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THE REACH OF THE FEDERAL GOVERNMENT INTO RELIGIOUS ORGANIZATIONS

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PANELISTS:

MR. KEVIN J. "SEAMUS" HASSON, Founder and President, Beckett Fund for Religious Liberty

PROFESSOR MARCI A. HAMILTON, Cardozo School of Law

HON. R. ALEXANDER ACOSTA, Assistant Attorney General, Civil Rights Division, United States Department of Justice

REVEREND BARRY W. LYNN, Executive Director, Americans United for the Separation of Church and State

PROFESSOR JOHN S. BAKER, JR., Dale E. Bennett Professor, Louisiana State University, and Fellow, National Catholic Bioethics Center

JUDGE DIARMUID F. O'SCANNLAIN, United States Court of Appeals, Ninth Circuit (moderator)

JUDGE O'SCANNLAIN: Good afternoon. I'm Judge Diarmuid O'Scannlain of the United States Court of Appeals for the Ninth Circuit and I'm serving as your moderator today, and I want to welcome you to this afternoon's panel discussion.

Thank you to the Federalist Society for inviting me to moderate such a distinguished panel. Thanks, also, to the Society for choosing such an important and timely topic—The Reach of the Federal Government into Religious Organizations. For many of us, of course, religious liberty establishes the foundation upon which every other human right is secured. And while the question of the proper relationship of church and state is age-old, it continues to represent one of the most complex and contentious issues facing jurists, professors, and lawyers alike.

We are fortunate to have an exceptionally capable panel to help us sort out this puzzle. I would like to introduce the panelists rather summarily—their detailed biographies are in the main program—and then to propose three issues to which we might devote particular focus this afternoon.

Kevin Hasson, better known as Seamus, is the founder and president of the Beckett Fund for Religious Liberty, an ecumenical, bipartisan public interest law firm that defends the religious expression of believers of every faith.

Professor Marci Hamilton of Cardozo Law School is the Beckett Fund's frequent legal adversary, and she successfully represented the City of Bernie, Texas in the landmark Supreme Court case *Bernie v. Florez.*

Alex Acosta is the assistant attorney general for the Civil Rights Division of the United States Department of Justice and oversees federal enforcement of the civil rights statutes that protect religious freedom.

Reverend Barry Lynn, of course, is the very well known Executive Director of Americans United for the Separation of Church and State.

And, Professor John Baker teaches at Louisiana State University and is a Fellow of the National Catholic Bioethics Center, and argued *Wallace v. Jeffrey,* the silent prayer case.

It is a great privilege to have this diverse array of formidable legal talent assembled here in this room.

I would like to suggest that the panel focus today on three issues of special significance. The first is the Religious Land Use and Institutionalized Persons Act, RLUIPA, affectionately known to us in the trade as R-LUPA. Seamus Hasson will tell us more about his history and purpose. Suffice it to say that R-LUPA in the land use context and as concerns institutionalized persons, forbids state and local governments from imposing a substantial burden on the exercise of religion, unless they can demonstrate that the imposition of such burden is the least restrictive means of furthering a compelling governmental interest.

Private parties as well as the Civil Rights Division are beginning to enforce R-LUPA against state and local governments. These litigations have given way to fierce debate within the federal courts of appeals on the question of the Act's constitutionality. And the circuits are now split on the question, some agreeing with the Beckett Fund and at least one agreeing with Professor Hamilton. I would hope they might share their perspectives on R-LUPA. Is it needed? Is it constitutional?

A second question is the issue of faith-based initiatives, and particularly what strings attach to faith-based organizations that accept government funds. Faith-based initiatives are a featured instrument of the Bush Administration's domestic policy agenda, and confronted with this opportunity, faith-based organizations have had to deliberate among themselves about the implications of entering contracts with the government to provide social services. Alex Acosta's responsibility at the Civil Rights Division is to enforce Title VII's anti-discrimination provisions, and I expect he might offer his views on whether faith-based organizations that accept government funds should be denied the right to hire only those who share the same faith. Barry Lynn, I know, also has strong views on the same question, and I hope he will share them with us, as well.

Third is a case currently before the Supreme Court this term. The Court has thus far granted certiorari in two religion cases, both of which came from my circuit incidentally, the Ninth Circuit. The first is *Newdow v. United States Congress,* the Pledge of Allegiance case, about which all of you have certainly read. But, I would like to direct the panel's attention to a second case: *Locke v. Davey,* in which the Supreme Court may

have before it the question of the constitutionality of a Washington State Blaine Amendment and, by implication, those of dozens of other states.

Blaine Amendments, by many accounts, were the products of 19th century nativist and anti-Catholic bigotry. Their effect is to bar state support for religious institutions. In many states, even after the Zelman decision, they provide a state constitutional hurdle to enacting school voucher legislation. The case of *Locke v. Davey* involves Washington State's Promise scholarships, which assist low- and middle-income students who rank near the top of their high school classes to attend college. One such student took his Promise scholarship to Northwest College, a self-described Christian college, and declared a double major in pastoral ministries and business administration. The state promptly withdrew the scholarship because financial support for theological studies is barred both by the state statute and by that state's constitution. The Ninth Circuit sided with the student in this case. I hope we might elicit the panelists' views on what the Supreme Court should do.

With those suggestions, I invite the panel to offer their reflections. I'm going to ask Seamus to begin by providing a bit more context on R-LUPA, and then each of the panelists can give eight minutes or so to whichever issues of the three they find most compelling. And if we stick to the schedule, we should have some time for discussion amongst the panelists as well as an opportunity for questions from the audience.

We'll start with Mr. Hasson.

MR. HASSON: Thank you, Judge. If those of you on the far left, so to speak, will forgive me, I will speak sitting down. My tremor will be less distracting to you and to me that way. Professor Hamilton no doubt thinks I'm shaking because I'm afraid of her. In fact, this is the only thing that Janet Reno and I have in common.

