compromise and do want to have the discussion, you know, what the contours of that will exactly be, you know, yet to be determined, but cannot operate in an environment where you're asking them to take on the ultimate question as the first –

MR. RAUCH: Right; but, of course, we're not asking that. As we see it, -- the two of us understand this proposal differently -- but as we see it, we're cabining that larger conversation about the meaning of marriage, we're not trying to solve this whole global climate of religious liberty, we're talking about --

MR. DIAMENT: No, but I'm saying that insofar –

MR. RAUCH: -- a small deal, civil unions for very specific protections, and that would be worked out by politicians. And, of course, if you didn't like the deal, you'd walk away at the end of the day.

MR. DIAMENT: As I said before, I think it would be worthwhile before we go there to deal with some of these other non-civil union, non-marriage related issues, and you know, try it on for size, so to speak, in those contexts, which I think might ultimately benefit the discussion around these civil union and marriage questions.

MR. GALSTON: The arms controllers talk about confidence building measures, I guess that's what you're proposing. Do you want to get the last word in from the panel before we go to the floor?

MS. WILSON: Not much of a word, but I want to respond to a couple of specific things.

MR. GALSTON: Okay.

MS. WILSON: The Constitution, for reasons of Smith, isn't going to give a lot of assurance or comfort to the person who feels that, for religious reasons, they need to object. So I think despite that, there really is a crying need to get in front of these problems or we're going to throw it into the courts. And when you're looking at who's going to be on one side of the equation, usually small faith based groups, that's a very expensive proposition.

And I think the least that we owe to the potential religious objectors and the same-sex couples is to tell everybody where their rights begin and end. So I think there's just absolutely no excuse putting aside constitutional protections for just saying we're going to take a dodge on this. And that's precisely, by the way, what Connecticut is doing in the raised bill, 899, that is supposed to codify Kerrigan, the same-sex marriage decision. They have a protection for clergy. Well, nobody in their right mind believes that the sanctuary is ever going to have to be opened to marriages that that church is not down with, right. The real fight are church affiliated

groups, not the church and not the sanctuary. And it is a pretense of religious liberty for the Connecticut legislature to go around blessing clergy and saying, hey, by the way, you don't have to do these marriages, that's beside the point.

The first are the justices of the peace, the fight are – is with the clerks and with these church affiliated groups, and it's, frankly, gutless for them to take a dodge on that.

With respect to – let's go back to justice of the peace for just a second. You know, I have great sympathy for the idea that, you know, this is your job and you need to get with the program. On the other hand, we don't leave our religious convictions at the door.

And I think it would be incredibly ironic to say that anybody involved in any way with the process of marrying folks should have no religious views on this at all, right, given the fact that marriage has been a religious institution, as well as a civil one in our society, but a religious institution for a very long time, it would be ironic. And I'll give you an example from Canada. There was a 70 year old Saskatchewan marriage registrar, I believe, I'll have to go back and look, who was asked by a same-sex couple to marry them. He had been marrying folks for like 36 years. Never in a million years when he started down the path of marrying folks could he possibly have imagined that a same-sex male couple was going to ask him to marry them.

This guy has a reliance interest to some extent. He is thrown into a back spin when same-sex marriage arises. That doesn't necessarily answer what we should do, but I think it does say that we have to tell this person, and all the other folks who are involved in marrying people, where their rights begin and end and what exactly the job entails, and some of that should be sympathy, I think, for the fact that they've been doing this for quite a long time. And if we can staff around their objection and have both the religious objection and the equality interest and rights of same-sex couples accommodated, I'm really hard pressed if no one knows otherwise why we shouldn't do that.

MR. GALSTON: And, of course, that just re-emphasizes the importance of drawing, as David did, in response to my question, some substantive distinctions between this issue and other issues, like race, wherein, for example, public accommodations laws, you know, the government of the United States reached a different view on that question. And it seems to me there's no way of defending continuation of practices, for example, on grounds of habit and reliance in the one case without distinguishing substantively between that case and the issue before us, and that's why I posed the question, to draw out the fact that you have to presuppose a substantive difference between this view and other views where we reach different moral and constitutional understandings.

