

**MICAH** Thanks for joining us for this event on LGBTQ rights and religious freedom. My name is Micah Schwartzman. I  
**SCHWARTZMAN:**co-direct the Karsh Center for Law and Democracy. The Karsh Center is a nonpartisan legal institute whose mission is to promote the understanding and appreciation of principles and practices necessary for a well-functioning pluralistic democracy, including civil discourse, civic engagement and citizenship, ethics and integrity in public office, and respect for the rule of law.

The Karsh Center is co-sponsoring this event with UVA's Religious Studies Department. And I want to thank Kathleen Flake for all of your work in making this event possible. This panel occurs at an important moment for these issues. You might have noticed this past week, the Supreme Court rejected an emergency appeal in a case involving Yeshiva University and recognition of LGBTQ student groups on their campus. The Supreme Court also has pending before it, a case called 303 Creative, involving wedding vendors and public accommodation laws. So these issues are very much in the public eye.

To discuss them, we have a distinguished panel today. And I want to briefly introduce them. And then I'm going to turn things over to my colleague, Craig Konnoth, who will be moderating today. I'm going to introduce the panelists in order closest to me and then proceeding down the line. So first, we have Christine Durham, who is Senior of Counsel on the Salt Lake City Office of Wilson Sonsini Goodrich and Rosati, where she focuses her practice on appellate litigation.

In 1982, Durham became the first female justice on the Utah Supreme Court and served as Chief Justice from 2012 until her retirement in 2017 after more than 35 years on the bench. During that time, she helped to create the National Association of Women Judges, served as the first chair of the Utah Judicial Council's Education Committee, and was founder of the Leadership Institute in Judicial Education.

Next, William Eskridge is the John A. Garver Professor of Jurisprudence at Yale Law School, a leading scholar of legislation and statutory interpretation. He's also published three monographs and dozens of law review articles articulating a legal and political framework for the proper state treatment of sexual and gender minorities. His most recent book from Yale University Press is *Marriage Equality: From Outlaws to In-Law*. And I will add that yesterday, he gave the Joseph Smith lecture in religious liberty at the dome room of the rotunda.

Ria Tabacco Mar is director of the ACLU Women's Rights Project, where she oversees the organization's women's rights litigation. She was previously a senior staff attorney with the ACLU's lesbian, gay, bisexual, transgender, and HIV project. And was assistant counsel at the NAACP Legal Defense and Educational Fund.

Mar was part of ACLU's litigation team in the US Supreme Court cases *RG & GR Harris Funeral Homes versus EEOC*, which led to the court's decision in *Bostock* extending federal employment discrimination law to cover sexual orientation and gender identity. She also led the ACLU's litigation in *Masterpiece Cakeshop against Colorado Civil Rights Commission*, a wedding vendor case that preceded the case, currently pending before the Supreme Court.

Next we have Robin Fretwell Wilson, who is director of the Institute of Government and Public Affairs, Mildred Van Voorhis Jones chair in law, co-director of the Program and Family Law and Policy and the Epstein Health Law and Policy Program, and a professor in the College of Medicine and Department of Pathology at the University of Illinois.

She is a member of the American Law Institute and was named a Fulbright Specialist to the United Kingdom. With Professor Eskridge, he recently published *Religious Freedom, LGBT Rights, and the Prospects for Common Ground* from Cambridge University Press.

And finally, we have Craig Konnoth, our colleague, who is the Martha Lubin Karsh and Bruce A. Karsh bicentennial professor of law at the University of Virginia School of Law. He's a 2024 Greenwall faculty scholar, and the University of Virginia John T. Casteen III faculty fellow in ethics. Professor Konnoth writes in health and civil rights, as well as on health data regulation. He's also active in LGBTQ rights litigation and has filed briefs in the US Supreme Court and the Tenth Circuit on LGBTQ rights and issues.

Please join me in welcoming our panel. And I will turn things over to Professor Konnoth to moderate. Thank you.

**CRAIG KONNOTH:** Anyway. So I'm delighted, delighted to be moderating this panel. And really, I'm just going to jump right into it and pose questions in alphabetical order, down the panel from Justice Durham, downwards to Professor Wilson. And the first question I really have is if you could sort of frame the problem we are facing, what is the biggest problem you see in the conflict that we face between religious liberty and LGBTQ rights, if it is a conflict, and where do you find that sort of the nub of the problem?

**CHRISTINE DURHAM:** So I get to be first up. And what I'd like to do is just make two or three observations pertinent to the question and perhaps introducing my perspective to some extent. I would not argue with the proposition that there is conflict. It's been a strange era for those of us who have been around a long time because the rise of a more, perhaps I could even say militant form of religious assertiveness.

You see things like the Christian National Movement and other things that I find somewhat disturbing. And I've also lived for over 50 years in a state, which was founded on the desire and the aspiration for religious liberty by a group of people who had experienced a good deal of discrimination because of their religion. So that also has had some influence.

I wanted to focus on three points. The first being that I am surprised, just in my conversations and sometimes even with other lawyers, but certainly with people in my community, lawmakers, educators, other people who were interested in these issues, at what I view as a real shifting of emphasis in our understanding as a nation of the grounding of religious liberty in the federal constitution.