R-LUPA has to be seen in a longer context. In 1990, the Supreme Court radically changed the Free Exercise Clause. Before then, a law which burdened religious exercise was trumped by someone's freedom of conscience unless it served a compelling interest and was narrowly tailored to serve only that interest. In Smith, the Supreme Court said otherwise for most things. For most things, neutral laws of general applicability no longer implicate the Free Exercise Clause for most things. For some things, for hybrid rights, which is to say a right—well, now I'm shaking the table so I'm distracting everybody; on the other hand, I'm preventing Barry from writing, so that's a good thing. There are tactical advantages to everything.

So-called hybrids—hybrids between freedom of speech and freedom of religious expression—still required strict scrutiny. And systems of individualized assessments did, too, a classic case being unemployment decisions. After Smith, Congress passed RFRA, the Religious Freedom Restoration Act, which in a very sweeping fashion sought to reimpose the compelling state interest test, both as against the states and the federal government. Professor Hamilton succeeded in getting it struck down as against the states, but it still stands as against the federal government.

R-LUPA was a much more narrowly tailored statute that followed that does four things. Let me read them to you. It says, in Section 2(b)/3(a), "No government shall impose or implement a land use regulation that totally excludes religious assemblies from a jurisdiction." You can't totally exclude it. In Section (b), it says, "No government shall impose or implement a land use regulation that unreasonably"—unreasonably—"limits

religious assemblies, institutions, or structures within a jurisdiction." In Section 2(b)(1) and 2(b)(2), it says, "No government shall implement a land use regulation"—skipping stuff now—"that treats a religious assembly or institution in less than equal terms with a non-religious assembly or institution," and that, "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." The final thing it says is it codifies what remains of the substantial burden test. It says, "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person unless it is in furtherance of compelling interests and is narrowly tailored." This is pursuant to a system of individualized assessments. I'll be back later.

JUDGE O'SCANNLAIN: All right. Thank you. We'll hear from Professor Hamilton.

PROFESSOR HAMILTON: Well, you couldn't find two more different perspectives than Seamus' and mine, and so I compliment the Federalist Society once again for being the only group in the country that wants to hear both sides.

Let me just start with a little bit of background of James Madison and the preachers at the time of the framing. And we're going to go back to what was the primary principle that this country was based on at the time of the framing that's made the difference in the world, and that is the rule of law. At the time of the framing, the preachers who were in the pulpit and inculcated the rule of law from the pulpit believed religious individuals would be properly subject to duly enacted law governing their conduct. All we're talking about today is conduct, not just belief. We're not talking about speech; we're talking about conduct.

The rule of law as the governing factor that does, in fact, affect religious individuals just as it affects the President was in place in 1963 during the Warren Court era. We had an unheralded—or I guess a heralded—or unexpected large expansion in individual rights without regard to impact of what one does on the larger society. Religious groups benefited from the Warren Court's expansion as much as others, so from 1963 to 1990, we did have a handful of cases that said that religious entities would not have to obey the law unless the government could prove it had a compelling interest and it acted according to the least restrictive means.

Religious groups were understandably upset about this in 1990 when the Supreme Court returned to the tradition of the Free Exercise Clause in the United States and explained that the rule of law in fact—generally applicable neutral laws—would apply to religious entities. The religious entities succeeded in persuading Congress to pass a law which would restore the Warren Court mentality.

In the context of land use, it is a particularly troubling specter because what's happened in the land use context is that when two individuals go to buy two adjoining pieces of property now, one individual is regulated by the rule of law in the local situation. His neighbor, who simply because he's a religious landowner, now can fight and does fight tooth-and-nail to get out from under the regulation of the rule of law. This, in my view, setting aside all of the other arguments, is simply fundamentally unfair. And it once again is opposed to a grounding principle of the United States, which is private

property belongs to private individuals whom we treat fairly and not different based on their status.

So, R-LUPA comes into the picture, and we now have a circumstance in which local governments are being told that they can't apply the laws that they apply to everybody else to religious entities, except if they're willing to take on the threat of a federal lawsuit, which is spurred by an attorneys' fees provision taken right out of the Civil Rights Act, which now has been supplemented by the Department of Justice going around the country and investigating land use practices by local governments involving churches.

It is about as heavy-handed federal intervention as you can imagine. The letters that are being sent out to local governments that are already struggling financially are telling them to produce their entire code, every writing that interprets their code, every action they've taken with respect to a church in a set number of years, and whatever records they deem will be necessary. It is phenomenal—far more than any of these cases are requiring in the courts.

So, what we have right now is two groups that are under attack in the United States. One is the residential homeowners who are finding that when they bought into a neighborhood, they did not buy into a reliable zone; they bought into a situation where a church can now come in and intensively use their next-door property in ways they never imagined. And we also have the cities that are trying to figure out what to do in the face of the many threats of such lawsuits. I'm involved in a number of these lawsuits largely on the ground that it's my view that this is clearly unconstitutional.

RLIUPA, if it's upheld, will be a blueprint for other entities to be able to exponentially expand the power of Congress. RLIUPA is not a regulation of land use. It doesn't say if you need a certain setback, this is the result. It's not a regulation of land use. It's a regulation of local law. It says that if you have a religious entity, the local law is lifted. It eviscerates local law in certain circumstances. There's not another federal law that operates in the same way, and I think it will go the same route as the Religious Freedom Restoration Act, which the Supreme Court found clearly unconstitutional.

It's also a violation of the 14th Amendment, Section 5 power. Congress does not have the power to increase rights under the First Amendment unless it's widely shared knowledge, or there's a record of persistent, widespread discrimination against the entities in the states. The record in Congress—although the adjectives would tell you that the record is quite adequate, the record in Congress is not adequate. It gives you two cases of discrimination and then largely is a series of garden variety complaints about garden variety land use that churches weren't terribly pleased about abiding by, but they're the same land use rules that apply to everybody else, and not evidence of discrimination.

Of the many, many cases that have been brought around the country, we have yet to find a case in which the court has found, in fact, that there was discrimination. So, to the claim that there was widespread and persistent discrimination, one wonders when it will reveal itself.