And with that, let me now turn to the rest of the room for questions and comments. Just two brief procedural points. First of all, when I recognize you, there is a roving microphone that will be placed in your hand; and secondly, if you would identify yourselves; and third, if you would keep your questions and comments as brief as the substance will allow. Yes, right in the front of the room.

MR. WITTKAMPER: Hello, my name is Jonah Wittkamper and I work with Search for Common Ground just around the corner, and we're in the process of helping to develop a national consensus dialogue on issues of same-sex couples, and I have a very, very simple question. I would like it if you guys could talk about the value of private conversations. What we're having here is a public conversation. What would be the value of private conversations around this issue, and that being between national leaders behind closed doors who represent the opposing sides, and also in grassroots communities?

MR. GALSTON: Thank you. Who would like to take that on?

MR. RAUCH: I think they're valuable. I think we probably all agree that there's no reason not to do both. At the moment, there are not a lot of trusting ties between advocates on both sides of this argument. David may have more experience of this than I do, but my experience has been that mistrust is not only at the policy level, but tends to be at the personal level. And there are a lot of people who are reluctant to talk to people they will tell you are presumptively bigots and so on.

That said, one interesting reaction that I've had to this piece we wrote is, a lot of people approaching me privately -- people in this sort of broad centrist category who have a view on gay marriage, but don't see this as the only voting issue that they'll ever worry about -- who have said, yeah, that's the way we should be talking about it, more power to you, let's have more of that. And that leads me to suspect that behind closed doors, there is room for more discussion than we've seen to date.

MR. WITTKAMPER: I agree.

MR. GALSTON: Yes, this gentleman on the aisle.

MR. JONES: Hi, I'm Robert Jones, President of Public Religion and Research. I want to ask a question that I think goes to this comment that Robin made about nobody in their right mind believing that, you know, clergy were going to be forced to do that. Interestingly enough, there are a large number of Americans who have been convinced that this is, in fact, what is exactly going to happen.

I just want to point out, we had a -- in our recent polling in the fall, and Jonathan, we asked the three part question that you suggest, what we found is -- about a third of

Americans, and we had 29 percent supporting same-sex marriage. When we asked those that didn't initially support same-sex marriage whether or not they would, in fact, support it if the law guaranteed that no church or synagogue would be forced to perform these marriages, we found support jumped by 14 points.

MR. RAUCH: Wow.

MR. JONES: So there's a lot of misinformation. I think it goes to sort of the misinformation on the debate that's out there. And so my question is this, this point also goes to the fact that the compromise might not actually have to cut quite as deep as the compromises on the table here, so that if it's really about getting clear on what the law of the land really is, and if it's really about performance, right, and limited to churches and synagogues and sort of religious institutions proper, we may not actually have to go down to the level of clerks and those kinds of things. So I'd love to get a reaction from the panel to that.

MR. DIAMENT: Well, I would agree that – I would agree with the fact that it's misinformation that's out there, right, you can't have a basic understanding of the First Amendment and think that, even in this era of Employment Division versus Smith, et cetera, that a rabbi or a priest would be compelled to perform a wedding ceremony that he doesn't want to perform.

That misinformation is counterproductive to both sides. It's counterproductive to the gay rights proponents because it's a scare tactic that gets people to vote the way, you know, the way they did. It's counterproductive to genuine advocates for religious liberty because it's misdirecting people in terms of what the real issue is. I would concede – I concede the point that, right, the clergy are not going to be compelled. But I would say just because you solve that problem, you haven't solved the problem.

Forget about the clerks for a second, okay, and again, go back to it is a real issue for a church whether their tax exempt status is going to be yanked. Forget about the catering hall, okay, you know, just on the basis of there being a church that disapproves of homosexuality in general or of same-sex marriages in particular.

It's not hard to imagine a campaign being waged, you know, to yank their tax exempt status. Look what's happened to the boy scouts over the past number of years, since the Supreme Court of the United States unanimously said they have a right not to have openly gay scout masters.

The perfectly waffle within their rights reaction to that has been activist campaigns against the boy scouts to get their park permits revoked, to get all kinds of, you know, public access and public partnerships that they have revoked, to get them thrown out of charity campaigns and all

sorts of things. And I'm not – again, the people that are doing that are acting within their legal rights to protest and advocate as Americans are allowed to. But we don't need to imagine consequences, practical consequences, so to speak, being advocated and possibly visited upon houses of worship and other religious institutions that have nothing to do with officiating at wedding ceremonies, and so it really is a serious issue that people need to understand and that discussions have to be had either in the context of the compromised, proposed, or others about, okay, how are we going to live and let live.