And I'm constantly reminding people that there are two clauses in the Constitution, in the First Amendment, regarding religion. And the first clause is that there shall be no establishment of religion. And I find that a lot of the people I talked to want to go straight to free exercise of religion. But that tension has been built in, built into our nation from the beginning. And we're I think we're still sorting out the balance.

Now I want to add to that a layer. Much of my career, I've worked with our state constitution, and I taught state constitutional law for a number of years at the University of Utah. And some of you probably will not be aware, I don't imagine UVA has a course on state constitutional law, am I right about that? But the language in many of the state constitutions, some of which predates language in the federal constitution on the subject of religion and so on has come to be far more significant in some of the litigation that is being conducted around religious liberty.

And one of the things I like to highlight and I always did when I was teaching is that it took the territory that became the state of Utah over 50 years to find a way for Congress to let them into the Union. And one of the things they had to do in order to be admitted to the Union was to include in the state constitution some very explicit language about establishment of religion and separation of church and state.

Because of course, Congress was worried about the presence of a potential theocracy, and historically, it was a theocracy in territorial days. So some of the things that the United States Supreme Court has been doing with establishment and religious liberty issues would happen under the language of our Constitution in our state, which I think is a very interesting note.

And finally, I'd just like to add that although it has not focused specifically on religious liberty as have many of the cases that have been coming down. I'm currently involved with my law firm. We are representing pro bono three plaintiffs, three transgender girls who are seeking to overturn a ban that was passed by the legislature last session, that it was an absolute ban on any transgender girls playing on any sports teams. And these are high school and middle school and actually, it involves K through 12.

And I'm going to leave more discussion on that topic to my colleague here who has spent a lot of time negotiating with our legislature on that specific-- well, not on the ban. She wants me to clear her of any association with the ban. But they had a backup system. They didn't have enough confidence in their passage of the bill that they built into the bill itself. A provision that said if this ban gets struck down on constitutional or other grounds, we've got a plan B. And I'll leave it to Robin to talk about the plan B. Thank you very much.

**CRAIG** Thank you, Justice Durham. Professor Eskridge.

**KONNOTH:**

**WILLIAM** I'd like to reframe the question just slightly. Craig, you've done a great job. And that is that I think liberty and equality are on both sides for both groups. So for LGBTQ people, not too long ago in Virginia, we were outlaws literally. And now, we are theoretically in-laws. But there's still a lot of discrimination.

**ESKRIDGE:**

And the way LGBTQ people see it when they're denied, say, service in a restaurant or they're denied service by vendors and whatnot, they see that as both liberty and equality sort of hit. And indeed, Obergefell, the marriage case in Lawrence, this sodomy case, emphasized both equality and liberty.

And so certainly, it's a denial of equal treatment from our point of view. But it's also a denial of liberty, the freedom to flourish, make life choices, and have it supported by the state. The state guarantees the marketplace and government institutions. Doesn't guarantee private religion. So we see it as both liberty and equality.

And in doing the book, I spoke to literally dozens of religious leaders on all sides of the issue. And I'm very persuaded by those discussions, that religious persons also see it on their end as involving both liberty and equality. So it's not just freedom to exercise their faith and to live their faith, but it's also equal treatment by the state, which they see as bullying and forcing conformity upon them, which is a denial of equality, as well as liberty.

Now having framed the issue that way, here's why I think this issue is a particularly tricky one for policymakers. I guess I should also preface it by saying that in my experience, most LGBTQ people do not want to intrude upon people of faith who disagree with them. And most religious people, including fundamentalist religions, do not want to discriminate against sexual and gender minorities.

But there are these cases, and the cases have a very high temperature. And I think the reason for that is that aside from this equality, liberty stuff, there are dignitary issues on both sides. And that's what links equality and liberty. That both groups, people in both groups, the couple that wants to get married, the employee who is not allowed to list her domestic partner and get health benefits, see this as a dignitary affront that goes to respect for her, or his, or their individuality, their humanness. Being treated as a second class citizen is a really big deal emotionally, right?

And on the other side, religious vendors or maybe even churches that offer halls for rent and other groups see this as a dignitary affront for the state to require them to lease for events that are contrary to their faith traditions. They see this as a dignitary. They said, we're being treated like second class citizens. And here's the irony, but it's true. Both groups, for reasons you ought to be able to understand, see themselves as still dispossessed.

And again, we're talking about minorities. LGBTQ people, there is still a lot of hatred for LGBTQ people. But for religious people who are traditionalists, let's say, it tends to be more traditionalist faiths that are willing to discriminate. They see themselves as dispossessed in a modern America. And that has the following effects. When both groups see themselves as dispossessed, it's about their citizenship. It produces anger. It is emotional. This is not just business as usual. It's emotional very often.

Unfortunately, an even worse thing is that it raises the stakes of these encounters from just simply commercial encounters or even jobs. It raises the stakes of them. And that very often gets attorneys involved, and politicians involved, and the Constitution involved. That when ordinary people see themselves as having a constitutional right, that is regaining their identity and their emotional well-being, they feel particularly entitled to stand up for this principle and that happens in my opinion on both sides.

