The following amicus brief was joined by James E. Andrews, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). It was filed in the U.S. Court of Appeals on May 26, 1995.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

95-50306
(U.S. Dist. Ct. No. SA-94CA0421)

P.F. FLORES, ARCHIBISHOP OF SAN ANTONIO,

Appellant,

v.

THE CITY OF BOERNE,

Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

BRIEF AMICUS CURIAE OF THE COALITION FOR THE FREE EXERCISE OF RELIGION

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INTEREST OF THE AMICUS

The Coalition for the Free Exercise of Religion ("Coalition") is a coalition of sixty-six religious and civil liberties organizations. These organizations represent the spectrum of religious diversity in America, Christians, Jews, Moslems, Native Americans and Sikhs. The Coalition includes religious liberals and conservatives, and groups with world views as disparate as the ACLU and Concerned Women for America. They are united by the conviction that the protection of religious liberty is essential for the well-being of this society. The members of the Coalition are listed in Appendix A.

The Coalition was called into being in response to the much-criticized decision of the United States Supreme Court in Employment Division v. Smith. It drafted, lobbied for and ultimately secured the passage of the Religious Freedom Restoration Act ("RFRA"), which provides statutory protection for the rights the Court declined to protect in Employment Division v. Smith.

The Coalition takes no position whatever on the merits or any other of the various disputes between the appellants and the appellees. It addresses only the question of whether RFRA is a legitimate exercise of Congressional power.

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ON APPEAL FROM THE U.S. DISTRICT COURT
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ARGUMENT

The Religious Freedom Restoration Act ("RFRA") counteracts Employment Division v. Smith, 494 U.S. 872 (1990). Without changing constitutional law, Congress enacted RFRA as a statutory remedy to fill the void left by that decision. Congress had ample authority to do so.[1]

I. CONGRESSIONAL POWER UNDER AMENDMENT XIV, § 5 IS TO BE GENEROUSLY CONSTRUED

A. Section 5 Permits All Legislation Necessary And Proper To Fulfill Its Purposes

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1. The Supreme Court demands that Congress invoke its authority under § 5 either explicitly or in authoritative legislative reports. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 15-17 (1981). That requirement is met here. 139 Cong. Rec. S. 14469-70 (October 27, 1993) (remarks of Senator Bradley); id. (remarks of Senator Grassley); Senate Report 103-111, 103rd Cong., 1st Sess. at 13; H. Rep. R. 103-88, 103rd Cong., 1st Sess., at 9. These were no mere ipse dixits. The issue of Congressional authority was discussed extensively at hearings. See, e.g. Religious Freedom Restoration Act: Hearing Before the Committee on the Judiciary, U.S. Senate, 102nd Cong, 2d Sess. (statement of Professor Douglas Laycock) (supporting exercise of § 5 power) 67, 92-96; id. at 116, 124-25 (statement of Bruce Fein) (challenging existence of § 5 power); Religious Freedom Restoration Act of 1990: Hearing Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 101st Cong., 2d Sess., on H.R. 5377 at 50-51 (remarks of Rev. John H. Buchanan, Jr., at 50-51 (supporting power); id. at 72-79 (letter from Professor Douglas Laycock) (same): Religious Freedom Restoration Act: Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 102d Cong., 2d Sess., on H.R. 2797 at 353-59. The Congressional Research Service in a report prepared for the Congress concluded that the Act was within Congress' power. A. M. Ackerman, The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis, (1992)(Report 92-366A).

This case turns on the legislative power conferred on Congress by Section 5 of the Fourteenth Amendment. Like all Congressional powers, that power may be exercised in tandem with the Necessary and Proper Clause. As Chief Justice Marshall said so long ago, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420 (1819):

> Let the ends be legitimate, let it be within the scope of the Constitution, and all means that are appropriate, while are plainly adapted to that end, which are not prohibited, but consistent under the letter and spirit of the Constitution, are constitutional.

That rule applies in the § 5 context.

> All of the [Civil War] Amendments derive much of their force from [the enforcement] provision . . . . It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. . . . Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-46 (1879).

