

The following 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 Supreme Court of Wisconsin on December 15, 1995.

In The
WISCONSIN SUPREME COURT

No. E-94-0159

STATE OF WISCONSIN,

appellant,

v.

EMANUEL D. MILLER, et al.,

appellees.

On Appeal From The Wisconsin Court of Appeals
Reversing An Order Denying Motions To Dismiss
And Judgments Ordering Statutory Forfeitures
Entered In The Circuit Court For Clark County,
The Honorable Michael W. Brennan, Presiding

BRIEF AMICI 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 over sixty 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 American Civil Liberties Union 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 participating in this brief 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 very rights the Court declined to protect in *Employment Division v. Smith*.

Neither the Coalition for the Free Exercise of Religion nor its constituent organizations takes no position on the question of whether Appellees should prevail in this case on the merits. In this brief we

address only the constitutionality of RFRA.

ARGUMENT

Without changing constitutional law, the Religious Freedom Restoration Act ("RFRA") creates a statutory remedy to fill the void left by *Employment Division v. Smith*, 494 U.S. 872 (1990). Congress had ample authority to do so, as at least three district courts have already held. *Abordo v. State*, _____ F.Supp. _____ (D. Hawaii 1995); *Sasnett v. Dept. of Corrections*, 1995 W.L. 379, 223 (W.D. Wis. 1995); *Belgard v. State*, 883 F.Supp. 510 (D. Hawaii 1995) Cf. *Alameen v. Coughlin*, 892 F.Supp. 576 (S.D. N.Y. 1994); Contra, *Flores v. City of Boerne*, 877 F.Supp. 355 (W.D. Tex. 1995).

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

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 Section 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.

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). 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. Opponents of ratification of the Fourteenth Amendment repeatedly called attention to this shift in power, which caused some states to refuse to ratify it.

South Carolina v. Katzenbach, 383 U.S. 301 (1966) considered the constitutionality of provisions of the Voting 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 unsuccessfully that a suit against it by an employee for employment discrimination was barred by the Eleventh Amendment. Acting pursuant to 5, Congress, the Court said, may "provide for private suits against states which are constitutionally impermissible in other contexts." 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 section 5 grant of power was calculated to redress institutional shortcomings revealed during the slavery crisis. 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.

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 section 5 in the face of constricting decisions of the Supreme Court. The case law indicates that Congress has that power. *Katzenbach v. Morgan*, 384 U.S. 641 (1966), decided after *Cooper*, upheld the constitutionality of the Voting Rights Act which, like RFRA, created a statutory right pursuant to section 5 where the Court had refused to recognize a right under the Constitution itself.

Reynoldsville Casket Co. v. Hyde, 115 S.Ct. 1745 (1995), is not to the contrary. There the Court held that the separation of powers was violated when Congress enacted legislation re-opening final judgments. *Hyde* explicitly reaffirmed Congress' power to alter the law prospectively in response to judicial decisions. RFRA does nothing more than that.

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

The Supreme Court has addressed the scope of the legislative power conferred by section 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. 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 section 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 difficulties of proving a core violation of the Amendments. RFRA is but a recent example of this power.

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 section 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. In order to be sure that sophisticated forms of intended discrimination do not go undetected Congress may 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 section 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 section 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 section 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 hearing 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. (citations 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 the power of Congress to impose 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 dis-criminate 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 ordi-nances were directed at it. The courts, too, have encountered sophisticated efforts to mask religious bigotry in neutral garb. See, e.g., *Mississippi Islamic Center v. City of Starkville*, 876 F.2d 465 (5th Cir. 1989); *Alameen v. Coughlin*, 892 F.Supp. 576 (S.D.N.Y.1994) (prison ban on certain prayer beads motivated by bias against faith).

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 act to harm religious minorities, although they will often not candidly reveal their biases. 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 based on 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 on all tests was the only effective means of guaranteeing freedom from bias in any particular case, 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 section 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 section 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 text 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 likelihood that anarchy would follow a compelling interest requirement. Congress thus undercut one of the primary factual 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 are alone 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 section 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 section 4(e) furthered that goal, it was within Congress' power, although the Constitution did not require that result of its own accord. In short, *Katzenbach v. Morgan* reads section 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 pro-phylactic rules to deal with these situations", 488 U.S. at 490. By a parity of reasoning, Congress could determine that allowing neutral rules to trump 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 guaran-tees was beyond the grant of power embodied in section 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?

Notwithstanding Justice Harlan's concerns, the definitional theory is fully consistent with the Amendment's history. The Fourteenth Amendment was designed to establish minimum standards for national protection of civil liberties, and to give Congress the power to add to those protections. Enscorning 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.

Some have suggested that RFRA violates the Establishment Clause. C.S. Eisgruber & L.G. Saber, Why The Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L.Rev 437 (1994). They argue that RFRA prefers religion over non-religion by allowing exemptions only for persons with religious objections to neutral laws, but not those with secular ones.

At the outset, it is worth noting that the Supreme Court itself has repeatedly rejected this view. Thus, in striking down a particular accommodation of religion as an establishment of religion in *Bd. of Educ., Kiryas Joel School District v. Grumet*, 114 S.Ct. 2481 (1994), the Court made clear that it was not holding that any and all accommodation of religion was prohibited by the Establishment Clause. 114 S.Ct. at 2492-3. Accord *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 and n.11 (1987). And in Corp. of the *Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the Court upheld a statute granting a limited exemption from Title VII to religious institutions only. Indeed, while the Court declined to mandate religious exemptions in *Employment Division v. Smith* it also suggested that legislative exemptions were probably desirable, 494 U.S. at 890.