Finally, I think the best way to think about RLIUPA is what are we as a society? What are our founding and most important values? And, what does RLIUPA say about those values? I think that RLIUPA says three things. It says, one, the rule of law may not apply to religious entities, which is a very dangerous rule. It says, number two, that we are willing to treat private property as something that we can disable certain members of

our society *vis-a-vis* other members of their society. We can say religious property owners have more rights than the private property owner who sunk their entire life savings in their home. But finally, in the end, what I'm hearing from neighbors and from private homeowners is that Congress simply did not know anything about local land use law, didn't know what it was getting into, and need to know now to reconsider what it's done.

Thank you very much.

JUDGE O'SCANNLAIN: Mr. Hasson, you have your eight minutes on the merits.

MR. HASSON: There was an old joke. Why were the Puritans opposed to sex? Because it might lead to dancing. One suspects Professor Hamilton is opposed to establishments because they might lead to religion. Our dispute over RLIUPA is a piece of a much larger dispute. Though I'm not claiming sanctity, I'm not claiming devilry, I'm claiming two different periods of the Constitution.

Let's take it back to Hamilton. In May of 1776, Hamilton was a 25-year-old member of the House of Burgesses in Virginia. He was charged with producing the Virginia declaration of rights, the equivalent of the Bill of Rights. It was at the then emerging state level. George Mason had produced a draft that said all people should enjoy the widest possible toleration in free exercise of their religion. Madison, to put it bluntly, had had enough of tolerance. Virginia was still imprisoning Baptists, in 1776, for not registering with the government pursuant to the Act of Toleration.

He wrote a letter to his college buddy William Bradford, in which he said that he had no more patience for this kind of principle. As soon as he got the change in 1776, he pivoted from toleration to rights and said, "The freest exercise of religion is based on conscience." It didn't matter that Baptists were breaking the law of James Madison in 1776. They had a right to break the law. They had a free exercise right. Before there was a First Amendment, there was a free exercise right based on the natural law of James Madison.

Now, let's fast-forward to RLIUPA. RLIUPA is not about land use. RLIUPA is about the Constitution in the land use context. There is nothing that RLIUPA prohibits that the Free Exercise Clause, the Due Process Clause, do not prohibit. I'll argue that in a second. Before I do, let me remark, the fundamental disagreement that Professor Hamilton and I have is whether religion is a constitutional good singled out for special constitutional protection or whether it's both a good and a problem singled out for special attention.

Everything else in the First Amendment, speech, press, and assembly are constitutional goods; so is religion. It would be preposterous for Grand Haven, Michigan to say, we have too many newspapers in Grand Haven. We won't accept another newspaper in Grand Haven. Anybody would realize that violates the Press Clause. For Grand Haven to say we have too many churches and we won't tolerate anymore churches in Grand Haven is exactly the same thing. The Free Exercise Clause protects the constitutional good of religion, just as the Freedom of the Press Clause protects the constitutional good of the press.

There is nothing about Federalism that exempts it from the Bill of Rights. All RLIUPA does in its four main sections is codify existing Supreme Court precedent on the

Free Exercise Clause and the Due Process Clause. Here's what I mean. 2.B.3.a: "No government shall impose or implement a land use regulation that totally excludes religious assemblies from a jurisdiction." This is a longstanding majority view, but the Due Process Clause says that it is irrational. That is the minority view. The majority view is that it's irrational to exclude religion and religious institutions entirely from jurisdiction. This does nothing other than codify that.

2.B.3.b: "No government shall impose or implement a land use regulation that unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." The key word is "unreasonably." This is the rational basis standard of the Due Process Clause and the Equal Protection Clause.

2.B.1 and 2.B.2, equal terms provision: "No government shall implement a land use regulation in a manner... that treats a religious assembly or institution in less than equal terms with a non-religious assembly or institution." Let me tell you the story about Grand Haven, Michigan. While RLIUPA was being considered, before it had been enacted, the Beckett Fund filed a lawsuit against Grand Haven, Michigan on behalf of Haven Shores Church. Haven Shores Church was nothing other than a garden variety storefront church that was being denied a store front. Why? Because the Grand Pooba of Zoning of Grand Haven thought that churches should have steeples. And so, in an area in which you could have, and did have the Elk's Lodge, the Moose Lodge, for-profit and not-for-profit assembly halls, theaters, everything you could imagine except for churches, Haven Shores couldn't have its store front.

While we were litigating that, in the midst of trying to convince the judge that the existing free exercise and equal protection jurisprudence barred what Grand Haven was going to do, RLIUPA passed and mentioned us in its legislative history. And the judge, of course, turned on his heels and gave us the first victory on the ruling. It happens all the time. We have—what's the number, guys? —25 cases pending, from Hawaii to New Hampshire.

Now, the main provision under RLIUPA that we sue under all the time is the discretionary burdens provision. That is to say, Congress imposed nothing other than the Free Exercise Clause's individualized assessments jurisprudence under RLIUPA. Just as Smith said individualized assessments still are subject to scrutiny, Congress said the same thing. If unemployment decisions remain subject to strict scrutiny, so does conditional use permit. It's nothing other than free exercise. All of it together is nothing other than what James Madison recognized. Religion is a natural and constitutional good that deserved special protection.

Thank you.

JUDGE O'SCANNLAIN: Now, we will hear from Assistant Attorney General Alex Acosta.

HON. ACOSTA: I'm going to reorder my remarks today. We've heard some good conflict and different viewpoints in RLIUPA, well-grounded in our founding fathers and in modern legal jurisprudence.

I think where I could contribute most is by giving a flavor for the real-world application of this. I should add, I've asked my office to fax over some of the RLIUPA letters to determine exactly how heavy-handed we are. I won't go into whether or not

Congress knew what it was doing when it passed the Act. Congress can defend its knowledge base itself.

RLIUPA is the law. The Department of Justice has an obligation to defend the law. The Department of Justice has an obligation to enforce the law. And we will defend it and we will enforce it. Now, I will readily admit, when I arrived during the transition the Department of Justice was not enforcing this law. We are enforcing all civil rights law, and we have a legal and an ethical obligation as attorneys to do so.