B. The Fourteenth Amendment Allows Congress to Supercede State Sovereignty

The Tenth Amendment, reserving non-delegated powers to the states, is no obstacle to Congressional enforcement of the Civil War Amendments. Those amendments worked a deliberate

constitutional revolution. City of Richmond v. J.A. Crosson, 488 U.S. 469, 490 (1989).[2] They transformed what had been the state's exclusive responsibility to protect the fundamental rights of citizens, see, Barron v. Mayor and Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), into a joint federal-state enterprise. No longer was protection of individual liberty to be dependent on the will and whim of local officials, judges, or oppressive majorities.[3] Opponents of ratification of the Fourteenth Amendment repeatedly called attention to this shift in power,[4] which caused some states to refuse to ratify it.[5]

South Carolina v. Katzenbach, 383 U.S. 301 (1966) considered the constitutionality of provisions of the Voting

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2. Cf. A. Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992) (hereafter Amar, "Bill of Rights").

3. E. Foner, Reconstruction, 1863-1877 251-255 (1988); M.K. Curtis, No State Shall Abridge: The Fourteenth Amendment of the Bill of Rights (1986) (hereafter M.K. Curtis, "No State"); R.J. Kaczorowski, The Nationalization of Civil Rights: Constitutional Theory And Practice In A Racist Society 1866-1883 (1987).

4. J.B. James, The Ratification of The Fourteenth Amendment, (1984) at 30-31; 59; 69; 103, 106; 110-11; 176; (hereafter James, Fourteenth). Cf. M. McConnell, The Fourteenth Amendment, A Second American Revolution or the Logical Culmination of the Tradition, 25 Loyola-L.A. L.Rev. 1159 (1992).

5. M.K. Curtis, No State, supra, at 151-53; James, Fourteenth, supra, at 59.

Rights Act of 1965, including the pre-clearance provision, which prohibited implementation of any change in state election laws without prior federal approval. South Carolina unsuccessfully challenged this provision as an invasion of the reserved powers of the states. Pointing to § 5, the Court said, "as against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibitions of racial discrimination in voting." 383 U.S. at 324.

That holding was reaffirmed in Fitzpatrick v. Bitker, 427 U.S. 445, 453, n.9 (1976). There, Connecticut argued that a suit against it by an employee for employment discrimination was barred by the Eleventh Amendment. The Court had no difficulty dismissing the defense. Acting pursuant to § 5, Congress may "provide for private suits against states . . . . which are constitutionally impermissible in other contexts."[6] Accord City of Rome v. U.S., 446 U.S. 156, 172-78 (1980).

C. Section 5 Altered The Relationship Between The Supreme Court and the National Legislature

That grant of power in § 5 was calculated to redress institutional shortcomings revealed during the slavery crisis.

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6. Even when National League of Cities v. Usery, 426 U.S. 837 (1976) restricted federal regulation of the states, those restrictions were inapplicable to Congressional action under § 5. E.E.O.C. v. Wyoming, 460 U.S. 221, 243, n. 18 (1983); City of Rome v. U.S., supra, 446 U.S. at 179.

The decisions in Dred Scott v. Sanford, 60 (19 Howard) U.S. 393 (1857) and the fugitive slave law cases, Ableman v. Booth, 62 U.S. (21 How.) 506 (1858), fueled the crisis leading to the Civil War. Rectifying these judicial `mistakes' decisions was a prime goal of the drafters of the Fourteenth Amendment, Amar, Bill of Rights, supra, 101 Yale L.J. at 1222-24.

By creating a right of national citizenship, Section 1 of the Amendment overruled Dred Scott. But those who saw to the enactment of the Civil War Amendments were not about to trust their handiwork to the very courts which had so materially contributed to the national crisis. The enforcement sections insured that the Congress would have a say in the definition and enforcement of the rights protected by these Amendments, provided only that Congress observed the standards imposed by the Amendments themselves. Ex Parte Virginia, supra; City of Richmond v. J.A. Crosson, 488 U.S. 469, 490 (1989).

