RELIGIOUS FREEDOM AND INTERNATIONAL HUMAN RIGHTS IN THE UNITED STATES TODAY

by
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I spend most of my career in this part of the law pointing to defects in the scheme for protecting religious liberties in the United States. I am always trying to persuade the courts, Congress, and readers of law reviews that religious liberties have serious problems, and that we don’t do nearly enough to protect them. Although I believe that, context clearly matters.

The religious liberty glass in the United States is half empty, or a quarter empty, but it is also half or three quarters full. From a domestic perspective, from which I usually work, we have not lived up to my understanding of our ideals and aspirations. From an international perspective, and subject to the fact that my knowledge is very limited, I think we are doing better than most countries. The problems we have are minor, compared to problems in most of the parts of the world. The problem we are having the most difficulty with has also confounded most countries: when and under what circumstances must religiously-motivated practices be exempted from generally applicable laws? I think that on that issue, we are not in compliance with our international treaty obligations. But I do not know of any nation that really is in compliance.

What I want to do in the time allowed is to survey the kinds of liberty religious issues that can arise and try to give, at least at the headline level, some examples and some sense of frequency of significant problems in the United States.

One other thing that I should say, by way of introduction, is that the remarkably decentralized structure of government in the United States is both part of the solution and part of the problem. Federalism means that the United States has the power to govern and also that each of the
fifty states has power to govern. State government is also decentralized. Cities have power to govern. Counties have power to govern. All sorts of single-issue regulatory agencies and administrative boards at each of these levels has power to govern.

In our classic political theory, decentralization of government protects liberty; no one body has too much power. In the worst case, you can move to another state that is more sympathetic to your needs. But there is a down side to that decentralization. We have vastly multiplied thenumber of governmental bodies. If you are a religious minority in the United States, and if any one of these bodies regulates you, you lose. You are regulated. It is not enough to get an exemption at the federal level and at the state level if your city slaps a regulation ordinance on you.

Decentralization in some ways aggravates the risk that the most serious religious liberty problems will occur somewhere, if only locally. Consider actual hostility to some religious groups. This problem does not arise often here, but when it does arise, this decentralization increases the risk of small scale local regulation on the basis of that hostility. A set of bigots can take over one agency or one local government in a way that they are quite unlikely to take over a state or the Congress.

Against that background, let me start with more serious problems and work up to the less serious but more common problems. The first thing we usually think of when we think of religious persecution,—and I think the most serious religious liberty problem—is deliberate persecution of small faith groups, with the persecution motivated by larger faith groups, using legal force and the power of the government to oppress their religious opponents. That’s what the great religious persecutions of history were about. That’s what the great religious persecution that survives in some countries is about. It is very rare for that to happen in this country; in my experience, it is nonexistent.
The Santeria litigation that I was involved in the early 1990s was, I think, such a case. Santeria is an Afro-Caribbean religion that still practices the sacrifice of animals. Much of the effort to suppress Santeria was the product of the animal rights movement. But plainly, in Hialeah, the city in Florida that produced the case that went to the Supreme Court (Church of the Lukumi Babalu Aye v. City of Hialeah), part of the coalition that enacted those ordinances was conservative Christians who believed that this religion was simply blasphemous. If you read the transcripts of the city council meetings, people were saying things like “God will punish our city if we let this religion function.” In some ways, the striking thing about all of that litigation is that Santeria has been present in the United States for a long time. As long as it stays out of public view, people don’t like it much, but they don’t try to suppress it. What triggered the Hialeah litigation was that this highly unpopular underground religion attempted to go public and build a church and practice like any other. That the city was unprepared to tolerate. To its great credit, the Supreme Court, which has not been helpful lately on religious liberty issues, said unanimously that what Hialeah is doing to Santeria is a violation of religious liberty, even as the Supreme Court understands it. That is one example of what looks like an old fashioned religious persecution.

The so-called cults that the Special Rapporteur mentioned—the Hare Krishnas, the Scientologists, the Unification Church, and others—have had similar problems. Organized movements afraid that their children would be lured off into these groups, worked systematically to suppress or restrict their influence. The worst two episodes of that effort seem to be behind us: (1) the deprogramming episode that peaked in the middle to late 1970s, when members of these groups were physically abducted and held for thought reformation to bring them back to the faith of their parents, or at least to bring them out of the cults, and (2) the episode of tort judgments in the mid 1980s, where
disaffected members of the cult would sue the cult for not delivering on its promise of greater happiness, and juries would bring in verdicts of $30 million in punitive damages. At one point, every temple and monastery of the Hare Krishnas was in the hands of the receiver to be sold to pay one of those judgments. The judgment was eventually dramatically reduced.