MR. BLANKENHORN: Also, you know, is it really – I mean you know a lot more about this than I do, but I'm surprised that you agreed with the idea that this is completely misinformation, because, see, I mean I thought Bill put a really – put this issue on the table when he brought up the race analogy, because the core moral assertion – a core moral assertion and the most important analogy put forward by the proponents of gay marriage is the – it's the analogous to racism. The analogy to racism has been central. Now, I grew up in Jackson, Mississippi, I know a little – I think I know a little bit about the issue of racism, and I'll tell you, once we properly decided that racism was not – was no longer sort of within the pale for Americans, even in the sovereign state of Mississippi, if that's the moral conclusion that we are to draw, and we are being every day urged to draw that exact conclusion about the issue of gay marriage, is it really misinformation to imagine that over time?

MS. SCHWARTZ: Yeah.

MR. BLANKENHORN: I don't think it is.

MS. SCHWARTZ: No, because, you know, this whole time that we've had a very clear –

MR. BLANKENHORN: You agree with the analogy, right, you agree with the race analogy?

MS. SCHWARTZ: The race analogy is complicated because people think, and you articulated this as growing up in Jackson and seeing the way that people treat each other, just the inhumanity that you witnessed in race relations, and they say, so it's not the same because a gay person has not experienced, you know, the terror of being you know, brutalized or killed or driven out, everything that you saw people do there. But that's not the question, because our constitutional rights don't inhere in our having survived unspeakable – our constitutional rights –

MR. BLANKENHORN: That's not the point I was making.

MS. SCHWARTZ: -- inhere in our humanity.

MR. BLANKENHORN: That's not my argument at all.

MS. SCHWARTZ: But to take why I agree with, Nathan, that it's inconceivable, and I'm seeing none, so why I think over here it's inconceivable is because we've – for all the time that we've had this understanding, and religion constitutionally is treated, you know, identically to race, as well, you know, you won't – I mean you won't find a church that has to, you know, marry people who are not in the faith, who are not members. You won't find a synagogue, you know, that – other people who are not LDS cannot walk into the Tabernacle. So this is just a different, you know, this –

MR. BLANKENHORN: African Americans can do – African Americans can and do and did under great controversy establish their right to walk into any church in Jackson, Mississippi –

MS. SCHWARTZ: But not get married.

MR. BLANKENHORN: -- on any Sunday.

MS. SCHWARTZ: That's different.

MR. BLANKENHORN: That's the point, the point is the marriage ceremony.

MS. SCHWARTZ: It's the marriage ceremony.

MR. BLANKENHORN: In other words, the misinformation is, a clergyman will be compelled to perform a marriage ceremony that that clergyman's faith objects to.

MR. DIAMENT: Okay. But this is –

SPEAKER: That happens in Sweden.

SPEAKER: -- the Governing Idea – the Governing Idea seminar –

MS. SCHWARTZ: We're never going to see this happen here again.

MR. DIAMENT: And if the governing idea of this issue is that opposition to same-sex unions is the same as racism, if that is the governing idea, which I believe many advocates have put in many hours successfully to promulgate and defend exactly that notion, with no qualification, if that's the governing idea, I don't particularly think of it only as misinformation to think that those who desist from that formulation will be viewed as outside the moral pale.

SPEAKER: I agree.

SPEAKER: And will be – have to make a choice between their citizenship and their conscience.

SPEAKER: Except for your last phrase, I agree with what you said 100 percent. The only point I was making about the misinformation is, the clergy officiating at the wedding ceremony issue. I agree with you 100 percent on the fact that if the race analogy is carried forward, and if gay marriage is legalized, then you're going to have exactly the dynamic, like I

said, waged against the boy scouts, or dare I invoke the name of Bob Jones University, you know, and yes, conservative, small churches, synagogues, religious orders, et cetera, that object to, you know, gay rights generally perhaps, or at least marriage in particular, will be – there will be campaigns of various – cultural campaigns against them to paint them as bigot institution –

SPEAKER: -- a little bit.