That original intent is sufficient to dispose of the argument that in enacting RFRA, Congress invaded the Court's special province or has been guilty of lese majesty by questioning the Court's construction of the Constitution.[7]

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7. Professor J. Brant, Taking the Supreme Court at Its Word: The Implications of RFRA and the Separation of Powers, 56 Mont. L.Rev. 5 (1995) argues that Smith was premised on the Court's own perception of a judicial inability to manage the compelling interest test. See 494 U.S. at 885-86. She offers no explanation of why the balancing test is more difficult in this context than in other, constitutional

Neither Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) or Cooper v. Aaron, 358 U.S. 1 (1958), holds anything to the contrary. Marbury merely holds that the Court is empowered to decide constitutional questions in cases properly before it, not that no other branches' views of constitutional questions is relevant or, in appropriate cases, binding. The narrow holding of Cooper is that states may not defease constitutional rights owing to individuals and enforced in litigation by the courts. Nothing in either case purports to hold that Congress cannot broaden individual rights pursuant to § 5 in the face of constricting decisions of the Supreme Court. And the case law indicates that Congress has just that power. Thus, Katzenbach v. Morgan, 384 U.S. 641 (1966), upheld a section of the Voting Rights Act which, like RFRA, created a statutory right pursuant to § 5 where the Court had refused to recognize such a right under the Constitution itself.[8]

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contexts. Moreover, cases arising under RFRA are "cases and controversies" arising under federal law for Article III purposes. Cases meeting that requirement may be assigned to the federal courts by Congress. Art. III, § 1. The courts may not decline to exercise a jurisdiction validly conferred upon it because the cases are difficult or the courts would prefer not to be bothered, as say under the Voting Rights Act or Title VII or the anti-trust laws. The separation of powers does not mean that one branch can unilaterally decide that it wants no part of some action validly undertaken by another branch.

8. When the courts invalidate state legislation under the `dormant' Commerce Clause, Congress retains the power to intervene under its Commerce Clause power. See, e.g., Barclay's Bank PLC v. Franchise Tax Board, 114 S.Ct. 2268, 2286 (1994). It cannot be suggested that in doing so Congress tramples on the Court's role.

Lampf, Pleva, Lipkind v. Gilbertson, 115 S.Ct. _____ (1995), is not to the contrary. There the Court held that the separation of powers was violated when Congress enacted legislation opening up final judgments. Lampf explicitly reaffirmed Congress' power to alter the law prospectively in reaction to judicial decisions. RFRA does nothing more.

II. RFRA IS WELL WITHIN THE § 5 POWER OF CONGRESS

The Supreme Court has addressed the scope of the legislative power conferred by § 5 (and its analogues in the Thirteenth and Fifteenth Amendments) in several cases. Several theories have been articulated: (1) definitional (2) instrumental (3) fact-finding (4) and prophylactic.[9] For present purposes, it suffices that the prophylactic and fact-finding theories make the constitutionality of RFRA easy; the definitional theory buttresses this exercise of § 5 power still further.

A. Prophylactic Relief

The power of Congress to legislate to enforce the guarantees of the Civil War Amendments includes the power to enlarge the area of prohibited conduct to take into account the

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9. See, generally J.H. Choper, Congressional Power to Expand Judicial Definitions of the Substantive Term of the Civil War Amendments, 67 Minn. L. Rev., 299 (1982); W. Cohen, Congressional Power to Interpret Due Process and Equal Protection 27 Stanford L. Rev. 603 (1975); R. Burt, Miranda and Title II; A Morganitic Marriage, 1969 Sup. Ct. Rev. 81.

difficulties of proving a core violation of the Amendments. RFRA fits neatly under this rubric.

1. Title VII and the States

A state violates the Equal Protection Clause only if it deliberately denies a person the equal protection of the laws. Washington v. Davis, 426 U.S. 229 (1976). A law which merely has an unintended adverse impact on a class of persons does not violate the Amendment. Personnel Administrator v. Feeney, 442 U.S. 256 (1979).

Congress, relying on § 5, has extended Title VII's prohibitions on employment discrimination to the states. Fitzpatrick v. Bitker, 427 U.S. 445, 453, n.9 (1976). It did not confine the operation of the statute to the intentional discrimination prohibited by the Fourteenth Amendment. Instead, states were made fully subject to Title VII's adverse impact theory, Griggs v. Duke Power Co., 401 U.S. 424 (1969). The rationale justifying this extension was prophylactic -- that Congress may, in order to be sure that sophisticated forms of intended discrimination do not go undetected, bar even de facto discrimination. 427 U.S. at 449, n.3.