Now I think the only thing that's surprising is this doesn't happen more often. But it does happen often enough. And these disputes do tend to be very emotional. And it's very hard, I think, for judges who I think are not very successful in resolving these disputes based upon moderation the rule of law and principle. But I do think that Justice Kennedy, for example, did a very good job along those lines. And I regret that he's no longer on the court. So those are some thoughts.

**CRAIG KONNOTH:** Absolutely. Thank you so much, Professor Eskridge. And I think, if I might sort of connect what he said to my question as well, because I think that did a brilliant job of reframing the question, but also answering the question that I was trying to get at which is that the key clash in some ways is people's sense of selfhood and identity because they both see themselves as having the same interests that are in direct conflict here. So people's sense of self and place in the nation is the conflict in some ways.

So Miss Mar, or would you do you prefer Miss Tabaco, perhaps?

**RIA TABACCO MAR:** I do go by Tabacco Mar. The challenges of pronouncing.

**CRAIG KONNOTH:** Absolutely. Go ahead.

**RIA TABACCO**

**MAR:**

Well, thank you so much for inviting me. And I feel compelled to say at the outset that I believe I was invited on this panel to be a dissenter. And so I will try to do that position justice. But I did want to name that at the outset. And I do, I think, take issue both with the question and perhaps Professor Eskridge's reframing of this as a conflict or a tricky conflict. I don't see it that way. Or if it is that way, I don't think it's any trickier, any more of a conflict that occurs whenever people hold religious beliefs that are in tension with other anti-discrimination laws that protect people on the basis of other characteristics.

And the statute at issue in Masterpiece Cakeshop is a terrific example. The Colorado Anti-Discrimination Act dates to 1885. This was a period during reconstruction when many states were acting to protect the rights of formerly enslaved people. And that first iteration prohibited discrimination on the basis of race, color, or previous condition of servitude. So it's very clear the problem that it was trying to address, which was that formerly enslaved people were now being turned away from public shops, not because they had so recently been enslaved.

And there's a wonderful decision from the Supreme Court of Nebraska at this time that essentially says, all of these anti-discrimination laws stand for the principle that one cannot open a shop and say, you were a slave or the son of a slave. And therefore, I will not shave you. And that principle that dates to the late 1800s, I think, carries through today what we've seen with the anti-discrimination act over time as we have gradually expanded the characteristics that are protected.

As we begin to fully appreciate what it means to be human and what it means to have equal dignity in the public sphere. And sexual orientation and gender identity are only the latest characteristics to be added to the anti-discrimination act. It does, I think, quite importantly and rightly also protect against discrimination on the basis of religion.

And so to the extent that there is anything tricky or conflicting about complying with the anti-discrimination act, it's not specific to LGBT people. . It's. Inherent in the norm that all of us should have equal dignity in the public sphere. We see that in the Piggie Park case. Many of you will remember. This is a case that was a challenge to Title II of the Civil Rights Act, which essentially protected the same idea of discrimination in public places on the basis of race or color.

And Piggie Park was a barbecue restaurant that serves people of any race, but only White customers were allowed to dine in. Black customers would be served only at the takeout window. And the owner of the shop, Morris Bessinger, told the court that it was his religious belief that integration, racial integration contravened the will of God. And in the 1960s, the Supreme Court essentially gave that argument the back of the hand. It dismissed it in a footnote, didn't even make it above the line, saying that this argument was patently frivolous. And that was sort of the end of it until now.

So to the extent that the owner of Masterpiece Cakeshop experiences a conflict with the Colorado Anti-discrimination Law, they may be a real conflict. But it's the precisely the same conflict that Maurice Bessinger faced in the 1960s. We don't need special rules to confront this problem. There's nothing different about LGBT people's equality, our dignity, our right to move freely in the world, not worrying about whether we're going to be turned away simply because of who we are, not knowing where we can show our faces and spend our money. That profound dignitary harm is the same, the precisely the same harm.

The other thing I'd say is that that conflict, if there is a conflict, is also not specific to laws that prohibit discrimination. So people hold religious beliefs about a variety of topics. And my favorite case on this subject is *United States versus Lee*. Many of you will remember Mr. Lee as a member of the Old Order Amish, who the Supreme Court accepted, hold religious beliefs that it is the responsibility of the community to take care of their own, including importantly, their elders.

And that religious belief prohibited Mr. Lee, who ran a farm, from paying Social Security taxes, which he believed were inconsistent with his view that it is a responsibility of the community and not the government to care for members of the community as they age in place. And the Supreme Court never questioned the sincerity of Mr. Lee's belief and nor should it. But instead, essentially said, if that were the case, every man would be a law unto himself. The famous line from Justice Scalia.

Because people in our pluralistic society do hold religious beliefs for a variety of things. And we don't want courts to be in the business of testing or evaluating those beliefs, trying to decide which beliefs are orthodox, which are worthy of protection, and which are not. So to the extent there is a conflict faced by Jack Phillips, the owner of Masterpiece Cakeshop, or Maurice Bissinger, the owner of Piggie Park, it is the same conflict faced by Mr. Lee, the member of the Old Order Amish, who was given no exemption from paying Social Security laws.