As I said, the worst of those episodes seems to be behind us. The lead persecuting organization is now itself the subject of big judgments in one of the deprogramming cases. The Cult Awareness Network has filed for bankruptcy.

These examples show that deviant religions—deviant in the purely sociological sense of practicing something far removed from the broader norms of society—even in this country can trigger a hostile religious response that will use the power of government to try to suppress the small and deviant religion. Having said that, the closest that any of those episodes came to violence was the deprogramming episode. This country has not had in a very long time the sort of religiously-motivated violence against small groups that plagued some other parts of the world. There was a wave of private violence against the Jehovah’s Witnesses in the 1940s, and of private and even some governemntal violence against the Mormons in the 19th century, but those events are not recent, and they are very rare in this country.

Second, there are clear cases of sustained hostility and rivalry between private groups, groups that don’t like each other very much, groups that don’t trust each other very much, groups that each fear that it would be very bad if the other gets political influence. But this is mostly private, not governmental. It is not manifested in violence, and it is not manifested in overtly religious governmental restrictions. Most obviously, this is what sociologist James Davidson Hunter called “the culture wars.”
It is partly political, partly just the left-right political split of the country, but it plainly has a religious dimension. The conservative evangelical wing of Christianity has become a political force in the country, and it has produced fear and hostility among many folks on the other side of its political issues. I have no doubt that there are many people in the United States who think that evangelical Christianity is a terrible danger to American freedom. Anything political that can be done to reduce the influence of evangelical Christianity looks good to some of those groups on the other side. For their own part, many of the evangelical Christians believe that the secular left is a real danger to American society.

One flashpoint for all of this is the so-called sexual revolution and the conflict that results between groups promoting greater sexual freedom and groups promoting traditional religious teachings. It is especially clear on these issues that religious people on the conservative side are not only evangelical Protestants, but also traditional Catholics, Orthodox Jews, most Muslims, and any other faith or tradition that adheres to the traditional moral positions. The more radical elements on each side occasionally burst out into explicitly anti-religious or anti-secular statements. We had the episode a few years ago when a gay rights organization disrupted a Mass at St. Patrick's Cathedral. We occasionally get statements from radical feminist or gay rights groups that religion is a fraud, and religious liberty is a fraud; it is all a form of oppression and so forth. But these extreme acts and arguments come from a small group of people. It is not the government, and it is not the bulk of the people in any of these movements. This is the hostility of people with extreme views on each side of these issues.

At a somewhat less active level, the hostility is more widespread. There is a Gallup poll from 1993 where 45% of the American people said they have a very negative or negative view of fundamentalists,—a term not defined. 80% said they had negative views of minority sects or cults,
also not defined. Thirty percent admitted that they would not like to have a fundamentalist live next door to them; only 12% admitted that they would not like to have a black live next door to them. More than 60% said they would not like to have a member of a minority sect or cult live next door to them.

These kinds of attitudes for the most part do not produce anything like overt persecution. They do produce a sort of low-level hostility and insensitivity to need. It becomes important particularly when someone from one of these churches or sects needs a discretionary decision from a low-level government official. They need a zoning variance, a special use permit, a license of some sort that is discretionary; they need the school board to accommodate the religious belief of their child in a public school situation. All these are things they are not clearly entitled to in any governing law, but from a religious perspective, it would be good if they could get them. They are hard to get, and if 45% of the population is hostile to fundamentalists, it is a reasonable inference that 45% of governmental officials share these hostile attitudes. They understand that they cannot act on these attitudes overtly, but it would not be a surprise if those attitudes affect exercises of discretion.