The Civil Rights Division has opened 12 formal investigations and filed one lawsuit under RLIUPA. Our nationwide efforts are at 12. These investigations spanned a breadth of religious traditions: a Muslim school, a Buddhist temple, a black church in a predominantly white suburb—a church that I will speak a little bit more about in a few minutes—a Jewish synagogue in Florida, and churches of various Christian denominations. Four of our cases have already resulted in favorable outcomes. By favorable outcomes, I mean jurisdictions withdrew their objections upon hearing that there was a public spotlight on their actions. In addition, we have approximately 25 RLIUPA cases that we're currently reviewing. We have also intervened to defend the constitutionality of RLIUPA in several cases.

Let me give you a few examples of some of what our investigations are finding. We're finding that a great many jurisdictions impose restrictions on churches that are not imposed on comparable institutions. For example, in Brighton Township, Pennsylvania, there is a three-acre minimum acreage requirement on churches, but not on private clubs, theaters, or fraternal organizations. In fact, Brighton specifically permits, without any acreage requirement, adult movie theaters, bookstores, and sexual encounter centers -- I'm not exactly sure what those are, but we'll leave it to Brighton to figure that out. And so, the point is, a church must have three acres, but an adult movie theater need not; a private club need not; a fraternal organization need not; a Kiwanis club need not. After we sent a letter informing them that we were looking into this matter, Brighton Township changed that.

In a second example, in Northbrook, Illinois, there's a zoning ordinance that entirely prohibits religious uses from business and industrial zones. It’s its own township. But the interesting thing is that those same business and industrial zones that prohibit all religious uses permit non-religious membership-based organizations like the Rotary Club. Northbrook has likewise amended its regulations.

And yet, in another example, in Surfside, Florida, the regulations allow private clubs and lodges but not houses of worship in the tourism district. It's used this provision to exclude small orthodox Jewish synagogues, which present particular problems because obviously individuals of the orthodox faith cannot easily travel large distances to worship.

Now, this kind of facial discrimination exists in about half the cases we consider. Localities appropriately exercise substantial discretion in zoning, but—and let me add, that is appropriate; that is how it should be. Discretion at the local level is a good thing. But sometimes local authorities exercise this discretion in a discriminatory fashion. In an area such as religion, where decision-makers often bring prejudices to the table, discretion has to be carefully looked at. Consider, for example, a case in West Mifflin, Pennsylvania. There, a black Baptist congregation purchased a church property from a predominantly white Baptist congregation. It seems straightforward enough. Except,

when they went to apply for the use permit, the City decided that they no longer wanted to allow a church at that location and they denied the use permit to the black Baptist congregation. Now, what discretionary reason could there be, such that a black Baptist congregation not be allowed to worship in the exact same location that a white Baptist congregation can worship? Vigorous federal enforcement of RLIUPA, with a sensitivity to the needs of communities to manage growth, the needs of communities to exercise local discretion, and similar measures, is important to preserve the autonomy of religious institutions. And more importantly, Congress has said that is the law.

Next, I want to turn to an issue near and dear to my heart. That is the case of *Locke v. Daveys*. Judge O'Scannlain referred to this case. As those of you who followed it problably know, the United States has filed an amicus brief in that case. With due respect to Judge O'Scannlain, I think he mentioned that the Ninth Circuit "got it right" in this. And with due respect, I think it's one of the few instances this year where the U.S. files on the side of the Ninth Circuit. We were very glad to do so.

The case concerns a Washington State student, Joshua Davey. Davey earned a Promise scholarship—and he earned it. He graduated in the top ten percent of his class, and his family had limited income and met the income eligibility requirements. He used the scholarship to enroll at Northwest College, a college that was eligible to receive Promise scholarships under the Washington State plan. All is well, except that Davey then decided to declare a double major in business and theological studies. Under Washington State law, students who declare a major in theology taught from a religious viewpoint are ineligible for aid. Davey could pursue a major in theology, but not in theology taught from a religious perspective. The question is, is that a viewpoint?

Anyhow, the real issue is this. The real issue is the Washington State Blaine Amendment. Now, some amici have argued—and actually Seamus' brief and Professor Garnett, if he's out there, who co-authored a brief, did a very good job of discussing the history of the Blaine amendments.

Amici have argued that the Blaine amendments' unique history adds context to this debate. The Blaine amendments coincided with a significant wave of Catholic immigration to the United States in the mid-nineteenth century. Nativist groups soon grew in influence. In 1854, the anti-Catholic Know-Nothing Party took control of the Massachusetts legislature and governorship. To add some flavor to what the Know-Nothings were about, let me tell you a few things that they did. Catholic state employees in Massachusetts were fired. A law was passed requiring the reading only of the King James version of the Bible, reading that was forbidden to Catholics at the time. Foreign language instruction was banned from schools; and a constitutional amendment barring aid to schools operated by religious sects.

A few years later, in 1875, the organized nativist movement exerted their muscle on the national stage. Speaker of the House of Representatives James Blaine sought a federal constitutional amendment that would have enacted the same provisions as the Massachusetts amendment. It passed the House; it lost in the Senate. But he had sufficient political muscle to insist that every subsequent state that was added to the Union, including Washington State, incorporate into its constitution an amendment similar to that which the Know-Nothings inserted into the Massachusetts constitution.

Today, 37 states, including Florida and Washington State, have these Blaine Amendments. So, we should remember where these Blaine Amendments came from. And

it is this Blaine Amendment that is the subject of the Supreme Court case. My time is limited. I assume that on rebuttal or on Q&A, we'll have an opportunity to address some of the other issues.

Let me close by saying that the Blaine Amendments case, Locke v. Davey, will likely determine the outcome of school choice plans in the 37 states in which they are. This isn't that new a debate. Lincoln addressed this issue in his day. "As a nation," President Lincoln said, "we began by declaring that all men are created equal. We now practically read it: all men are created equal except Negroes. When the Know-Nothings" —the originator of the Blaine Amendment—"get control, it will read, 'All men are created equal except Negroes and foreigners and Catholics.'" In essence, the question before the court is, are the Blaine Amendments constitutional?