I think it's really important to ask ourselves why this question feels different and why it feels harder when it comes to LGBT people. And I submit the answer is because we still question the inherent dignity of what it means to be LGBT. And many LGBT people are in this group. I don't exempt our community from it. In fact, many LGBT folks were the loudest and the first to say, why would you want to buy a cake from that guy anyway?

And the answer is, well, I don't really want to what my shop owner thinks about me as a person. It should be irrelevant. When I walk into the store, my dollar is the same as the next person's. And if it feels difficult in this context, I really urge everyone to ask themselves why that is so, and why the existence, the equal dignity of LGBT people feel so troubling, and we've come to accept the equal dignity of so many others in our community.

**CRAIG KONNOTH:** Thank you very much for that, Ria. I'm just going to switch to first names actually since I do all of you, and I've known most of you for several years. So Robin, if I may.

**ROBIN FRETWELL WILSON:** So the trouble of being at the end of the panel is I wanted to say one thing, and then one thing, and then one thing. So I'm going to try to say all the things in 4 minutes, and I'm watching the timer. But let me start with the last point because I think it's actually the most profound and important in front of us on this debate.

We have half the country guys that does not have a sexual orientation, gender identity nondiscrimination law in America. Half the country. We don't have that at the federal level. And if we start with the supposition that by passing that, all of the religious people in this space will somehow be forced out of the marketplace. If we set this up as when we have this equal dignity of one community, we don't need to worry about the equal dignity of the other, I'm afraid we will be where we are now for a very long time.

Now I think the difficulty here is to assume that there is a clash. I think that's wrong. And we can ground this in different ways. But it's really not the province of the courts and nor is it a thing that the court is very good at doing, to find a way through these things that are perceived clashes. That is the province of state lawmakers. Congress, has anybody seen Congress do much? So it may not come from Congress, but at least from state lawmakers. And we're going to have to work through these things.

Now I think we can work through them by finding an identity of interests. And some of that's been said on this panel already. But let me say that LGBT people don't want to shed their sexuality, their identity at the door of their home. They fully want to be who they are fully in public and in private. And religious people want exactly the same thing. They don't want to shed their identity at their home.

Now many of them are vendors. And so we have incommensurable things that are being weighed off here. I agree with you completely about people being turned away from a business on Main Street. That's unacceptable. This is a badge of citizenship to be able to walk into a business on Main Street and be served like every other person.

But we have to find an answer for that shop owner. If we don't find an answer for that shop owner, then the legislatures that have yet to pass sexual orientation, gender identity, nondiscrimination laws, every one of which are controlled by Republicans. And nearly all of which are led by Republican governors in those states. If they see it as a conflict between LGBT persons and this one shop owner, they'll pick the shop owner.

Now the question is how do we take those people out of conflict? And I think the answer is to try to break up the question of scarcity. In other words, and maybe the shop owner isn't the easiest example, but how many people remember Kim Davis, right? Kim Davis, the clerk in Kentucky who wouldn't serve the gay couple who stood there for five days. I mean, it's horrible conduct. It's an absolutely horrible thing to happen to people. The ACLU--

**RIA TABACCO** They reference into those couples, yes.

**MAR:**

**ROBIN** And thank you for that because they needed help. But one of the clashes here is between these clerks and state offices and the couples that need to be served. In Utah, which passed the next to the last anti-discrimination law before Virginia's, actually just decided to break the fiction that we have to choose between the clerk and the office and the couple. And they did that by providing other options for people to solemnized those relationships.

**FRETWELL**

**WILSON:**

Now, Utah had an easy run of it because there had never been, before Utah's landmark nondiscrimination law, a duty in state law for any clerk to solemnize a marriage. It's a very religious state. So maybe everybody was just going to church for these things, but not everybody would. So I blew through my stopwatch. But knowing that, they gave clerk's offices the ability to have someone else in the community solemnized marriages on the same basis as everyone else.

Because they could not be sure that within any clerk's office in Saint George, for example, or another place, that they would have willing clerks. And many of these clerks had been in those jobs for decades before same sex marriage was anywhere even in the air. And so rather than force a clash which comes from scarcity, they took those people out of position of clash by putting a duty on the clerk's offices to make sure that people were all married on the same basis, but not necessarily with people in the employ of the government being the ones to have to do that.

Now that's just one example of thinking outside of the box the way that Bill talked about last night. But we will be in this culture war forever if we continue to litigate all of these details between individuals through the courts. We need instead to go to our legislature and tell them that it's their job to figure out how everyone can flourish. And they need to come up with better answers than the ones we've had.

**CRAIG** And that's perfect, Robin, because you kind of circled to my next question in a way, which is to think about what legislative solutions you might like to see. And as we go down the panel, and I'll give you maybe a couple of minutes more and then sort of proceed onwards. And is to think about what the solutions might look like. And I expect that many of you might have different ideas on what these solutions might look like. And I'm hoping you do because that's what the third round is going to be. So do you want to say anything more about legislative solutions? Otherwise, we can turn to them.