There are pocket of deeper ignorance among the population, and very occasionally among governmental officials. You see remnants of old style anti-Catholicism, anti-Mormonism, anti-Semitism, anti-Muslimism expressed on occasion in the private sector. It is rare for those to become overt, but on occasions of high stress they do. The Arab-Muslim community experienced some difficulty during the Gulf War for example, and continues to suffer grossly overbroad suspicions associated with fear of terrorism. But the sheer bigotry against particular faith traditions, which used to plague Western society, has become in my experience extremely rare.
The biggest problem has very little to do with traditional religious rivalries and hostilities and has everything to do with governmental regulations. The biggest problem is the basic pervasiveness of regulations in all aspects of our lives, and in the widespread expectation that everyone will comply with secular norms. All of those forces on the governmental side conflict directly with the enormous plurality of religious views in the country to produce a whole series of conflicts between a particular religious practices and a particular regulation. Some of them arise in recurring patterns that we can identify and label—there is a real problem with land regulation, a real problem with American Indian religions.

Many of these conflicts do not recur in patterns. There is one unexpected conflict after another. No one in Washington could have predicted that a Jehovah’s Witness would lose her job in a restaurant because she would sing happy birthday to the diners who were celebrating their birthday. That is a religious belief I didn’t know about before it emerged in litigation, and it is a safe bet that most of the rest of the non-Jehovah’s-Witness world didn’t know about it either. It apparently led to settlement that protected the right of the Witness. That is one case. There is not an epidemic of happy birthday cases. It is typical in the sense that there are hundreds of different isolated conflicts between secular norms, governmental regulations, religious views, and practices that from the dominant secular perspective seem idiosyncratic.

The regulator responsible for enforcing the law and conflict may or may not be hostile to the religious view involved. More often he is not. But he does seem to be systematically committed to his own single-issue regulatory agenda. He is responsible for zoning this town. He is responsible for enforcing employment discrimination laws. He is responsible for whatever his issue is, his issue is not religious liberty, and he does not want to make any excep-
tions. That is the standard source of the conflict here, and I think here in Western Europe as well.

Let me give you some examples in no particular order. These are all real cases from the last few years. A church runs a feeding program and homeless shelter and other efforts to help the poor. It turns out the neighborhood often doesn’t want those programs to be in the neighborhood.

Does the church have a right to carry out its mission to the poor, to do what Catholics call corporal works of mercy. Or is the church subject to zoning laws and its mission to the poor subject to being excluded from town altogether or excluded from where the church is? You can feed the poor, the city often says, but only if you can afford to buy a second site somewhere else in a poor neighborhood where the neighbors won’t complain. (Western Presbyterian; Stuart Circle).

There is a remarkable case in Oregon where the prison authorities arranged to tape the conversation between a murder suspect and the priest who came to hear his confession. The authorities got the confession on tape and wanted to introduce it in court. The Ninth Circuit Court of Appeals said they couldn’t do that (Mockaitis v. Harcleroad).

There are cases of the children of Sikhs trying to attend public school. Every Sikh male is required to carry a knife, but the knife can be ceremonial. In the most widely reported case, the knife was only a few inches long, was not sharp, and was sewn into its sheath. In open court, the judge attempted to remove the knife from the sheath and could not do so. But the school board said it had an absolute rule; it would not let the student in with a knife. (Cheema v. Thompson).

I mentioned the cases of the American Indians, which raise a remarkable range of issues—whether they can gather or possess eagle feathers, whether they can build a bonfire for a sweat lodge, though bonfires are illegal in Ne-
braska because of the worry about prairie fires. There was the peyote case, a few years ago. (Employment Division v. Smith). The most frequently recurring conflict is over sacred places in lands in the west, lands typically owned by the federal government, no longer owned by the tribes to which they are sacred.

We have had conflicts about distribution of religious literature in school, and religious meetings in school, where the two principles of religious liberty come into potential conflict. On the one hand, we are very concerned that the government does not use the public school to teach religion, or a particular religion; on the other hand, the individual children who attend that school retain their own right to freedom of speech and freedom of religion. The Supreme Court has said that an individual child or student group acting on its own can meet and speak and publish (Mergens v. Board of Education), but the conflict here requires frequent litigation and threat of litigation to get full compliance from the schools.

More difficult and less settled are cases where parents have religious objections to parts of the curriculum in the public school, particularly with respect to sexual matters — the school is teaching sex education, or an AIDS curriculum, or distributing condoms to high school students without parental consent, etc. But this issue also arises in other parts of the curriculum. There is a remarkable casualness in the American public schools about teaching competing theories of the supernatural. The school says this topic is not religion; this is just fun, or that is meditation, and therapeutic. People who take their religion more seriously or more literally are inclined to view some of these things as alternate religious schemes.