Thank you.

JUDGE O'SCANNLAIN: Our next panelist will be the Reverend Barry Lynn.

REVERAND LYNN: Thank you very much. My communications director yesterday said, why are you hanging out with the Federalist Society tomorrow? And of course, I gave them the answer that it is a rare opportunity to speak to every future judge in America—no, no, no. I meant it as a joke.

Just to make sure we get to this point, I have a fundamentally different view of the effects of government funding for religious institutions and their subsequent ability to discriminate in hiring than, say, the United States Department of Justice. For this Administration, even government funded faith-based providers may avail themselves of Title VII's exemption for religious groups; that is, a religiously preferential hiring provision added to the 1964 Civil Rights Act. To the Department, it's viewed as necessary to preserve the religious identity of those institutions, but to me, it's more accurately described as a violation of George Washington's admonition that the government should give to bigotry no sanction, with this sanction coming in the form of tax revenues from all of us.

I'm quite willing to affirm the fact that religious institutions have a right to manage many of their internal affairs, including some that involve land use, and also when they hire, so long as they are using voluntarily contributed funds by their own adherents. I don't concur with the theologies that bring the Methodist Home for Children in Georgia to the point of refusing to even interview Jews for jobs there, or the Baptist Home for Children in Kentucky to fire an otherwise qualified worker when she is discovered to be a lesbian. The law today, in general, finds that if such judgments are based on actual religious impulses and views and are not mere pretexts to cover up gender and racial bias, they will be upheld, and I have no problem with that. Those, by the way, are real cases in settlement or in active litigation, not because of theology but because of state funding in Georgia and Kentucky.

For me, the constitutional and even the moral calculus changes when any religious institution accepts any form of taxpayer support. At a minimum, though, no discriminatory hiring should be permitted when a government grant or contract is made to a faith-based provider for the purpose of providing what appears to be a secular service. There is no legitimate reason for a feeding program run by a local Presbyterian church to hire only Presbyterians to ladle out the soup. There is no legally cognizable

basis for distinguishing Presbyterian ladling from Buddhist ladling or even atheist ladling.

Now, if that Presbyterian institution says, “Look, every single act that we do here is spiritual, and no job does not contain a religious element,” then that institution should be ineligible to receive government funding in the first place as a pervasively sectarian provider. And I understand the view that might be taken by a local church in that regard; I just don't want to fund it with public dollars. And moreover, it may even violate the purported claim that his faith-based initiative will, in fact, deny any funds to religious worship, instruction, or proselytization. There are very few cases on this point, but I happen to think that the court that got it the most right, although it is somewhat an aging case, is Dodge v. Salvation Army, where a victims' rights coordinator at a domestic violence shelter run by the Salvation Army was fired when it was discovered that she was a Wiccan, a modern-day pagan. The Federal Court for the Southern District of Mississippi rejected a Title VII defense because the position was funded, they said, substantially, if not entirely, by federal, state, and local governments.

Now, the President's whole faith-based initiative is based on a multitude of misunderstandings, and frankly deceits, when it was first announced in January 2001. I told a reporter that it was the worst idea since they took King Kong off Skull Island and brought him to New York. I've been apologizing a lot lately to the Kong family. I have offered many apologies because every time you give a federal dollar to a religious institution, it merely frees up another dollar which can be used for more overtly religious purposes.

So, I think it's sheer sophistry when the Administration says that we will fund the bread but not the bibles because now more bibles will be purchased from the collection plate that don't have to go to buy the bread. It's rarely possible for an institution to turn off the spiritual spigot whenever there's a federal dollar floating by, but then turn it back on when it's a privately contributed dollar. Moreover, as a constitutional matter, this Administration has indicated that some religions will be ineligible to receive funds because of their hateful character—specifically, the Nation of Islam—or their lack of humane characteristics. Wiccans, again, at least according to Stephen Goldsmith over at the White House, who is apparently unduly influenced by reading Hansel and Gretel as a child. Government-approved religion lists demonstrate how little basic understanding of the First Amendment is housed in this Administration.

I do want to turn, also, to this case of *Locke v. Davey*. I would like to think that members of this organization have deep conflicts over this case because it is fundamentally whether there is a legitimate state's rights issue that is in very many ways at the heart of this question. Control of the public treasury isn't a legitimate state's rights question, even if you find some sympathy for Mr. Davey who was denied scholarship funds because he announced that he was prepared to go into the ministry. Washington, of course, prohibits payments for preparing for the ministry. At a minimum, it seems strange to conclude, as the Ninth Circuit did. I'd like you to tell me afterwards if this is true — that there are some conservatives who, as a mantra before breakfast, say 'the Ninth Circuit, the most overturned circuit in the United States.' I don't know about that. But I don't think Washington State's Constitution has anything to do really with the substance of the Blaine Amendment. I think it has to do with a very firm reflection of James Madison's own abhorrence of compelling a man to furnish contributions of money for the

propagation of opinions with which he disagrees, which of course he characterized as sinful and tyrannical.

The free exercise of religion does not literally mean that persons preparing for the clergy can expect free, or even subsidized, education. Mr. Davey was not unable to complete his study because he did not get a scholarship. Religious commitment always has some costs, and it's not necessary for the state to subsidize each one of them. Arguably, an even bigger decision was that Washington State was involved in some kind of viewpoint discrimination. Training for a position in the clergy is categorically different from training in other fields. Mr. Davey was not engaged in the study of comparative theology, which, if unfunded at the same institution that was funding people to study, say, comparative philosophy, would be an equal protection viewpoint discrimination issue.

I realize that some states have been sloppy in their statutes, but I don't think that the application in the Washington case is sloppy at all. Mr. Davey was preparing for the pastoral ministry, and indeed the spiritual and theological preparation of new clergy has such a critical significance to any religion that state-compelled financial support for clergy training raises extremely serious free exercise issues for those people who have differing theological views.