Texas Monthly v. Bullock, 489 U.S.1 (1990), sometimes cited for the proposition that accommo-dating religion establishes it, involved a Texas sales tax which was imposed on the sale of

secular, but not religious, magazines. The Court agreed that the statute established religion. But even the test suggested by the plurality opinion of Justice Brennan, which remains the high water mark of Establishment Clause restrictions on religious accommodation, does not invalidate RFRA. Justice Brennan explained that to avoid invalidation as a naked religious preference, an accommodation of religion must not impose substantial burdens on third parties and must not subsidize a religious practice in ways unrelated to the alleviation of a burden on religious practice. 489 U.S. at 15 and 18, n.8. Where, however, a statute removes a significant burden on religious practice (and where it imposes no great burden on others) it does not establish religion.

RFRA, by its terms, applies only to those cases in which government regulation imposes a substantial burden on religious practice. 42 U.S.C. 2000bb-1. It thus easily falls within the first of Justice Brennan's restrictions. And in a majority of cases, religious accommodation does not impose an unconstitutional or even any burden on others. (Citing *Presiding Bishop, supra*, Justice Brennan noted that not all burdens on others were unconstitutional.) It can be argued, perhaps, that where a substantial burden falls on others, the state has a compelling interest in not accommodating religion. Whatever the merits of that claim, it fits well within the RFRA statutory scheme of considering compelling interests as excusing accommodation. It surely does not support the claim that RFRA is facially unconstitutional.

Justice Brennan's statement of the Establishment Clause constraints did not command a majority; only two other justices joined in it. Four objected (in an opinion authored, ironically, by Justice Scalia, author of *Employment Division v. Smith*) that Justice Brennan's opinion tilted the balance too far against protecting the free exercise of religion. And two other justices (O'Connor and Blackmun), while finding the Texas statute infirm on Establishment Clause grounds, agreed that Justice Brennan's formulation slighted the right of freedom of religious practice. *A fortiori*, since Justice Brennan's plurality opinion would not invalidate RFRA, they, too, would uphold the constitutionality of RFRA.

The other case generally cited for this proposition is of no more help to the claim of unconstitutionality. *Caldor, Inc. v. Estate of Thornton*, 472 U.S. 703 (1985), invalidated a Connecticut statute that required employers to accommodate at all costs the Sabbath observance of its employees. The statute was wholly inflexible, leaving employers no choice but to accommodate some workers at the expense of others. RFRA is not such an inflexible statute. The compelling interest test is just the sort of escape clause the Connecticut statute lacked.

In short, RFRA is plainly not unconstitutional on its face as an establishment of religion.

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

RFRA is likewise 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 section 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 conceded in *Employment Division v. Smith*, 494 U.S. at 878, that the accommodationist understanding was a plausible reading of the Constitutional text and agreed that legislatures, could, if they chose, accommodate religious practice. He insisted only that "we do not think the words must be given that meaning." *Id.*

There is also substantial evidence that those who drafted the Fourteenth Amendment consciously set about protecting the free 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 demonstrates that because the Fourteenth Amendment grew out of the national debate over slavery, a debate that was itself largely triggered by religious abolitionists, it had as one of its goals protecting religious liberty.

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, but by enacting a variety of facially neutral laws, such as the law prohibiting teaching slaves to read, 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. They were determined to prevent any repetition of that suppression.

The Framers of the Fourteenth Amendment signaled their intent to incorporate the rights of conscience into the Fourteenth Amendment. Repeatedly, they explained that the Amendment 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*, supra), in American political practice.

III. A SINGLE STANDARD APPLIES TO ALL SECTION 5 LEGISLATION

It also cannot be argued that the power of Congress to enforce incorporated rights is 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 section 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 concurring) 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, 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 narrow 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 section 5 powers.

CONCLUSION

For the reasons stated, RFRA is constitutional.

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Counsel gratefully acknowledges the assistance of Melissa Ganz, a second-year law student at the University of Pennsylvania.

I, Marc D. Stern, counsel for the amici, certify that this brief conforms to the rules contained in 809.19(8)(b) and (c) for a brief produced with a 13 point proportional serif font. The length of this brief is 7,245 words.

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In The

WISCONSIN SUPREME COURT

No. E-94-0159

STATE OF WISCONSIN,

appellant,

v.

EMANUEL D. MILLER, et al.,

appellees.

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APPENDIX A

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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
James E. Andrews, as Stated Clerk of the General Assembly of the
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Anti-Defamation League
Association of Christian Schools International
Association on American Indian Affairs
Baptist Joint Committee on Public Affairs
B'nai B'rith
Central Conference of American Rabbis
Christian Church - Capital Area
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
Council on Spiritual Practices
Criminal Justice Policy Foundation
Episcopal Church
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
International Association of Jewish Lawyers and Jurists, American Section
International Institute for Religious Freedom
Mennonite Central Committee U.S.
Muslim Prison Foundation
National Association of Evangelicals
National Campaign for a Peace Tax Fund
National Committee for Public Education and Religious Liberty
National Council of Churches of Christ
National Council of Jewish Women
National Federation of Temple Sisterhoods
National Jewish Commission on Law and Public Affairs
National Jewish Community Relation Advisory Council
National Sikh Center
Native American Church of North America
Native American Rights Fund
North American Council For Muslim Women
People For the American Way Action Fund
Peyote Way Church of God
Prison/Justice Fellowship
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
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