This is a good place to note that much of the line of conflict is religious intensity. The conflict in the United States is not principally between Christians and Jews for the most part, certainly not between Protestants and Catholics. It is
between the religiously intense and the religiously unintense. If there is a dominant religion in the United States, it is low intensity theism. Those of any faith who are intense about their religion have more in common with each other. Muslims, Jews, Catholics and Protestants, who are intense about it have much more in common with each other than they do with the 80% who answer on surveys that they are Christians but seem to be only moderately intense or not serious at all.

We have conflicts over photographs on drivers’ license and social security numbers. A remarkable number of people have become convinced that the social security number is the mark of the beast from the Book of Revelation.

Obviously, we have lots of prison cases. In part this is because prisoners are chronic litigants. They have nothing to do with their time, so filing lawsuits is recreational. If they really get lucky, they’ll get a trip out of the prison to go to the courthouse. But prison litigation also arises because prison authorities are accustomed to having near absolute power over their charges, and they rarely stop to think about the reasonableness of their rules. My favorite example of frivolous prison litigation is a case one my former students litigated in Colorado.

Plaintiff was a 64-year old forger in a work release program. The prison authorities obviously did not view him as dangerous; they let him out to go to work for five days a week. They let him out on Sunday to go to church on Sunday morning, and he was the organist at the Episcopal Church in Craig, Colorado. He was a 64-year old “Episcopal” forger. But, they said, if you take communion under both species, you are back in the general population. The reason is that we have an absolute rule: no drugs or alcohol for prisoners, and we don’t make exceptions. Under Employment Division v. Smith, we don’t have to make exceptions. The prison authorities settled.
They settled not because their position was doctrinally wrong, but because their position was politically ridiculous, and they did not want to defend it in the newspapers. They settled this on the reasonable ground that they were going to look foolish to defend this in front of a judge.

There are prison cases about hair and beards, about religious symbols, about whether prisoners can wear a cross or a Star of David on their clothing (Sasnett v. Sullivan). There are conflicts over scheduling. Scheduling problems are most severe in the prison context, but they also arise in the civilian population. A calendar has to be set up some way, and ours is set up for Sunday observing Christians and secondarily for Saturday-observing Christians and Jews. Friday-observing Muslims are just out of luck. Small religious groups that have holidays that fall within the middle of the week turn out to be out of luck. Of course the most severe example is within the prison context. In O'Lone v. Estate of Shabazz, the Supreme Court held that if you have Muslim prisoners who are working when their Friday service is held, that is just too bad. The prison does not have to bring them in from the work site to be able to attend services.

Conflict over sexuality spills out into religious liberty litigation. There have been a flurry of cases from around the country with inconsistent results involving suits against landlords for marital status discrimination when they refuse to rent their apartments to unmarried couples, or for sexual orientation discrimination when they refuse to rent to gay or lesbian couples.

There is a huge flurry of cases that no one saw coming. When we prepared the Religious Freedom Restoration Act (RFRA) in 1993, no one had ever heard of these cases. Now there are dozens of them. They are bankruptcy suits against churches. They arise when a church member who has been contributing a share of his income for a long time falls on financial difficulty. Eventually, he files for bank-
ruptcy, and creditors sue the church to recover all of his contributions. First they said they wanted all the contributions for the last year before bankruptcy, because that's the most obvious theory that the Bankruptcy Code provides. Then they began to realize that under state law they can go back further. I just filed an appeal for a Texas church that is on the losing end of a $45,000 judgment for contributions that were made from 1988 to 1992, by a member that has tithed his income to that church for 43 years. (Cedar Bayou Baptist Church v. Gregory-Edwards, Inc.)

Tithing and excessive spending had nothing to do with why he went bankrupt. He went bankrupt because of a business dispute. The laws that are being invoked here have been part of Anglo-American laws since the 16th century. Someone in the mid-1980s had the bright idea that they could be applied to religious contributions.

Once one person thought of it, it caught on quickly. The first judgment against a church was in 1992, and as I say, now there are dozens of those cases pending around the country. But when we held hearings on RFRA in 1992, no one in Washington had heard of these cases.

The employment discrimination laws as applied to churches themselves are a source of some conflict. Some churches have limitations on what women can be appointed to do. The common problems are churches that have religious requirements for employment and apply those requirements across the board, even where the secular observer does not see the religious significance of the job. There was a case in the Supreme Court about whether the janitor in a Mormon gymnasium had to be a Mormon in good standing. (Corporation of the Presiding Bishop v. Amos). As a matter of federal statutory law, the church won that case, but under state statutes the answer is often less clear.