**ROBIN** Yeah. I think we should just march on. Just get back to me in a minute.

**FRETWELL**  
**WILSON:**

**CRAIG** All right. So Ria, do you want to?

**KONNOTH:**

**RIA TABACCO** Sure. Although I'm not sure I'm the right person to begin this question because I actually don't think it's possible to divorce legislative solutions from the courts in the way that you're describing. And that is precisely because of where the Chief Justice began, which is this little thing called the United States Constitution. And if we've seen anything in the last years, months, decades, in the last week, it's that there are people who are seeking broader and broader exemptions under the Free Exercise Clause beyond what I think anyone on this panel is advocating for, to be clear.

**MAR:** Who will bring those claims under the Free Exercise Clause? And what we've seen this court, and in particular, the 6-3 court, but even the 5-4 court that existed under Justice Kennedy, what we've seen this court do is essentially say if you have an exemption, and I'm using the word exemption very loosely here. If you have an out for anyone, then you have to offer that same out to everyone.

And we've seen that just this week. I think the Yeshiva University orders is quite troubling in this respect as Professor Schwartzman noted. Yes, temporarily, Yeshiva University directed to recognize the LGBTQ student club on the same basis as other clubs. But the dissent from four justices makes very plain their view. A view that I think would win the day if the case were taken on the merits, which it may well be, which is that the New York City Human Rights Law does not apply to organizations founded under the benevolent laws, which is essentially appears to be a section of the code that allows for the creation of Freemasons and the like.

And so because you've said the law doesn't apply to this one group, that means you can't refuse to extend that same exemption to Yeshiva University. And I say that not knowing what anyone on this panel thinks why you ought or ought not to get the exemption, but only to make the point that it doesn't really matter ultimately what the New York City Council thought because the Council did, I think, attempt to strike a balance. The court is going to be clear that if anyone is out, then everyone is out.

And in fact, in the *Fulton versus City of Philadelphia* case, we saw if there's even the theoretical notion that anyone's out, then everyone's out. So in *Fulton*, this was the case, of course, where Catholic Social Services sought to renew its foster care contract with Philadelphia despite the fact that it refused to certify same sex couples and the theory that no same sex couple ought ever to be fostering.

And there, the city of Philadelphia had never let anyone out of its non-discrimination provision, which was both in the city law and in the contract. But the contract reserved for the commissioner of social services the right to let someone off the hook for complying with this anti-discrimination rule. And the Supreme Court says, well, you've said that you could excuse someone. So you never did. You've never done it. No one said it had been done. But because you said theoretically, you might exempt someone sometime, it can't really that bad. And you've got to give Catholic Social Services the exemption this time.

So I just don't think it's right to say that we as legislators or we can encourage legislators to carve out exemptions and strike the balance when this court has made so clear that any out, even the idea of an out, the theory of an out, is going to be an out for everyone.

**CRAIG  
KONNETH:**

Yeah, absolutely. And I actually appreciate that because in some ways, you've reframed my question, which is do legislative solutions even matter because if the courts are just going to come in and append it based on its own sense of doctrine? And even when there are outs for religious organizations, we see in Hobby Lobby, for example, you still end up with the court sort of shifting the balance in a way that it thinks is appropriate.

So maybe with that reframing, as well as with my earlier question in the mix, do legislative solutions matter? And if they do, what do they look like? We'll proceed down to Bill.

**WILLIAM  
ESKRIDGE:**

Well, I think legislatures matter. And I honestly think it's a defeatist attitude to think that the Supreme Court is just going to roll over everything. It might indeed, and I agree with your evidence. But I think that's not the attitude we should take. And let me use Hobby Lobby as an example.

So the Supreme Court came down with a virtually lawless decision in Hobby Lobby, which extended the Religious Freedom Restoration Act protections to private, for profit companies that were closely held by someone who was a person of faith. That is a very dramatic extension of the Religious Freedom Restoration Act. So what happened? Was this the closing down of protections for contraceptions in America and even of gay rights? And the answer is no, it was not. Not yet anyway.

The most dramatic reaction was that after Hobby Lobby, there were initiatives in Arizona, Indiana, Arkansas, and other states to amend their religious Freedom Restoration Acts to include the Hobby Lobby situation because most states explicitly excluded the Hobby Lobby situation or seem to the way they phrased their statutes. And there was a tremendous political pushback to that.

And I'm not talking about New York or even Virginia. I'm talking about Indiana, Arkansas, Arizona. These are pretty conservative states. And in every one of those states, there was legislative pushback. Extremely conservative Republican governor vetoed the Arizona statute. An even more conservative Arkansas governor vetoed the Arkansas statute. An even more conservative Indiana governor signed the statute, and then they backtracked it with a new statute.

So I don't think it is hopeless. I think political pushback is very important, even when there have been irretrievable constitutional defeats. And I would give us an example, Dobbs. Do not take a defeatist attitude toward Dobbs. The Supreme Court is not going to overrule it. But that does not mean that we should think that legislative and political pushback is irrelevant to Dobbs, or Hobby Lobby, or these other things.

And here's why I think the Robin project is very important. Is I think it's critically important that the reddest of red states, Utah, adopted a statute. And I admire this statute, which combined a dramatic expansion of anti-discrimination protections to both sexual and gender minorities, while at the same time codifying pretty sober religious allowances.