SPEAKER: Yes, I agree with all of that.

MS. SCHWARTZ: Unfortunately, it's a constitutional right, and I haven't seen campaigns to make the conscience, you know, anti-choice, non-profits, nor the religious institutions that have very, you know, conscientious and faith based objections to abortion lose their tax exempt status. I mean I think the boy scouts issue, you know, you're getting into public accommodations, you're getting into when people receive public funding. It's a hard question and it's a question that I agree deserves to be answered. Everybody needs to know the state of play, and not just because that's fair, but because that answers the question, right, because when people actually have the information on the ground, the conversation is rational, and the information on the ground is going to bother people.

Like I will state, I believe that clerk has to issue that license as a public official. There are people who will have a big problem with that, but I am willing to state a truth that isn't great for my side all the time, and I want the people who disagree with me to state a truth that, you know, clergy members aren't going to jail if there's a hate crimes bill. We do that, we have a really smart conversation.

MS. WILSON: Let me jump in, seeing how I started this little spark, with really misinformation of my own. What I meant to say is that no constitutional law professor in their right mind, nobody who knows anything about this in their right mind, but you are absolutely right that this claim –

SPEAKER: It's not enough, we need a majority.

MS. WILSON: This claim was so badly thrown around prop 8 I just got back from a panel in California, and it was really, really unfortunate, and it was on both sides, right. So you had people who are, you know, for gay marriage running ads showing Mormons busting into a lesbian couple's house to take away their rights, okay, and then you had, on the whatever religious side or whatever the right accurate denominator is, descriptor, folks running ads saying that if prop 8 doesn't pass, then we cannot teach our children what we believe and we cannot speak in church, right, that can't be right, I mean please tell me that's not right. So, you know, the misinformation –

SPEAKER: We get all kinds of news here this morning.

MS. WILSON: -- the misinformation is really legion. But I absolutely agree that the fight is going to be an indirect one, it's not going to be over the sanctuary, you're not going to be able to get at that, so it will be over tax exempt status, and indeed, Bob Jones, right. And I want to, just real quick, about the book, maybe sell some books.

SPEAKER: Don't let us get in the way of that.

MS. WILSON: There are wonderful chapters in the book about tax exemption. Doug Kmiec talks about it, Jonathan Turley talks about it, I talk about it, probably not as well as the other two. But the big fight in those three discussions is whether Bob Jones, the race case, can actually be used as a precedent for trying to force this issue here.

And we disagree; I think there's greater room for that, Kmiec says, no, there's not as much, there's some tax guidance I cite, too, that he ignores, so please look at the tax guidance, that suggests, indeed, that other things can be used to decide what the collective community conscience is as a way to yank your tax exemption, and that's the fighting threat to small faith based groups that are not going to want to litigate this.

Out of fear, they are going to, and I think legitimately, believe that they either have to yield or they are going to jeopardize their tax exemption. And having represented tax exempt organizations in practice, I will tell you, that is an economic death penalty for many of those organizations, and they deserve better than just having this risk loom out there, somebody should tell them.

MR. RAUCH: The divide is on the non-lawyer side of the room.

MS. WILSON: No, I see that.

MR. RAUCH: I don't know whether ultimately a church might be threatened to lose its tax exemption if it refuses to marry gay couples in the sanctuary. David thinks it might happen, you say it won't, I don't know. But right now, as a non-lawyer, we know that that fear is out there, right? And we know that there are times when human beings in politics can make choices between escalating and de-escalating a major cultural battle.

And the premise that I think David and I have in common is we're at one of those moments now, where we can make a conscious choice. Actors in this debate can talk to each other across the center to make some policy changes that will provide some comfort and reassurance to both sides, thus heading off something that might get out of control and become much worse, so that's what we're suggesting as a political proposition.

MR. BLANKENHORN: Right.

MR. GALSTON: And if I could just toss in my two cents here, and then, since we're running way over, I will entertain one more question, and then I think we'll have to disband.

SPEAKER: Take two or three at once.

MR. GALSTON: That's not a bad idea. Now what was I going to say?

SPEAKER: Bill Galston at a loss for words, stop the presses.