2. The Voting Rights Act

The prophylactic theory was again applied in City of Rome v. U.S., 446 U.S. 156 (1980). On the same day that it held

that the Fifteenth Amendment and § 2 of the Voting Rights Act, ("VRA") banned only intentional discrimination, City of Mobile v. Bolden 446 U.S. 55 (1980), the Court in Rome upheld the constitutional power of Congress to authorize the Attorney General to object to electoral changes which had only the effect of diluting minority political power:

> [U]nder § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are "appropriate," . . . Ex parte Virginia . . .. [T]he Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.

446 U.S. at 177.

Congress subsequently extended the effects test to § 2 of the VRA. 42 U.S.C. § 1973(a). _See_ Thornburg v. Gingles, 478 U.S. 30 (1980). That extension was unsuccessfully challenged by state and local governments as beyond the power of Congress because the Constitution did not itself comprehend `effect' claims. Jordan v. Winter, 604 F.Supp. 807 (N.D.Miss. 1984), _aff'd sub nom_, Mississippi Republican Executive Committee v.

Brooks, 469 U.S. 1002 (1985), citing Major v. Treen, 574 F.Supp. 325, 342-49 (E.D.La. 1983). The Major court rested on the prophylactic theory:

> Congress here determined, after extensive hearings . . . that the intent test inordinately burdened plaintiffs in vote dilution cases, was unnecessarily divisive due to the charges of racism which must inevitably be leveled against individual officials or entire communities, and . . . compelled protracted, often futile inquiries into the motives of officials who acted many years ago. . . ..
>
> Congress enact[ed] a legislative prophylaxis, calculated to forestall the institution of potentially discriminatory electoral systems and extirpate facially neutral devices or procedures which continue to expose minority voters to harmful consequences rooted in historical discrimination. (citations omitted)

Finally, Oregon v. Mitchell, 400 U.S. 112 (1970), upheld the VRA's ban on all literacy tests. The multiple opinions of the Court were summarized in Fullilove v. Klutznick, 448 U.S. 448, 477 (1980):

> The [Mitchell] Court was unanimous, albeit in separate opinions, in concluding that Congress was within its authority to prohibit the use of such voter qualifications; Congress could reasonably determine that its legislation was an appropriate method of [foreclosing the possibility that purposefully discriminatory administration of literacy tests would escape undetected and] attacking the perpetuation of prior purposeful discrimination, even though the use of these tests or devices might have discriminatory effects only. (citation omitted).

3. Racial Set-Asides

In 1977 Congress set aside a certain percentage of contracts under a public works program for minority contracts. The Court rejected a challenge to these set- asides, invoking the prophylactic rationale that the set-asides guaranteed that there would be no current perpetuation of past discriminatory practices. Fullilove v. Klutznick, supra, 448 U.S. at 476-480. Accord Metro Broadcasting v. F.C.C., 497 U.S. 547 (1990); City of Richmond v. J.A. Crosson, supra.

4. RFRA Is Appropriate Prophylactic Legislation

Laws designed to prohibit religion or to discriminate against particular faiths, even if neutral on their face, are unconstitutional. Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S.Ct. 217 (1993). But the litigation history of City of Hialeah highlights how difficult it is to prove such bias. Both the District Court, 723 F.Supp. 1467 (S.D. Fla. 1989), and the Court of Appeals, 936 F.2d 586 (11th Cir. 1991), specifically rejected the Church's claim (upheld unanimously by the Supreme Court) that the ordinances were directed at it. This Court, too, has encountered sophisticated efforts to mask religious bigotry in neutral garb. Mississippi Islamic Center v. City of Starkville, 876 F.2d 465 (5th Cir. 1989).

As in regard to Title VII, the Voting Rights Act and racial set-asides, Congress heard extensive testimony about

hidden religious bias before adopting RFRA. It found that the RFRA burden of proof is necessary to offset the difficulty of proving illicit motive. As the House Judiciary Committee wrote, H.R. Rep. 103-88 at 6:

> After Smith, claimants will be forced to convince courts that an inappropriate legislative motive created statutes and regulations. However, legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators.