And so I admire that. And what I admire about it is that both sides sat down and listened to one another. And I think that can be replicated, though it has not been, and it's going to be a struggle. For example, Arizona. I've talked to a lot of the people in Arizona. I could see some success in Arizona if the business community is very supportive. The religious community is very heterogeneous frankly in Arizona. It's not so heterogeneous in Utah, but it is in Arizona.

If you could get some of the religious stakeholders on board, like the Church of Jesus Christ of Latter Day Saints, which is important, but not controlling Arizona. And then the LGBTQ rights groups, who I think would be the main roadblock to any kind of replication of the Utah statute of principles. So there's that. We have a Supreme Court that is not going to bend over backwards for LGBTQ rights, particularly along these lines that we're talking about.

And we've got an administration at the federal level that is very supportive. And they are taking a shellacking. And they're not taking a defeatist attitude. Every time they take a loss, they come back. And they try to do more. And they've done some good things for us so far in LGBTQ rights. And so I think it's not just legislators. I think it's administrators and legislators. And the most important variable we've not talked about, and that is society.

This needs to be worked out, and negotiated, and pressed at the societal level, within churches frankly. That religious views are not monomaniacal on this. Religious views themselves are endogenous to the larger process of legislation, administration, law, but particularly, society. And particularly on LGBTQ rights, we do have the hidden weapon of what I call pop-up homosexuals. And that is that LGBTQ people pop up in unexpected places. They really do.

The Cheneys, very conservative couple, are very avid for marriage rights for their lesbian daughter and so on down the line. Even Phyllis Schlafly had a gay son. That didn't move her very much. So that's where I think it is. And many of you University of Virginia Law School students, you all are going to be leaders not just in Virginia, which is kind of a purplish state but does have an anti-discrimination law, and a RFRA. It has very broad RFRA I might add. But you all can be leaders all over the south and all over the nation.

And lawyers I think usually play a more constructive role than they sometimes do. They're raising the stakes as the Supreme Court is now doing, I think that's not very constructive. But lawyers can play a role. Some of you might end up clerking for the Supreme Court. If you do, I would urge you to be a voice of moderation, even though you don't actually have a vote in conference.

**CRAIG**

**KONNETH:**

Thank you, Professor, or Bill rather. Christine.

**CHRISTINE  
DURHAM:**

I'd like to respond to several points that have been made. First of all, I really think, Ria, that you made an incredibly important point when observing that part of what's happening, at least in the litigation arena, is that the dignitary status of LGBTQ+ people has not achieved that of women, and people of color and race, and so on. I mean, you're absolutely right.

If you transform the examples of the cases that deal with race and gender, for example, although gender was a little harder than race, we have to remember, what you come to is people say, well, somehow, this doesn't feel the same to me. And Judge is saying, this doesn't feel the same to us. So that's really important to remember.

The other thing. I don't think I'm a defeatist, but I have to say I'm more of a pessimist than you are, Bill, because I look at the relative competency on the part of legislators and administrators, versus the competency of the courts. And frankly, I don't get really excited about the competency levels for either.

You do have advantages if you're lucky, if you function in a system where the state and federal judges who will be making these decisions are in fact neutral and have strong fealty to the federal, and in the case of state judges, to the state constitutions. But I have to say when I look at legislatures, I mean, what has happened?

I'm just going to blow up the whole framework here because, and I admire what Robin does, and I admire what you teach. But having spent many years of my life working with the Utah legislature, we have a one-party system. They have so gerrymandered the electoral system that we will never get anything, at least for the next 10 years, anything but-- not just Republicans, but Republicans who are more conservative than the population at large.

In the in-state polls that have been done on the Dobbs decision and on abortion, guess what? Utahns, a majority of Utahns support rights to abortion. Now, you won't see a scintilla of that sentiment in any legislative debates or any legislative discussions. So that's why I end up a little bit to the, I hope not defeatist. I think those of us who care about these outcomes, activists, in whatever fashion, we identify as having the best possibility of success.

And really, Robin and I were talking last night. And I told her, I think she's got a gift for what she does. She must be a mediator at heart. But I find myself, well, frankly, frequently, somewhere between annoyance and outrage at what goes on in our legislators and our courts from time to time.

And it's surprising to me in some ways that our state judges have been quite progressive in the arena of things like name changes and legal gender changes. And in doing so before the legislature has even acted. So you get these streams of encouragement that come from different sources. But I wish I had more confidence in the competency of the legislature to deal with these very personal, as well as very institutional concerns. Well, I think I'm getting old, and I'm just hoping I live to see a little more progress. So I'll leave it there.

**CRAIG  
KONNETH:**

Absolutely. That's really helpful. I'm going to offer a couple of thoughts and then a quickfire round. And then we're going to open up to Q&A. Oh, yes. Absolutely. Please. I'm sorry.

**ROBIN  
FRETWELL  
WILSON:**

That's OK. I just want to say a couple of things. So look, we were talking at dinner last night. Let's start with abortion, where I think lots and lots of people are just at an absolute loss for where we are. I think some of those statutes happened the way they did. Just look at Indiana has-- I'm sorry, Missouri has eight separate laws that have piled and piled and piled on each other in 50 years.

