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March 1, 2014: The Attack on Douglas Laycock

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Title: The Attack on Douglas Laycock

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3/1/2014—I was sad to see the vicious attacks on Doug Laycock, Law Professor at Virginia and leader of a group of law professors that have been trying to get religious exemptions in gay marriage legislation out of sympathy for both gay marriage and religious liberty. The attacks, which taint Doug as anti-gay rights arose out of a letter he wrote to Governor Brewer of Arizona, which others also signed (I did not), that pointed out that the proposed Arizona law would not have immunized discrimination against gay people but would have given religious believers a potential defense in private anti-discrimination lawsuits. A judge would have to determine whether the exemption defense would be successful. Doug was arguing that, ironically, a religious exemption in a gay marriage bill, which have not been controversial, automatically allows discrimination while the RFRA type amendment in Arizona would likely have rejected most religious exemption claims. Even though I disagree in part with the analysis that the Arizona law was not that bad, the point in the letter that the religious defense would not automatically win, was correct. And the suggestions on the web that Doug and some other signers are not really pro-gay marriage is absolutely wrong with regard to people who have been signing the pro-gay marriage letters. The reason I strongly opposed the Arizona bill was the same reason I now have qualms about generalized religious exemptions—this not your father's RFRA [Religious Freedom Restoration Act]. I believe the Supreme Court is going to uphold religious exemption claims under RFRA. The Court signaled this by ruling in favor of the religious claimants in *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal* in 2006, holding that the government had failed to justify its ban on a sacramental tea containing a Schedule I substance. This case was litigated under RFRA and this claim succeeded, whereas prior to *Unemployment Division v Smith* (1990), it likely would have failed. I predict a majority on the Supreme Court will say, look, we warned you that heightened scrutiny for religious exemption claims would lead to anarchy. Now you'll see were right. But just because I disagreed with the legal analysis in the letter is no reason to mischaracterize both the argument and motivation of honorable persons.