The Senate Committee likewise found that legislative bodies will not act to protect religious minorities, although hiding their motives. It quoted approvingly from Justice O'Connor's criticism that "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." S. Report at 7. And see 42 U.S.C. 2000bb(a)(2) (same).

B. Congress' Enhanced Fact-finding Capacity Supports Its Decision to Enact RFRA

Katzenbach v. Morgan, 384 U.S. 641 (1966) challenged Section 4(e) of the 1965 Voting Rights Act, enfranchising citizens who had completed six grades of an American flag school. The provision enfranchised New York's Puerto Rican population, many of whom could not vote because they were not English literate. New York State objected that since the Fourteenth Amendment did not of its own force invalidate

English literacy requirements, Lassiter v. Northhampton County Bd. of Educ., 360 U.S. 45 (1959), Congress could not rely on § 5 to legislate against such requirements.

The Court rejected New York's argument. First, it reasoned that enfranchising Puerto Ricans would allow them to defend themselves against invidious discrimination in the provision of government services, 384 U.S. at 653. But the Court did not rest on this prophylactic ground alone. Pointing to Congress' superior institutional fact-finding competence, it held that Congress could determine that New York's English-literacy requirement constituted invidious discrimination, notwithstanding the Court's conclusion in Lassiter only a few years earlier that literacy requirements were not inherently invidious. This conclusion was based in part on Congress' ability to determine, after comprehensive legislative fact-finding, that English literacy tests were in fact widely tainted by racial bias, see 384 U.S. at 654, nn. 12 and 14, such that a total ban was the only effective means of guaranteeing freedom from bias, and in part on a Congressional finding that New York's ban was itself unconstitutionally motivated. Id.

Justice Harlan in his dissent conceded that Congress is especially well equipped to find legislative facts and that the

factual judgments underlying § 5 legislation were entitled to special deference. He would, however, have required formal findings of discrimination. 384 U.S. at 668. The Katzenbach majority, however, was satisfied if it was "able to perceive a basis upon while the Congress might resolve the [factual] conflict as it did," a position reaffirmed in Fullilove v. Klutznick, 448 U.S. 448, 475-78 (1980). Here, Congressional committees did engage in formal fact-finding and determined that religious discrimination often does taint official decision-making.

Moreover, in evaluating Congress' power under § 5, it is necessary to remember why the Employment Division v. Smith Court reached the result that it did. The Court did not mention original intent, and its sole reference to constitutional test was a conclusory statement that its new reading was "permissible" and that its earlier reading was not "required." 494 U.S. at 876. Instead, the Court's holding is based on a series of policy arguments, chiefly that to apply the compelling interest test to every claim for religious exemption "was to court anarchy." 494 U.S. at 889.

This argument was examined by Congress and found far too weak to sustain the weight placed upon it by the Court. Whether "anarchy" would result from requiring application of a

compelling interest analysis to religious exemption claims is an empirical question. Katzenbach holds that Congress is far better situated than the courts to evaluate that sort of prediction. In the ordinary course of lawmaking, Congress is frequently confronted with the need to assess risks. By virtue of competence, experience and expertise in evaluating risks, Congress can more accurately gauge the risks of religious exemptions than can courts.

The legislative history makes clear that Congress disagreed with the Court's assessment of the liklihood that anarchy would follow a compelling interest requirement. Congress thus undercut one of the primary rationales of Smith. After quoting the Court's fears of anarchy, the Senate Judiciary Committee expressed its agreement with Justice O'Connor's very different evaluation of those risks in her Smith concurrence. Senate Report at 7-8; Accord House Rep. Report 103-88 at 4.

That Congress evaluated the risk of anarchy differently than the Court was made particularly clear in the Senate's consideration of whether prisoners should be subject to RFRA. The Senate Report carefully evaluated the arguments (advanced forcefully in the Additional Views of Senator Simpson, id. at 11) and determined that application of RFRA to the prisons

would not result in "anarchy." The anarchy argument was rehearsed at length on the Senate floor, and again proved unpersuasive, 139 Cong. Rec. S14350-14471 (October 27, 1993). These factual findings are entitled to respect. They alone are sufficient to carry the day.

C. Congress Properly Invoked Its Power to Define Violations of the Fourteenth Amendment

Significantly, the Court in Katzenbach v. Morgan went on to identify a broader basis for its exercise of § 5 power. "Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise," Id.