The Supreme Court of the United States has repeatedly said, and we can get into this in more detail, that there is play in the joints between the Establishment Clause and the Free Exercise Clause. And I think in Davey's case, Washington State played, and played it well for the free exercise of everyone.

All of these issues that we're talking about, and some of the issues that Kevin raised earlier, really come to the core of what this country wants itself to be. If this nation comes to a point where religious groups come to rely on government favor rather than voluntary benevolence to subsidize their ministries, or when divinity students think it is the state's responsibility to pay for their preparation for ministry, the United States may have crossed a river of no return. And as with government promotion of prayer in school or promotion of Ten Commandments monuments in judicial buildings, the believer who needs to seek the favor of politicians to support his or her viewpoints has a faith which is probably already withered and near death.

Thank you very much.

JUDGE O'SCANNLAIN: Our final panelist is Professor John Baker.

PROFESSOR BAKER: Just before we started, Reverend Lynn informed us that today the Alabama Supreme Court removed Judge Moore from the bench. In light of Reverend Lynn's remarks about the Ninth Circuit, I wonder whether we should consider ethical disciplinary conduct for judges who refuse to follow Supreme Court decisions.

The actual title of this panel is "Intrusion of the Federal Government into Religious Organizations." And the theme of my remarks is that the federal reach has grown and will continue to grow as the administrative state grows, and as federalism continues to erode. I want to touch briefly on the points that have been mentioned, and maybe a few more depending on my time. But I want to begin with this observation about how are we coming at the issue in terms of the Constitution, because Seamus put it in terms of a difference between himself and Marci, and actually I find myself in between.

I think on many substantive issues, Seamus and I actually agree. But I certainly agree with Marci on the Bernie case and on the Smith case before it. I think it has to do with the real meaning of the First Amendment religion clauses. Seamus approached it from James Madison in Virginia. But as I argued in Jaffrey and as then Justice Rehnquist agreed in dissent, and as Chief Justice Rehnquist has said more so since, the James Madison who wrote the First Amendment did it in very different terms than he did as a member of the citizenry and political body of Virginia. That is, Madison understood the meaning of federalism, as did Jefferson, and that what one could and should do at a state level was different from what one could and should do at the federal level.

Of course, the basic intrusion here which scrambles everything is the incorporation of the religion clauses along with other clauses of the Bill of Rights. But the religion clauses are especially problematic because the First Amendment is the only clause that refers specifically to Congress.

It is even more problematic if you understand Madison's view on the religion clauses as expressed in *Federalist* No. 10. As he said there, "Religion is both something to be valued but it is also a political problem." Basically, Federalist 10 is a divide-and-conquer strategy with regard to religious groups. Multiply them. The more, the merrier, because the more there are, the weaker their power is. And he said that ultimately, the protection for religious rights was the same as the protection for civil rights generally—federalism.

But when you ignore federalism, as the Court has done with the incorporation of the Bill of Rights, that is the basic federal intrusion. And of course, the jurisprudence is at a state now where the Court will never go back on that. But when it brings that federal intrusion, you get an irreconcilable conflict when you're dealing both with the state government and the federal government and with the Free Exercise and the Establishment Clauses because the history is the Establishment Clause had nothing to do with the states. It was to protect the states from the federal government.

So, when you eliminate those divisions, we are in a hopeless mess as regards the religion clauses. You're building on jurisprudence that has already scrambled the deck, and it makes it very difficult.

But now, I want to get more specific, and I want to pick up, first of all, the Washington case, *Locke v. Davey*. *Locke v. Davey*, in many ways, is kind of a flip of the case I argued from Alabama, *Wallace v. Jaffrey*. In the silent prayer case, I argued to the Court that, “Hey, this is not just a state's rights federalism issue. This is a case where Alabama had specifically cited the Northwest Ordinance passed by Congress and insisted by Congress that Alabama, as it did with all other states, include a protection for religious liberty.”

See, the very same ability that was mentioned regarding Blaine was practiced from the beginning. That is to say that the religious elements in Massachusetts, in drafting the Northwest Ordinance in 1787 and reconfirming it in 1789, were concerned that religion should be used to civilize the frontier. And so, the Northwest Ordinance says, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and education shall forever"—until the Supreme Court decides otherwise—"be encouraged."

Now, my point there was that Alabama came into the Union because they were forced by the Congress to have a provision on the free exercise, and pursuant to that, they

had adopted this provision. Of course, the Court gave that no attention at all. My attitude towards the Washington case is, let's be consistent. Washington is arguing federalism. Okay, you didn't recognize federalism in Jaffrey or any of the other cases, so you shouldn't recognize it over here. I don't care if you recognize federalism and say they can have their own Blaine Amendment. That's fine. But then go back and change the result in *Wallace v. Jaffrey*. You can't have it both ways. You can't have it heads, I win, tails, you lose, and that's what's happening in the religion clause cases.

Beyond that, faith-based initiatives. I actually serve on the board of a religious non-profit that recently accepted funds from the federal government—over my very strong objection, but not because I thought it was unconstitutional. Indeed, it's perfectly constitutional. I mean, along with the Northwest Ordinance, the first Congress enacted the Lands Act and they gave money to all kinds of religious groups to go out and civilize those people out on the frontier. There's a long history of that.

There's a second question about whether I want the federal government interfering in a particular organization. That's not a constitutional question, but I think it is extremely unwise for religious groups to do this. Why? It has to do with many other points that I would like to get into, but I've got one minute. The real problem is the Spending Clause. I've tried to tell the people in our organization, "You don't understand. You will be audited and you can be prosecuted." The reach and intrusion of the federal government—Marci's pointed out some of it—is across the board. It's not just religious organizations. The implications, though, are for religious organizations.

This Administration, which came in opposed to the policy of the Clinton Administration on prosecuting organizations, has gone the Clinton Administration much further as a result of the Enron-WorldCom mess, and they're prosecuting all kinds of corporate entities. But wait a minute; it doesn't stop with corporate entities. Greenpeace is complaining because they've been indicted. What is to prevent religious organizations from being indicted? Nothing. Nothing.

