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March 25, 2016: Religious Exemptions

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Title: Religious Exemptions

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3/25/2016--In a little noted change, Douglas Laycock of the University of Virginia School of Law, and the country's leading expert on church and state, submitted a brief on behalf of a Baptist group supporting the government's position in the contraception exemption case that was argued in the US Supreme Court on Thursday. Laycock has said that he had never supported the government in such a case before. In this case, a group of religious organizations claim that the exemption they enjoy from covering birth control under Obamacare is not enough. The exemption still renders them complicit in the procurement of birth control by their employees. The details of what they have to do under the exemption are contested. But for me they don't matter. It is clear that the organization does not pay for any medical procedures that they oppose on religious grounds. The problem is the way that the religious organizations say these kinds of cases should be resolved. The cases are being litigated under a statute--the Religious Freedom Restoration Act (RFRA)--that generally prohibits the federal government from placing a substantial burden on the practice of someone's religion unless the Government has an extraordinary justification. The religious organizations seem to be saying that only they can judge whether a government practice is a substantial burden on their religious practice. This is exactly the sort of claim that the late Justice Scalia feared would be made when he wrote in the Smith case in 1990 that religious believers have no constitutional protection against a generally applicable law. It would court anarchy to allow every religious believer to decide the validity of his own claim. Well, here we are. The burden on religious practice, whatever it is under the facts, is exceedingly modest. But the plaintiffs in this case say that such a judgment cannot be made by a Court. Maybe they are right, but if they are right, RFRA will have to be repealed. And eventually it will be. That is why Professor Laycock is siding, this one time, with the government.