The right of which the Court spoke could not have been a constitutional right for non-English speakers to vote. Lassiter authoritatively rejected such a claim. Nothing in Katzenbach v. Morgan suggested a retreat from Lassiter. The legislation thus enforced a right which had no constitutional basis. The majority nevertheless found that since the ultimate goal of the Fourteenth Amendment was equality, and § 4(e) furthered that goal, it was within Congress' power, even if the Constitution did not require that result of its own accord. In short, Katzenbach v. Morgan reads § 5 as conferring on Congress

the power to define what constitutes a violation of the Amendment. As the Supreme Court said in City of Richmond v. J.A. Crosson, "[t]he power to `enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with these situations", 488 U.S. at 490. By a parity of reasoning, Congress could determine that allowing neutral rules to tramp religious practices threatens principles of religious equality and the free exercise of religion.

Justice Harlan's Katzenbach dissent understood this definitional power to be the basis of the Court's holding. See 384 U.S. at 667-68. He objected that the exercise of power to define constitutional guarantees was beyond the grant of power embodied in § 5. If it were not, he wondered, why could not Congress define due process or equal protections rights down, that is why could not the legislature dilute the requirements of the Fourteenth Amendment.[10]

Notwithstanding Justice Harlan's concerns, the definitional theory is fully consistent with the Amendment's history. The Fourteenth Amendment was designed to establish

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10. In Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), the Court held that Congress could use § 5 only to increase, but not reduce, the scope of the protection afforded by the Amendment.

minimum standards for national protection of civil liberties, and to give Congress the power to add to those protections. Ensconcing these rights in the Constitution kept them safe from possible future hostile Congressional majorities; giving Congress power to `ratchet up' grants Congress power to undo damage worked by hostile courts.

Of course, the definitional theory is not without limits. Those limits were enunciated by Justice Black in Oregon v. Mitchell, 400 U.S. at 112. As the House Report (at 9) summarized them they are that:

> Congress may not (1) create a statutory right prohibited by some other provision of the Constitution, (2) remove rights granted by the Constitution, or (3) create a right inconsistent with an objective of a constitutional provision.

We do not understand the Appellant here to allege that RFRA fails the first two of these tests. The First Amendment, after all, does in terms protect the free exercise of religion. No provision of the Constitution bans all accommodation. The Establishment Clause permits much religious accommodation, see e.g .Kiryas Joel School Dist. v. Grumet, 114 S.Ct. 2481 (1994), such that RFRA cannot be said to be facially unconstitutional because it mandates accommodation.[11] We focus in particular on

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11. C. Eisgruber and L.G. Sager, Why The Religious Freedom Restoration Act Is Unconstitutional, 69 N.Y.U. L.Rev. 437 (1994) contend that RFRA is unconstitutional because it privileges religion by

the question of whether RFRA creates a right inconsistent with an objective of a constitutional provision.

D. The Framers of the Fourteenth Amendment Intended to Protect Religious Liberty

RFRA is not, to use Justice Black's phrase, "inconsistent with an objective of a constitutional provision." Congressional action to protect the free exercise of religion under § 5 is not importing a legal concept wholly absent in the Constitution, or one which the framers of the Fourteenth Amendment consciously intended to exclude from the Amendment's scope. Justice Scalia himself conceded that the accommodationist understanding was a plausible reading of the Constitutional text and agreed that legislatures, could, if they chose, accommodate religious practice. Employment Division v. Smith, 494 U.S. at 878. He insisted only that "we do not think the words must be given that meaning."[12]

There is substantial evidence that those who drafted the Fourteenth Amendment consciously set about protecting the free

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accommodating it. The Constitution, however, contains no blanket bar to accommodation.

12. The Smith majority marshalled no evidence that the men who wrote the First Amendment intended to exclude an accommodationist reading of the Clause. Indeed, just after Employment Division v. Smith was handed down, a leading First Amendment scholar demonstrated that the Framers of the First Amendment intended to subject facially neutral laws to legal scrutiny. M. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990) ("Origins").

exercise of religion from impingement by facially neutral laws. K. Lash, The Second Adoption of the Free Exercise Clause: Religious Exception Under the Fourteenth Amendment, 88 N.W.U. L.Rev. 1106 (1994). Professor Lash demonstrated that because the Fourteenth Amendment grew out of the national debate over slavery, a debate that was itself triggered by religious abolitionists, it had as one of its goals protecting religious liberty.