A couple of states indicted Catholic bishops in dioceses last year—New Hampshire entered into a plea agreement, and Arizona. And their model were federal prosecutors. And what is the mantra? The federal prosecutor's mantra is, "We're going to reform culture—the culture of this organization." That's exactly the wording that the D.A. in Phoenix used when he indicted the bishop there.

There is this notion about reform, and when the federal government comes along and says, "We're going to be sensitive," I have no doubt about the sincerity of the Administration. I have no doubt about the sincerity of the political appointees. What I worry about are the career people. And, while they may be helping Seamus today, what they can do for one side, they can do against that same side. And the reason why federal power has expanded is because whatever side gets in, they use the power of the federal government to expand their agenda, and that is exactly what the founders were against. If you don't have massive federal reach through the Spending Clause, then many of these problems simply never arise.

Thank you very much.

JUDGE O'SCANNLAIN: Now, we're going to have some intra-panel conversation before we take questions from the floor. I would like to invite Professor Hamilton, as the

person who first spoke, to have a chance to ask questions or comment to any one of your colleagues.

PROFESSOR HAMILTON: Some very quick points. The first is that James Madison is going to get worn out today, but he is the symbol for the Federalist Society, so I think it's only appropriate. He never once—and I looked—advocated constitutional protection for actions that harm others. All of these cases involve a zero-sum game. If the religious group gets the right, the groups that are next-door to that religious group get something taken away from them.

With respect to Davey, Madison also had a very telling line. That was in Memorial in Remonstrance, which, by the way, you can get on the web any time you're just in the mood to look at it. He said, "Not even one pence should go for the support of Christian education." I think that's a very telling line for that case, and it will be hard for the Court to get around it.

I'd like to express my deep surprise that the Department of Justice has been able to extract settlements from local governments that are already being sued by a law that provides for attorneys' fees by groups that are doing it for free for the religious groups, and the federal government is coming in and threatening an independent investigation. If you're a mayor and you've got to choose between building a bridge and fighting that battle, what do you do? None of those settlements in any of those cases, all of which I'm familiar with, involved those cities agreeing that they had discriminated. And I will reiterate what I said before. We don't yet have a case in which there's been a finding of discrimination. I've been looking for it because I'll take that case on the other side. But I haven't seen it yet.

JUDGE O'SCANNLAIN: Any comments? Mr. Baker?

PROFESSOR BAKER: Well, Marci, actually Madison was a member of the Lands Committee in the House, and the Lands Committee actually did vote money for religious groups.

PROFESSOR HAMILTON: Not for Christian education.

PROFESSOR BAKER: Yes, he did. What happened—on the original vote, the language was, "money for the religion of the majority." Madison objected to the words "for the majority." And when those were struck out, it passed through with his vote. It did so because it was perfectly consistent with his view in *Federalist* 10.

JUDGE O'SCANNLAIN: Other comments? Barry.

REVEREND LYNN: I do have a question for any panelist who wants to address it. And that is, in the context of vouchers or other federally funded programs of a social nature, what did people think is or ought to be or is required by the Constitution to be the rule when it comes to admission of students, say, to a school which receives voucher funding? Do you have to allow students to come into the school regardless of gender, race, and/or disability? Seamus.

MR. HASSON: As long as it doesn't come out of the time I had planned to say other things.

JUDGE O'SCANNLAIN: Oh, no. It doesn't.

MR. HASSON: You can talk about diversity in micro terms and you can talk about diversity in macro terms. You can talk about diversity that says every school has to admit everybody; or you can say Catholic education has thrived on single-sex education for years and there have been girls' schools and boys' schools. To dismantle that is to kill the goose that laid the golden egg.

On the other hand, there's the Bob Jones case. Where do you draw the line between the two? Justice O'Connor asked the question in oral argument in Bob Jones. And as I recall, the lawyer ducked it. There is not a good principle to answer for that, except to say that—what do you say? "We fought a civil war over race." She accepted his answer and moved on.

JUDGE O'SCANNLAIN: This side?

MR. HASSON: No, this is what I wanted to say.

JUDGE O'SCANNLAIN: Oh, sorry.

MR. HASSON: I'm going to beat James Madison to death some more. Madison didn't think religion was a problem; Madison thought religious discord was a problem, and he makes it clear in his detached memoranda. He thought that the reason there should be so many religions, the reason it was a good thing, was not that it protected the government from one religion taking over, as if the religion itself was a problem. It was that it protected against religious discord from ever coming to blows. It wasn't religion that was the problem; it was discord that was the problem.

When he first introduced what would become the First Amendment, he introduced another amendment, as well, that would have barred the states from violating anybody's freedom of conscience. He really did want to make religious liberty a federal thing. Congress wouldn't accept it. As he predicted, they wouldn't. He and Jefferson had had a lively correspondence over whether there should be a Bill of Rights in the first place. Madison wrote to Jefferson that it was a bad idea to try to get federal protection for religious liberty because it couldn't be gotten in the requisite latitude, was his phrase. Jefferson wrote back and said, literally, "Better half a loaf than no bread." And throughout the rest of that is his career, if you look closely at his detached memorandum, he makes the distinction between what religious liberty requires—the Pure Principle, he calls it—and that what the First Amendment got really was a half-loaf. The Pure Principle of religious liberty protected more than the Free Exercise Clause did, which is why Madison would have loved RLIUPA.

JUDGE O'SCANNLAIN: Thank you. Professor Baker.

PROFESSOR BAKER: I wanted to comment on education and diversity. One of the things that people may not have noticed in the affirmative action cases, *Grutter* and *Grata*, is that almost as a throw-away at the end, the Court says that on Title VI, everything that is applicable under the 14th Amendment is also true under Title VI, and that's because Congress passed a restriction on any one or institution that receives federal funds. Of course, that was designed for colleges not to be able to segregate if any of their students took federal loans. Well, like all intrusions, as I said, it can come around. That was passed by the liberals.