The most extreme argument in these cases is revealing for what it says about a widespread secular mind set. In all
the contexts I have mentioned, it is sometimes argued that it is improper, or even unconstitutional, to exempt religious practices from burdensome regulation. This argument says that everybody is the same; government does not single out religious practice for persecution, but neither should it give religious practice any special privileges. The church is just like anybody else. The extreme version of that is the employment discrimination suits by would be theology professors against religious universities. Two recent examples (EEOC v. Catholic University and McGuire v. Marquette University) were both cases where, from the University's perspective, untenured professors who did not get tenure were out of accord with the teachings coming from Rome. I do not think anyone used the word heresy, but these faculty were teaching views on sexual relations and abortion that the church did not want taught in theology departments at church universities. From the professors' perspective, they thought they had the same rights as if they were at The University of Texas or any other public university. They thought they had exactly the same right against the Catholic University of America as they would have against the government.

There is a remarkable range of these cases. There are other examples that I could give you, but the point is the sheer diversity of the kinds of conflicts that can arise between religious practices and pervasive criminal regulations. Some of them are recurring, and some of them are utterly unpredictable. But that is the level of problem that we are mostly dealing with in the United States. It is usually not deliberate persecution; it is usually not overt persecution. It is a conflict between diverse regulations and very diverse and imperialistic religious practices.

It feels like persecution. They tell you cannot build a church. They tell you cannot get rid of a heretic in your theology department. So it feels exactly like persecution. But from the secular side, that is often not the motivation at all. Sometimes the motivation is hostility to the religious views,
or to moral views associated with the religious views, and this anti-religious motivation is especially important when the government makes discretionary decisions. But often the government’s rigidity has nothing to do with hostility to a religious movement. It has to do with the triumph of secularism. It has to do with the view that everyone has to comply with the same regulatory rules as everybody else. In this view, what the church is asking for is not religious liberty at all; it is a special privilege.

Finally, the one example I did not mention yet may be the most pervasive, which is land use regulations. Land use regulation is enormously intrusive in this country. Everyone who has ever tried to build something complains about it. It is thoroughly localized; it is thoroughly individualized. Zoning commissions and planning commissions make decisions about individual parcels of land. They decide what you can build on your property. You have to have complete architectural drawings that have to be approved in advance by the government. Land use regulation becomes a means by which anything that the neighbors don’t like can be prevented. There are enormous numbers of conflicts between churches and zoning commissions, and more recently between churches and landmarking authorities. These are both forms of land use regulations, but the sources of the conflicts are very different.

The historic preservation movement and the landmarking authorities make it their task to preserve interesting buildings of the past. Unlike in the cases of the great Europe cathedrals, here the government cannot pay to help preserve a church, however interesting or historically significant it might be. And so, the decision that you have built a landmark church that has to be preserved is a decision that places enormous costs on the church, costs that the government is in no position to help with. The landmark movement tends to believe that any building more than a few years old is potentially a landmark, and certainly that any church is landmark. Religious congregations
build distinctive buildings. They build them for their own internal religious purposes; they build them for the glory of God as they understand it, but their buildings often do not look like an ordinary house or a storefront sitting next door. And so in the City of New York, where we actually have data, churches are forty two times more likely to be landmarked than any other property. Churches can be landmarked even when they are not particularly distinctive. City of Boerne v. Flores case involved landmarking of a church that was built in 1923 and is largely invisible from the street. You can’t see anything but the front wall of the church itself, and the front wall was never in controversy. The church had agreed from the beginning to preserve that. The landmark dispute is serious and recurring.

The zoning dispute is a little different, and it comes in two parts. One is the location of the churches. The church buys a piece of land, wants to build a church on it, and the zoning authority says no you cannot put a church there. That is reserved for residential, or that is reserved for commercial, or the eighbors say we don’t want a church there. The most common regulatory technique is that churches require special use permits which means the zoning board has very broad discretion to grant the permit or not grant the permit.