And in some sense, the pro-life folks could just write these laws without any political cost to themselves because no one thought they would ever matter. And they just stacked, and stacked, and stacked. I was doing a talk recently for the Oxford Union. And I went back and coded each of the states. I have this interest in just understanding where all these different states. You're like me. And so few of them, many of them do not have rape or incest exceptions. It's just absolutely out of mind stuff.

And I think many of us are at a loss for how do we even begin to go to the legislatures that stacked up all of these laws this way and move their minds? And yet, that's the project. That is actually what we have to do for the moment. Now, we may disagree with it. We may think this just is awful. The court was wrong. But that's where we are.

In many ways, with LGBT rights, we're in the same bucket all the time. That's where we start. And the question is we can litigate things like what happened to these folks that Kim Davis humiliated? Or we can try to write new scripts that avoid those clashes entirely. And I think that's the place we need to be. And Dobbs is on the top of the mind for me.

At the beginning of my life, I was fostered before being adopted. We are about to be awash in babies. Let's just be honest. And those babies are going to need homes. And I think we have to stop thinking in terms of exemptions. If you think about same sex adoption, for example, and the clashes we've had with religious agencies, like Miracle Hill. I see a lot of people shaking their head right now.

We had an agency in South Carolina that got a waiver from the US government, the Trump administration, to send families away when they presented to adopt. And not because they were gay necessarily. They sent away gay families, true. They sent away Catholics. They sent away Jewish families. They sent away anybody that didn't have their specific view of Jesus. Meanwhile, those children are what? What's happening?

Now we're going to have the same problem all over the country. You know who the three biggest set of adopters are in America? They are single women, gay couples, and religious people. And we need all three sets of people to stay in this if we're going to do something about all the babies.

Now, that takes you. I think Fulton was a horrible decision for other reasons, not least of which is people could write programs that just gives no exemptions to anybody for anything and constrain the discretion of agencies. And I think that's bad to write a rule that leaves no room for anything because you might be asked to extend exemptions to others. I think it's a terrible incentive system.

So what does it mean should do with adoption? Well, I think every couple who presents has to be treated with dignity. My father grew up in Appalachia, on dirt floors literally. And if my parents had gone to an agency to adopt and had been told they were not the perfect family, my father would have said, we're out of here. That's it. So you can't lose those folks. You have to treat them with dignity.

On the other side of this, religious agencies are really good, and church communities are really good at bringing families forward. You can't lose them either. So how do you do both things? That's the project. And part of the reason that we feel like we have to pick between the family and the agency is the way we have funded adoption and foster care services for decades.

We actually don't pay anybody until the child is placed in the family. And that means that every subsidiary step, finding a family, bringing them forward, training them, home studying them, certifying them as a family that can adopt, placing them in the family monitoring. Every single step has to be done by the same agency. And what we've done is create large monopolists in the marketplace. And many of them are like Bethany and Catholic charities. And they can't bring themselves to do all the steps, namely certification.

We'll just break that system up. Don't give an exemption. I'm not trying to give exemptions. I want to entirely reform the way we pay for adoption and foster care system services. So that the one thing that somebody can't do can be pulled out of the mix, and they can continue in the marketplace to serve. People don't have to be turned away. Create consortiums where it's the consortium that serves the family that comes forward, not any individual agency. So that people are treated with dignity.

**CRAIG** No. I appreciate that. And I think that in some ways, I sort of see a breakdown. And I'll describe the breakdown.  
**KONNOTH:** In the meantime, Nick, is that a mic for people to queue up? So there's a mic for you to queue up with your questions. And so walk up when you're ready.

And the breakdown that I'm seeing is sort of tracing, going back to the questions I asked, was the way the problem is seen, number one, right? So are we talking about groups that in a situation where we've got to pay attention to the fact that people feel on both sides harm to their dignity, to their quality interests, their sense of selfhood? And we should worry about the feelings on both sides?

Or is it more of a situation where we're saying, look, inherent in your concept of your religion, of your identity is the rejection of this other group. And that should not be tolerated. And just as it was not accepted in the context of race and sex, that the problem essentially is that right now, the way you conceptualize the world in your space, and it leaves no leaves no room for LGBT people. And the law cannot countenance that So this is my gloss, let's say, on the way the problem is. And we can play around with that.

And then in terms of solutions, what that maps onto is on one hand, maybe optimism in a legislative compromise, right? So if there are interests on both sides, equality, liberty interests that we have to take into account, some kind of legislative solution may be possible. And on the other hand, if the idea is that LGBT people should be treated in the same way as we see racial minorities and to some degree, women treated in cases of previous years, then there may be some skepticism of legislative solutions because courts are going to step in and do what they want anyway.