MR. GALSTON: Well, then I'll, you know, then I'll confine it to one comment, and that is that, you know, my wife is now a law professor at G.W., and when we came to Washington 27 years ago, the very first thing she did was sit down and write an article on the Bob Jones case. It might even be cited in one of those three chapters. And, you know, there's no question about the fact that the idea of what is and is not contrary to public policy is going to have considerable force in the tax exemption debate, and that – and this is why, you know, to repeat myself for the third time, the question of the extent to which the issue we're now debating is and – does or does not fit into the civil rights/race template is really important.

MR. RAUCH: And what I'm suggesting is, there is no answer written in Heaven about that. That's a decision human beings will make right now by deciding how they're going to treat this issue, as all-or-nothing or as something else, and I'm suggesting that it is politically preferable to treat it as being unlike the biggest, hardest questions of race. That's a choice we can make.

MR. GALSTON: And I happen to agree with you. And the reason I'm pushing this line is that, and now I remember the second point I wanted to make, there are people who descend from the – people in the American population who descend from the proposition that I think joins the entire panel here, that is, that we are talking about competing goods.

There are people at both ends of the bell curve who are willing to frame this as a good versus evil debate. And to say that this is a good versus good debate is to define a viable center, but it is to do so in a way that has important consequences for the left and right tails of the debate, and I don't see any way of creating a hermetic seal between the good versus good formulation and the good versus evil formulation.

And so at the risk of destabilizing this conversation, Jonathan, you know, I wanted to step back from the shared frame of good versus good to point out that that is the critical step in the argument.

MR. RAUCH: It's, in some ways, the larger context surrounding an attempt to push the conversation in a little bit different direction.

MR. GALSTON: And I think that if the good versus good frame becomes the frame for debate, then we have a chance of getting a positive outcome. And to the extent to which it remains morally polarized, we have a very reduced chance. You wanted to –

MS. WILSON: Yeah, I just wanted to say, you know, the way this question comes up in legal academic circles is a quick jump from what we're talking about to Loving, you know, the anti-miscegenation case, and the U.S. Supreme Court says, well, you know, Virginia can't tell, you know, white folks and black folks that they can't marry each other.

And when I first started the work on conscience protection in this realm is one way to try to navigate competing interests, I thought, well, certainly Loving will provide a guide. So we went back and looked at whether there were clerks who said I just can't marry white folks and black folks and I want to be exempted. We could only find one case that was privately settled, which I was very surprised by. And it's a little bit like Bob Jones, right. I mean maybe the difference here is that, for whatever you think about Bob Jones, it may be that not lots of people are willing to say out loud, you know, that race should matter in this – in a religious way this way, that Bob Jones, indeed, is a very small outlier, but for lots and lots and lots of people, marriage is inherently bound up with their religious understandings, and I don't think that they're – it's just gay animus that they say I can't facilitate this marriage given my religious beliefs.

There are lots of religious passages on this. It's harder to find all these passages that Bob Jones would want to tell you are there about, you know –

SPEAKER: A lot of those people say I will serve gay people, I will just not serve a gay wedding ceremony, and that's an important distinction.

MS. WILSON: Right, it is.

MR. GALSTON: Let me now take three questions all bunched together, yes, yes, and I guess that's it.

SPEAKER: There's one in the aisle there.

MR. GALSTON: Oh, and there's one on the aisle, yes, okay.

MS. SEAMAN: Hi, thank you very much. My name is Erica Seaman. I'm a PhD student at Georgetown University, and right now I'm working on religious pluralism in the United States, and in particular, starting a dissertation on interreligious marriage, which is indirectly related to this. I'm curious that most of our discussion has been on sort of the free exercise clause side of this and religious exceptions. And is there a debate going on tied to the establishment side of this?

As you just mentioned, and we know, our marriage tradition here is religious and civil and it comes from a very long history of mostly Christian marriage and Protestant marriage

in particular. And so it seems to me that for a very long time, through the history of the west, we've been defining marriage in different ways, and Protestants changed it from the way the Catholics were defining it, and the Anglicans changed it, and then we changed it here when we disestablished, but we're still trying to define it, which, to me, seems like an establishment clause question, and yet that hasn't really come up today, so if you guys could comment on that, that would be great.