The second problem is permitted uses within existing churches. The city says that we give you zoning for a church, but now we want to look at each aspect of your mission. You want to put a day care there. We do not think that daycare is a religious function. You have to get separate zoning for that. Unless we give new and separate permission, you cannot have a day care or a feeding kitchen or a school, or any of the number of other collateral functions of churches. Zoning authorities seem to understand that sermons and hymns and sacraments come within the initial church zoning. Everything else is up for grabs. And, again, we have the same conflict of worldviews. On the regulator side, they’re accustomed to telling every land
owner in the city what he can do and what he can not. From their perspective, why should the church be different?

It also turns out that there is genuine evidence of religious discrimination. This is not surprising because these zoning decisions are so intensely individualized and discretionary. The zoning authority can do whatever it wants. Whether or not zoning officials have any conscious religious motive, it would not be surprising if over a large number of cases, it turned out that those who seem safe or familiar to the zoning board, or those who have political connections to the zoning board, do better than non-mainstream faiths. This is a case or context where we can actually document the effect of governmental discretion and low-grade religious bias.

Reported zoning cases is the tip of a very large iceberg. These are cases where the zoning conflict was not resolved informally, and was not resolved with the zoning board, where it went to court, was not resolved at the trial court, where it was appealed and produced a reported opinion. In a few states, trial court decisions are reported, and these are included. If you look at all these reported cases, it turns out that small faiths account for a grossly disproportionate share of the cases. Jews are about 2% of the population and about 20% of the church zoning cases. Jews plus very small Christian denominations—denominations with less than 1-1/2% of the population—total about 9% of the population but account for about 50% of the church zoning cases. So, here at least, is a clear example where if you look at the larger pattern there is governmental discrimination against smaller faiths. In any individual case, it is enormously difficult to prove discrimination. When one zoning board in one small town says that Jehovah Witnesses cannot put a church where they want it, maybe the Witnesses just wanted to put their church in a totally inappropriate place or maybe the city just doesn't want any Jehovah's Witnesses around. Viewing one case at a time, it is hard to tell. But, if you look at the reported cases over a long period, it is
clear that there is a significant pattern of religious discrimination.

The legal and doctrinal framework for dealing with these problems is in a state of great confusion. The Free Exercise doctrine under the federal constitution is that government must pass laws that are neutral and generally applicable; that if government burdens religion with law a that is not neutral and generally applicable, then government must justify that burden under the compelling interest standard, which is the most stringent standard of justification known. The great ambiguity is that no one knows what is a neutral and general applicable law. There are only two cases at the Supreme Court level. There is some reason to believe that the Court thinks that nearly all laws are neutral and generally applicable, that they meant to get rid of these free exercise cases and tell churches to quit asking for exemptions.

On the other hand, there is some evidence in the first opinion (Employment Division v. Smith), and lots of evidence in the second opinion (Church of the Lukumi Babalu Aye v. City of Hialeah), that religious practices are entitled to exceptions from regulatory laws in any situation where some secular practice also gets an exception. If that is the rule, then hardly any law is neutral and generally applicable. The way American legislatures work — and I assume the way legislatures in the most of the world that work — is that the way you get a deal is to create exceptions for everybody that complains and might have the power to stop this bill if you refuse them an exception. American laws are riddled with secular exceptions. There are hardly any laws that actually apply to everybody. If that's what generally applicable means, then what the Supreme Court has done is vastly complicate the litigation, but at the end of the day, to leave churches still entitled to exemptions.

If I had to guess, I would say the resolution will be somewhere between the polar positions but closer to the end of
the continuum that fails to protect religious liberty. Laws will be declared generally applicable even though they do not apply to everybody, and quite possibly, most of what government does is going to be held neutral and generally applicable.

The second level of protections is in state constitutions, which is an undeveloped body of law. Four or five states supreme courts have expressly rejected the Smith test, and said that any burden on religion has to be justified by a compelling interest. Two or three states have adopted the Smith test. The rest remain to be heard from. Traditionally there is less vigorous enforcement of constitutional rights in the state courts.

Many of the state judges are elected. They have less political independence. State constitutions may develop as an important source of protection for religious liberty, but that would be a substantial new development. It has not happened in the past.

Third, there is the Religious Freedom Restoration Act, in which Congress said any law that substantially burdens religion has to be justified. The Supreme Court, as you know, struck that law down on federalism grounds in the Boerne case last term. There is an attempt to revive the concept, to pass a Religious Liberty Protection Act of 1998 that would enact the same standards insofar that Congress can, under other sources of congressional power in Article I. So Congress can protect any religious practice that affects commerce. That’s an odd formulation, but if you are building a church, you clearly affect commerce; if you are hiring employees, you are affecting commerce. So, however far Congress can reach under the power to regulate commerce, it would protect religious liberty.