And so to my mind, that kind of seems to be the mapping. That may not be the mapping. And hopefully, during the Q&A, we can sort of challenge the way I map things out. But are there any questions? Or I can keep going. All right. Well, I'll keep going. And then as people have questions, they can sort off--

**WILLIAM** Well, can we resist remapping?  
**ESKRIDGE:**

**CRAIG** Yeah. Exactly. So that's precisely where I was going to go.  
**KONNOTH:**

**WILLIAM** Let's resist the mapping.  
**ESKRIDGE:**

**CRAIG** Yeah. I could see everyone on the panel looking at me. So absolutely. So let the resistance begin.

**KONNOTH:**

**RIA TABACCO** All right. I'll resist first, and I can't wait to hear what Bill says. But I think the mapping really goes to something  
**MAR:** that Bill had said earlier about being defeatist. And I don't think it's that I'm a defeatist. I think it's that you and I have definitions of success. And I think the mapping is one way of defining those two versions of success.

I mean, to me, defeat would be accepting a legislative compromise that says that me and my family are less than other families. I have twin five-year-olds. And I would not accept any legislation that says our family is entitled to less dignity than anyone else. That is what I'm fighting for. That is what the ACLU is fighting for. And we will never stop. So defeat would be giving up. We absolutely will not be defeated.

I also wanted to respond to this idea that somehow, we all just need to work it out amongst ourselves. And I just wanted to share with you a quote. We'll see if anyone can recognize it. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. I think Bill recognizes this sentence. But does anyone else? I'll give you a hint. It's from 1896.

It's the majority decision in *Plessy v. Ferguson*. And I say that only to say that there are no new questions here. There is only old wine and new bottles. We are confronting the same questions that have plagued this country since our founding and. There is nothing special about this conflict or the existence of LGBT people that makes it any different.

**WILLIAM** I'm going to resist the question in both respects. I think, Craig, both sides see it the way you were putting it.  
**ESKRIDGE:** Certainly, LGBTQ people see it, if your faith exercise in the commercial sphere means the exclusion of me, that's wrong. But the way many religious people see it is that my playing out of my faith as a vendor or whatever is being excluded by your vision of the world. They see it that way as well. So I think it's on both sides.

You've hit the nail with your head as to exactly why this is such a divisive issue. It's not unique. Piggie Park is another good example. And so what about that? And that is, let's think about *Plessy* and what happened to *Plessy*. I presume you're not taught this at the University of Virginia. *Plessy* was kind of abrogated or something by *Brown versus Board*. They don't actually use the word overruled. And it was some schools case. They should have overruled *Gong Lum*, OK?

But that was not the end of the story. And in fact, *Brown*, I grew up in the south, *Brown* had very little effect in the south on education. It inspired a lot of people. It did lead to some integration. But *Brown's* effect was very disappointing. What I think invigorated *Brown*, which was a great decision regardless of its consequences, was the social movement. It was Dr. King. It was not just Thurgood Marshall, but it was Dr. King and many religious allies.

Try to think how many major normative changes in America have come without the support of religion? You think of abolition. Religion was very central. You think of the Civil Rights Movement, which is very central. Think of prohibition. Religion was very simple. They're not all great movements. Talk about women's rights. Religion actually played a role in that as well.

So religion was very important in the Civil Rights Movement at the ground level. And the big, actual advance came with legislation. The '64 Act, the '65 Act, which was voting, and the Educational Amendments, which meant that schools were very dependent on federal money, and they were not supposed to discriminate. So under Lyndon Johnson and Richard Nixon, of all people, there was actually a lot of desegregation. And still, progress has been very uneven, I'm afraid because society has lagged.

So my view is that I think it's not right to view, oh, the courts can solve it, or the legislatures can solve it. That's not my position. My position is that all the branches of government actually have a role to play, but they've got to be animated by social movements and social pressure.

So at the very basic level, administrators, and I'm not just talking about the Department of Justice. I'm talking about administrators at the local level. The key players on adoption are usually social services administrators. Second parent adoption for lesbian mothers did not come because judges were enlightened or even legislation. It came because social service workers said these are good parents. And we're going to support them for the district judges. And we're going to support them in Courts of Appeals. I'm going to support them in legislatures. And that came to be. So I think administrators play a potentially great role, even if they're not enlightened, in which they played not a great role.

And then judges. Here's what judges can do. Is that judges, particularly at the trial level, can pay attention to facts. And the challenge is to marshal the facts and reliance. And at the appeals level, judges can also do some good. One thing judges can do is they can reverse the burden of political inertia. Now that has to be an act of bravery. The Brown judges did that. They can do that. But here's the more important thing. They can create conditions for falsification of stereotypes and bad arguments. And that's exactly what happened in the adoption context.

And then thirdly, legislatures, what role that might they play? Legislatures provide an opportunity to entrench a norm. All the rest of it before then is equality practice. But if you can get some kind of legislative buy-in, as we actually might be on the verge of doing for the respect of Marriage Act, that would be a huge thing to get a lot of Republican buy-in if that passes the Senate as it indeed might after the election. That would be massively important. It would not be complete victory. You're never going to have that. It's always going to be dialectic and dialectic at the social level.

**CRAIG** So I just want to add a couple of thoughts though, and then we'll bring Christine and Robin. And footnote, again,

**KONNOTH:** I will stop the conversation if someone goes up to the mic. So I just want to encourage people. I see many members of my class here. And so don't make me call on you.

**RIA TABACCO** We don't bite.

**MAR:**

**CRAIG** That's all I have to say.

**KONNOTH:**