In the years preceding the Civil War, Southerners defending slavery attempted to silence abolitionist religious voices and attempted to prevent slaves from having access to religious materials embodying these religious views. The slave states pursued these goals not only with laws targeted at religion. They enacted a variety of facially neutral laws, such as the law prohibiting teaching slaves to read, a law which had the effect of preventing slaves from reading the Bible, and laws prohibiting gatherings of slaves, which had the effect of banning slave religious meetings. Id. at 1131-33. As Professor Lash put it, "[t]he architects of the Fourteenth Amendment were well aware of how slavery had resulted in the suppression of religious exercise." Id. at 1146, and were determined to prevent any repetition of that suppression.

The Framers of the Fourteenth Amendment signaled both their intent to incorporate the rights of conscience into the national Privileges and Immunities Clause (which the modern Supreme Court has done under the Due Process Clause) and the intended scope of those rights. Repeatedly, they explained that the Clause incorporated the Bill of Rights, including the Free Exercise Clause. And they insisted that neutral laws could violate the free exercise of religion. As Professor Lash summarizes it:

> Religious exercise was to be protected from majoritarian hostility or indifference; it was to be a substantive right affording more than simply "equal protection" [for religion]; and its protection created a zone of autonomy within which both mandatory and discretionary aspects of religious exercise were protected from government interference. Most important, by explicitly targeting "religiously neutral" laws as examples of what would become unconstitutional with the passage of the Fourteenth Amendment, men like John Bingham and Lyman Trumbull gave notice that in the future, generally applicable laws might sometimes impermissibly violate an individuals' religious liberty.

88 N.W.U. L.Rev. at 1149.

In enacting RFRA, Congress was not creating a right out of whole cloth, or enforcing a right without foundation in the Fourteenth Amendment, one the Framers intended to exclude, or one inconsistent with the purpose of the Fourteenth Amendment.

On the contrary, enacting RFRA Congress was enforcing a right with firm roots in constitutional text and history, and, as Professor McConnell has demonstrated (McConnell, Origins), in American political practice.

III. A SINGLE STANDARD APPLIES TO ALL § 5 LEGISLATION

It also cannot be argued that the power of Congress to enforce incorporated rights is no more constrained than its power to enforce rights embodied in the text of the Amendment. No suggestion to this effect appears in any of the cases discussing the scope of Congress' power under § 5. Nothing in the ratification debates suggests any such dichotomy. And the Congress and the Courts have not acted as if one existed. Section 1983 is used indiscriminately to enforce the Due Process Clause, the Equal Protection Clause, and incorporated rights. No one has ever suggested that the reach of § 1983 or the scope of Congressional power varies with the right being enforced.

The doctrine of incorporation as enunciated by the Supreme Court is not a judicial usurpation or innovation or an oral law of the Constitution. It is a doctrine flowing from the words of the Fourteenth Amendment itself. The incorporation doctrine derives from the majestic guarantees of the Fourteenth Amendment that no person be deprived of "life, liberty, or

property without due process of law" See, e.g., Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968). That being the case, when Congress enforces one of the incorporated rights it is enforcing the Amendment itself, not some secondary right. Its legislative authority is as great with regard to the due process clause as it is with regard to the equal protection clause, and as great with regard to the fundamental guarantees of the First Amendment as with regard to the process due a citizen in a state administrative hearing.

But even if it were true that a lesser grant of power applied to incorporated rights, it would not cast doubt on RFRA. The debate over application of a constitutional duty to accommodate religion in the face of facially neutral laws is fundamentally one about equal protection. All agree that the Free Exercise Clause mandates some form of equal protection for religion. Justice Scalia in Smith insisted that equal protection in this context means what Professor Laycock has termed "formal neutrality." The state is bidden not to "utilize religion as a standard for action or inaction." D. Laycock, Formal, Substantive and Disaggregated Neutrality Toward Religion, 39 DePaul L.Rev. 993, 999 (1990).