MR. GALSTON: Thank you.

MR. HYDE: I'm Richard Hyde, I'm an Ordained Minister in the United Church of Christ. And I want to remain – reassure you, I'm fully within the spirit of this panel when I ask this question because it's a hot one, and I'm just curious about the plural marriage issue. Is that on the table now; if it isn't, why isn't it, you know, the slippery slope argument, why not apply Loving to three people who want a marriage license and so on? And I'm not trying to throw a bomb at any of you, I assure you.

MR. GALSTON: And then – yes.

MS. POSNER: Sarah Posner with the American Prospect. My question is, is the fear of these lawsuits over these conscience protections caused by gay marriage, is that overblown? Because like if you take the New Mexico case, for example, that case was brought under the state's human rights laws, and they – a lesbian couple sued a photographer for not photographing their wedding, or their commitment ceremony, because I don't think gay marriage is legal in New Mexico.

So that case – that would have been brought regardless of whether gay marriage is legal or not. So isn't the sort of fear that gay marriage is going to cause an avalanche of these lawsuits a little bit overblown?

SPEAKER: Those are good questions.

MR. GALSTON: Okay. We have three good questions on the table, and this will give all five members of the panel an opportunity to respond and make whatever closing remarks they'd like to.

MS. SCHWARTZ: In answer to that question regarding, you know, is this really about marriage, because this New Mexico case was based on the human rights law based on non-discrimination, you know, I'm really glad that you asked that question, even though what I'm about to say could potentially scare fence sitters off of non-discrimination laws, and I think Nathan was talking about this question in his remarks.

Ultimately, it comes down to how you want to treat gay people, you know. Yes, marriage is a special thing. We actually have never had a national consensus on marriage, nor

should we. People have their own marriages. Every household is different, every person is different, and every religion treats it differently.

So it comes down to, what is our national consensus on how the public should, you know, to what extent we should be accommodating certain kinds of treatment of gay people. Now, I think the florist and the photographer and the wedding hall questions are really hard because these are peoples' businesses. But if you want to write a rule that allows kind of misbehavior and mistreatment of people, whether because they're gay or because they're gay and a couple or gay and trying to become a couple, you know, if you want to write a rule that explicitly says because this is biblically different and more supportable than other kinds of objecting to people, and let's face it, it's not being nice to people actually, you know, you might think you have a great reason, it doesn't feel great, and honestly, the dignity, you know, insult is the same whether the reason is good or not.

You saw one lawsuit post Loving, but how many people leave the courthouse kind of dissatisfied and go straight to a civil rights lawyer if they're living somewhere, that they could still get killed for voting? So then do you have an establishment clause issue?

You know, they tried to actually litigate the sodomy cases originally as an establishment clause issue and it didn't take. I think you dance right up to the line of stamping approval on a certain set and a certain snapshot and time frame of religious beliefs if you accommodate too much, but I don't think it wins as an establishment clause case. And on the plural issue, which I hate to answer, but always have to, there's no such thing as a – it comes down to her question, how do you treat gay people. There are gay people, people, you know. It comes down to if you're – if you think people can really be gay or if their behavior is, but if that's unsatisfactory, civilly marriage is a bilateral contract that is really only enforceable and you can only provide benefits to it as a bilateral contract, so if that's a more sort of concrete thing to satisfy ones self on, then by all means, do so.

MR. GALSTON: Nathan passes.

MS. WILSON: Nathan passed, okay. I thought I had more time. Let me talk about the overblown question first. I don't think it is, for two reasons. One is, we've seen an acceleration of the questions once the issue on the table was about marriage qua marriage, as opposed to civil union, so I think – I agree with Jonathan that there are lots of folks who are happy to serve gay people, but not on this thing, so there is something about this thing that's special to them.

I also wanted to speak for a second to this question of dignity issues, that it's hurtful to people. Just to be clear, the rule I have argued for is, at best, a hardship rule, so that

if there's a straight toss up between the religious objection and a hardship to the same-sex couple, I am coming down on the side of the same-sex couple. But the fact that in really hard cases I would come down that way doesn't excuse us from getting in front of these problems and staffing around it.

