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Liberty, Legislation, and Litigation of Religious Freedom: The Connecticut Law Review Symposium

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Introduction

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In 2017, the Connecticut Law Review hosted the symposium "Religious Freedom: Liberty, Legislation, and Litigation." The symposium set out to explore three specific areas of debate within the conversation about the federal Religious Freedom Restoration Act (RFRA): (1) liberty—the right to be free to exercise your religion without a substantial governmental burden; (2) legislation—how RFRA laws vary from state to state and what challenges exist in balancing competing interests through the legislative process; and (3) litigation—cases that arise within the employment law field, constitutional civil rights cases, and the notion of a corporation's right to free exercise. This Introduction summarizes the arguments of several of the symposium's contributors and authors in this issue of the Connecticut Law Review.

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EMILY GAIT & STEPHANI ROMAN [*]

The federal Religious Freedom Restoration Act (RFRA), which passed Congress in November, 1993, was enacted to "provide a claim or defense to persons whose religious exercise is substantially burdened by government."[1] The law addressed Congress' concern that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[2] After the federal RFRA was enacted, federal protection for religious freedom continued to face challenges, and the United States Supreme Court invalided the 1993 RFRA's applicability to states in *City of Borne v. Flores*.[3] States responded by enacting similar laws mirroring, expanding, or contracting the existing federal RFRA,[4] which continued to apply in the federal context.

On October 20, 2017, the *Connecticut Law Review* and the University of Connecticut School of Law hosted the symposium "Religious Freedom: Liberty, Legislation, and Litigation." The symposium set out to explore three specific areas of debate within the RFRA conversation: (1) liberty—the right to be free to exercise your religion without a substantial governmental burden; (2) legislation—how RFRA laws vary from state to state and what challenges exist in balancing competing interests through the legislative process; and (3) litigation—cases that arise within the employment law field, constitutional civil rights cases, and the notion of a corporation's right to free exercise.

This symposium took place before the U.S. Supreme Court issued its decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[5] However, the debate over rights under RFRA remains largely unresolved by this recent decision, which implicated the Free Exercise

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[*] University of Connecticut School of Law J.C. Candidates 2019. Thank you to Professors MacDougald and Spencer for their support, encouragement, and guidance. We could not have been more pleased with the energy and enthusiasm that every single panelist and moderator brought forward to make this an engaging discussion. Special thanks to the Symposium Committee for putting on the finishing touches.

[1] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103–141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[2] *Id.*

[3] 521 U.S. 507 (1997).

[4] *See, e.g.*, CONN. GEN. STAT. CONST. ART. 1, § 3 (2017).

[5] 138 S. Ct. 1719 (2018).

Clause of the U.S. Constitution. While some seek to expand the extent of protections for religious beliefs being carried into the public sphere or commercial domain, opponents are concerned over the limitations these intended protections have on civil liberties for minority groups that are repudiated by majority religions. Others argue that the shift from minority religions asserting protections under the federal RFRA to majority religious groups doing so may not have been anticipated by lawmakers at the time it was enacted. In light of the U.S. Supreme Court's decision to not directly address whether a service provider's sincere religious beliefs might have to yield to the state's interest in protecting the rights of same-sex couples,[6] the applicability of the federal RFRA and the reach of the various state analogues will continue to present challenges.

Speakers at the symposium included legal scholars, journalists, religious leaders, and the governor of Connecticut. Discussion focused on an array of topics, including conflicts between religious liberty and generally applicable work law, the collision between claims of religious autonomy and claims of LGBTQ equality in the domain of state law, and Connecticut's own RFRA. This Symposium Issue includes contributions from scholars who attended the symposium and graciously contributed their thought-provoking analyses to the *Connecticut Law Review*.

Professor Michael A. Helfand's contribution focuses on the scope of protections for religiously motivated institutions and corporations. Professor Helfand has previously proposed an "implied consent" framework for addressing religious institutional claims. This framework grounds the authority of religious institutions in the presumed consent of their members. Professor Helfand argues that consent can be assumed so long as members understood the unique religious objectives of the institution when they joined. This would implicitly authorize the institution to make rules and resolve disputes connected to accomplishing such objectives. Professor Helfand proposes that such a framework supports some of the religious liberty claims advanced by religious institutions and establishes important limits on religious institutional authority and autonomy. Professor Helfand's article summarizes his theory and responds to critiques.

Professor Christopher C. Lund's contribution is a brief exploration of martyrdom and some of the issues it presents. Professor Lund discusses a range of subjects, including religious voluntarism, the law of civil contempt, some renowned nineteenth century polygamy cases, and some modern cases of child abuse and neglect. Professor Lund's essay touches on history, theory, and doctrine. His basic premise is that martyrdom matters, and that religious liberty has been and will continue to be shaped by the willingness

[6] *Id.* at 1732 (observing that "the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed," but holding narrowly that the Colorado Civil Rights Commission violated Philips' First Amendment right by acting with hostility towards his sincerely held religious beliefs).

of people to suffer for their faith. A recurring thought in his essay is that religious liberty has a less certain future in a world without martyrdom.

Professor Charlotte Garden traces the recent history of arguments by religiously affiliated colleges and universities that they should be exempt from the National Labor Relations Act. Professor Garden considers how the legal dispute regarding union organizing at religiously affiliated colleges and universities sheds light on the debate over religious liberty for enterprises. First, she discusses courts' difficulties in separating questions regarding employer religious liberty from courts' conceptions of appropriate managerial prerogative. Second, she discusses how this particular legal dispute demonstrates that some religious exemptions have significant value in secular markets and that employers may be able to negotiate accommodations that partially compensate employees for the costs they incur as a result of those accommodations.

Professor Adrienne Fulco delves into the history of Connecticut's own RFRA. Professor Fulco analyzes the legal and policy concerns that prompted Connecticut legislators to first introduce a religious freedom restoration bill in 1991 and then pass a very similar version in 1993. Professor Fulco scrutinizes the pertinent legislative history to understand the legal, moral, and policy questions that were foremost in the minds of Connecticut legislators and the witnesses who provided testimony at the time. Professor Fulco also considers why a debate about religious freedom, that today is politically polarizing, not only provoked little controversy at the time, but also took place largely outside of public view.

The *Connecticut Law Review* is grateful to these authors for their participation in our symposium and their contributions to the enduring discussion of religious freedom in the United States.