Under the spending clause, Congress is going to try to protect religious liberty in programs that get federal money. It remains to be seen whether that will be enacted. It hasn’t been enacted yet. And if enacted, it will leave
gaps. Plainly, not everything falls within the commerce clause or the spending clause.

The most severe problem is that any such legislation must be drafted in quite general terms. Religious liberty is enormously popular in principle in the United States, but as my list of examples suggests, it immediately gets controversial in specific applications. There is always some interest group on the other side that wants this regulation enforced. So what happens is, Congress drafts at a very high level of generality, staying away from the specific conflicts. Congress says that any substantial burden on religion has to be justified by compelling interest, and then each side can comfortably expect that the things that it most cares about will be held compelling. The experience in the courts under the first Religious Freedom Restoration Act was not good. It was not good, but it was not terrible. The Religious Freedom Restoration Act plainly did some real good and protected a number of people who would not have been protected otherwise. But, the win/loss rate was very poor. There is a survey in the law review literature, I am just passing this on and I haven't tried to verify it, but it is reported that about 20 percent of RFRA claims were successful and about 80% were not.

The most common reason for rejecting RFRA claims was to find that there was no substantial burden under religion. There was a burden under the religion that bothered the believers so much that they were willing to spend the time and the money to go to court, but this is no substantial burden on religion. It is a way of getting rid of cases. (There is a recent article by a woman named Stavros in one of the international law journals, which reports that the European judges are doing exactly the same thing with the International Covenant on Civil and Political Rights, finding no burden in many of the cases, so that they never have to deal with the hard issue of finding that the burden is justified.) I think that this judicial reaction is mostly a function of the secular view that religion should not get any special treat-
ment, and partly a function of view that these are hard cases, and the courts would rather not be bothered with them.

So, on this question of how do to protect religious liberty from generally applicable laws that burden unusual religious practices, we are not doing very well. But we are at least struggling with it. We seem to have very large majorities in both houses of Congress committed to the view that religion should be protected from regulatory burdens. The President and the Vice President are plainly committed to that view. A number of state legislatures seem willing to enact that view.

Finally, let me bring this back to the international human affairs context. One reason Congress might choose to enact a statute like RFRA is to bring the United States into compliance with its treaty obligations. The international human rights provisions on religious liberty protect the right to manifest your religion in observance, subject to a standard of justification that sound similar to the compelling interest test in RFRA, although it uses a different phrase. That is a reason for Congress to enact RFRA, and it is also a source of constitutional power for Congress to enact RFRA. One basis on which Congress can regulate is to implement the treaties of the United States.

I must tell you, whatever the legal power of that argument, that politically it is worse than a non-starter. Politically, it is harmful in Washington to make that argument. People who might other wise vote to protect religious liberty threaten to vote against it if you tell them that the international treaties have anything to do with it, or that international human rights law has anything to do with it. That partly reflects the isolationist tradition that still survives to some extent in the United States. It partly reflects concerns over sovereignty and the international tribunals that have been highlighted by the conflict between environmental and safety regulations and the free trade treaties.
In religion, it partly reflects a view among a slice of evangelical Christianity — I think a small slice but a highly intense slice — that one world government is a sign of the end times, and that Armageddon is coming if we start doing things because international treaties tell us to. It partly reflects the American sense of superiority on human rights issues.

Congress thinks we do just fine on religious liberty issues, and the rest of the world should not be telling us how to get it right. I once made the mistake of testifying about the international human rights component. I explained in very simple terms that the Senate had made these treaties non-self-executing. No international tribunal anywhere in the world could tell Congress it had to enact RFRA, or do anything at all, to implement our treaty obligations on religious liberty. But if Congress wanted to do enact RFRA, the treaties and the Treaty Clause were a source of power to do what Congress wanted to do anyway. The word came back from the Chairman to “Quit talking about that, you are hurting your case.”

In terms of dealing with Congress, I am not sure that the international human rights community can make much progress or do much good, but on the substance of what we are trying to accomplish here, there does indeed seem to be a large majority in Congress to protect religious liberty from the incidental burden of pervasive regulation. In the judiciary there is great reluctance to take that mandate seriously. That is where we stand at the moment on what seems to be the most difficult problem here and in other developed countries around the world.