The dissenters in Smith (joined by Justice O'Connor in a concurrence), argued that this definition left religious

believers at a disadvantage, less equal than citizens who hold beliefs consistent with the prevailing values of the state. They argued for what Professor Laycock calls substantive equality, Id., that is, a rule which does not overlook the unequal results of neutral laws, inequalities which are often the unthinking product of religious assumptions so built into the culture that the bias is no longer readily detected.

This debate over the meaning of religious equality has surfaced elsewhere, most notably in Goldman v. Weinberger, 475 U.S. 403 (1986), considering the constitutionality of an Air Force regulation banning all non-official headgear. That regulation prevented Orthodox Jews from wearing religiously mandated head-coverings. The majority, emphasizing deference owed the military, upheld the rule.

Justice Stevens authored a separate concurrence, emphasizing that a religious exemption would create intolerable religious inequalities, 475 U.S. at 512-13:

> The very strength of Captain Goldman's claim creates the danger that a similar claim on behalf of a Sikh or a Rastafarian might readily be dismissed as "so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed."

To this, Justice Brennan replied that it was Justice Stevens views which led to religious inequality:

> What puzzles me is the implication that a neutral standard that could result in the disparate treatment of Orthodox Jews and, for example, Sikhs is more troublesome or unfair than the existing neutral standard that does result in the different treatment of Christians, on the one hand, and Orthodox Jews and Sikhs on the other. Both standards are constitutionally suspect; before either can be sustained, it must be shown to be a narrowly tailored means of promoting important military interests.

Id. at 521-22 (emphasis in original).

In short, the problem RFRA addresses is defining what it means to treat religion equally. Debates on whether equality means equality of results or opportunity -- formal or substantive -- are the stuff of the Fourteenth Amendment's Equal Protection Clause. When Congress enters that fray, it is implementing the Equal Protection Clause, and it is, beyond all challenge, well within its § 5 powers.

CONCLUSION

For the reasons stated, RFRA is constitutional. The judgment below to the contrary must be reversed.

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APPENDIX A

COALITION FOR THE FREE EXERCISE OF RELIGION

Agudath Israel of America
American Association of Christian Schools
American Civil Liberties Union
American Conference on Religious Movements
American Humanist Association
American Jewish Committee
American Jewish Congress
American Muslim Council
Americans for Democratic Action
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League of B'nai B'rith
Association of American Indian Affairs
Association of Christian Schools International
Baptist Joint Committee on Public Affairs
B'nai B'rith
Central Conference of American Rabbis
Christian Church - Capital Area
Christian Legal Society
Christian Life Commission, Southern Baptist Convention
Christian Science Committee on Publication
Church of Jesus Christ of Latter-day Saints
Church of the Brethren
Church of Scientology International
Coalition for Christian Colleges and Universities
Coalitions for America
Concerned Women for America
Council of Jewish Federations
Council on Religious Freedom
Criminal Justice Policy Foundation
Episcopal Church
Evangelical Lutheran Church in America
Federation of Reconstructionist Congregations and Havurot
Friends Committee on National Legislation
General Conference of Seventh-day Adventists
Guru Gobind Singh Foundation

Hadassah, the Women's Zionist Organization of America, Inc.
Home School Legal Defense Association
Honorable Jerrold Nadler, M.C.
International Association of Jewish Lawyers and Jurists
International Institute for Religious Freedom
Jesuit Social Ministries, National Office
Justice Fellowship
Liberty Counsel
Mennonite Central Committee U.S.
National Association of Evangelicals
National Council of Churches
National Council of Jewish Women
National Federation of Temple Sisterhoods
National Jewish Commission on Law and Public Affairs
National Jewish Community Relations Advisory Council
National Sikh Center
Native American Church of North America
North American Council for Muslim Women
People For the American Way Action Fund
James E. Andrews, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.)
Rabbinical Council of America
Soka-Gakkai International - USA
Traditional Values Coalition
Union of American Hebrew Congregations
Union of Orthodox Jewish Congregations of America
Unitarian Universalist Association of Congregations
United Church of Christ, Office for Church in Society
United Methodist Church, Board of Church & Society
United States Catholic Conference
United Synagogue of Conservative Judaism