And what I am saying when I say that an objector should have to disclose an objection ex ante in writing and we staff around it is that there will never be a dignity assault. We can have both the religious objection and preserve the dignity interest of couples, and it's just a fallacy to talk about dignity to the exclusion of protecting the religious objector, I think we can have both.

On the establishment question, I mean that's the question of the day, isn't it, right. I mean Doug Kmiec may have seen -- did an op-ed recently talking about sort of unwinding the religious and civil understandings of marriage.

Doug Laycock, my co-editor on the book, has this really terrific afterward where he basically talks about that. Kmiec is ripping Laycock off, interestingly enough, and saying that we should unwind civil and religious understandings because that may be the only way we can continue to protect religious liberty interest here given how little the Constitution does for us. I personally think that's a sad moment, right, because I believe in marriage. I mean, here, let me take David's page for just a second, I believe in marriage, I think it's protective of children, and it's protective of the adults, and the social science on that is overwhelming and beyond question.

But I don't think we have a complete handle on why marriage confers the benefits that it does. And I think to make a deep cleave and rift in marriage and say there's this religious thing and there's a civil thing may, indeed, damage this institution in some way that we can never get back. So I strongly disagree with Kmiec and with Laycock. I just think it is too much to gamble on. And can't we find a live and let live solution that gets us where we want to be without rupturing something really deep in marriage?

MR. RAUCH: Well, I'll use this opportunity to not answer the question, but to make a closing comment. In the spirit of Larry Summers, who I believe is speaking next door, I come away from this discussion first feeling very privileged that it even happened. That wouldn't have been easy a few years ago. But secondly, remembering something that Larry said years ago, in a very different context, about the value added tax -- it's a famous witticism -- he said, the reason we don't have a value added tax is that conservatives think it's a cash cow and liberals think it's a flat tax. And one day we will have a value added tax when conservatives realize it's a flat tax and liberals realize it's a cash cow.

Coming out of the discussion today, I'm inclined to say the reason we don't have a compromise like David's and mine is that conservatives see it as federal civil unions and gay rights advocates see it as a religious opt-out, and someday – maybe someday soon we may get something like this when, on the other hand, gay rights groups see it as federal civil unions and religious liberty groups see it as a religious op-out.

So I'll end on the hopeful note that perhaps, although I don't sense people are quite ready to come to the table yet, that with the prodding of say President Obama or a figure who actually floats some notion like this or something like it, that we may be able to have a good versus good debate.

MR. BLANKENHORN: Well, very quickly, thank you all for hanging in there this last part. I really enjoyed the discussion and I really appreciate the comments of each of the panelists, Bill, the way you guided it was great. Lara, on your last point, I just wanted to say that, you know, when you frame it the way you did as, on the one hand, there's a question of are we going to treat gay people fairly, are we going to give them their legal and human rights, and on the other side, there's this issue of marriage which is as individual as a snow flake, it differs from house to house, there's never been a national consensus, there never should be, there never will be, when you frame it that way, you are I think quite formally and explicitly just restating the traditional good/bad paradigm, in other words, you're just removing from the table all the things that matter to me and you're centering on what matters to you, which is, of course, your right.

But I would merely – I would simply say that what I would hope is that you, and maybe I, too, all of us, just – it's – what we did – I think our proposal is a good one, and I wish it would, you know, I do hope with Jonathan that it can be actually realized in policy, but as well as that, it's an invitation to a different kind of conversation that doesn't have that good/bad frame, that doesn't just write off the 50 percent of the ethical content that you don't really want to deal with. And so it's an invitation to just having a little bit of a different conversation.

MR. GALSTON: Well, let me drop a brief historical reference not In answer to your question, but in response to it. If you go back to 1856, the very first national convention of the Republican Party –

MR. RAUCH: Bill was there.

MR. GALSTON: -- and look at the –

SPEAKER: I knew you were going to bring this up again.

MR. GALSTON: -- and look at the cover of the Republican Party platform that year, it features a denunciation of what they called the twin relics of barbarism. One was slavery, and I'll give you one guess as to what the other one was.

SPEAKER: Something to do with Mormons probably.

MR. GALSTON: Very good, plural marriage. And so there is this deep historical connection between those two issues, which I think is still with us to some extent. Well, on that note, let me thank you for your patience and the panelists for their eloquence and we are adjourned.

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