Now, think about this from a religious point of view. There are some religions, in particular the Catholic Church, which has a special preference for the poor, which in many cases is going to mean affirmative action. And yet, now under these cases the Catholic Church colleges have to follow the same rules that are applicable to the University of Michigan. They have to have a program of affirmative action, if they're going to have one, that doesn't do what the undergraduate program did, but they can follow the law school program.

I'm not arguing for affirmative action. I'm arguing for the right of a private entity to do this. It was overreaching on the part of Congress by using the hook, the fact that students happened to get a loan, that some how you're going to cover the whole institution. Again, this is something that liberals wanted, and now it turns out it can be used as a double-edged sword. Every time you get federal overreaching in one direction, you can guarantee that your opponents eventually will be able to use it against you.

JUDGE O'SCANNLAIN: I'm going to call on Alex, who has something to say. But as he makes his comment, those of you who have questions that you would like to direct to the panel, please come to the mics.

Alex.

HON. ACOSTA: Sure. Three narrow points. I understand the surprise in the point that there has been no finding of discrimination. Typically when institutions decide to change the very issue that is being investigated, it is not accompanied by a finding of whether or not there's been discrimination. Going to the simplest example, you have a white church selling its land to a black church. A letter of investigation is sent saying, “We're just looking at this.” The city decides to issue the zoning permit that it had previously denied. Now, whether or not the city, in the process of doing that, stands up and says, “Oh, and by the way, now that we're issuing the permit, we just want to make it clear that we as elected officials had previously discriminated,” I think is beside the point and somewhat rhetorical. The point is that the cities have changed their zoning permits, whether or not you believe the law is a just law. The investigations have brought about changes that are separate and apart from settlements.

Going to the second point, the *Locke v. Davey* case, my understanding is that whether or not an individual declares an intent to become a minister is not the issue. My understanding is that at issue is whether or not the individual is engaged in a study of theology from a religious perspective. Now, it will typically coincide that that means the individual at least has some interest in joining the ministry. But the Washington State Amendment is much broader than that.

Going to my third point, I think that Barry Lynn is absolutely correct: a Buddhist ladle, a Catholic ladle, and the ladle of someone who does not follow a particular religious faith are all the same and the soup in them is all the same. That is the very point, that the mere fact that the Salvation Army is doing the ladling should not put the Salvation Army at a disadvantage in the provision of services. The fact that the provider chooses to structure itself in a way that furthers its own faith or views does not fundamentally change the fact that it is the provision of services that is being offered. I think that goes to the part of the faith-based initiative.

JUDGE O'SCANNLAIN: All right. Unless there are any further comments from the panel, we'll start questions from the floor starting with this mic and then going to that mic, and back and forth. Please introduce yourself and give your name.

AUDIENCE PARTICIPANT: Sure. My name is Anthony Piccarello, and in the interest of full disclosure, I work for the guy with the white beard.

MR. HASSON: What did I get wrong?

AUDIENCE PARTICIPANT: Nothing at all. My question is primarily for Professor Hamilton. I'm interested in your views on issues of particular concern to federalists. In other words, it seems to me that RLIUPA offers a lot to like from the federal perspective, not least the alleviation of overweaning, zoning regulations on the ability of property owners to use their property more or less as they wish. Minimizing unnecessary interference with religious exercise represents a preference for a legislative accommodation of religious exercise—that is to say, one through the political branches rather than one through the judiciary. It reflects the concern in *Federalist* 10 over capture of government by factions, especially including local governments—

JUDGE O'SCANNLAIN: And your question is --

AUDIENCE PARTICIPANT: -- and so, my question is, counterveiling that are arguments, it seems to me, that because you're providing an accommodation only for religious folks that you've got an Establishment Clause problem, which runs against the concern over unduly broad interpretations of the Establishment Clause, and a concern that localism is so critically important that it preempts any kind of federal concern. So, I basically just asked you why is it not the case that those arguments prove too much.

JUDGE O'SCANNLAIN: Professor Hamilton.

PROFESSOR HAMILTON: I'm writing a book. Three answers. One is that I think it's a hoot to argue that the reason RLIUPA's good for conservatives is because it lessens the burden of land use law. RLIUPA doesn't lessen the burden of land use laws fairly. What it does is say that those who are neighbors to religious institutions now have worse land use experiences than anybody else.

For example, you spend all your money that you've got; you buy a nice home; you want your children to be in a nice, quiet neighborhood. The church next door, the day

before RLIUPA is passed, cannot put a homeless shelter next-door to you. The day after it's passed, the church says, “You know what? I think we'll have a homeless shelter here. And in the suburbs of Chicago, we will bus them in.” And so, people with young children won't let their children in their front yards. That, I think, is a horrible example for conservatives who believe in private property rights. Favoring one group over another isn't enough.

Secondly, this is not a question of constitutionally protected religious exercise. The Supreme Court has never said anything with respect to land use, and it's not going to say anything, that strict scrutiny applies in the land use context. That's just dreaming.

Third, I think we've already illustrated how heavy-handed the federal government's intervention is here. It's not regulating commerce; it's not regulating land use. It's invalidating local land use, and it is coming in as a prosecutor and an intervenor. You can't imagine a more heavy-handed federal set of factors to prove that this is an extreme violation of federalism that has always traditionally belonged to local government and has to. Land is local. So, I disagree.

JUDGE O'SCANNLAIN: Any panel follow-up?

PANELIST: I mean, land is the most local thing that there's ever been in the law. And secondly, the real problem in the Bernie case was the takings jurisprudence of the Supreme Court, because if they hadn't gone off the deep end on the exceptions on the Takings Clause, assuming the Takings Clause is incorporated, which it is, you wouldn't have had the preservation exception that the Court had made and you have approached that case as a takings case instead of a religions clause.

PROFESSOR HAMILTON: Well, you actually couldn't. The Bernie case involved a request to completely demolish a building, completely demolish it, in a circumstance where they only needed to demolish the back part of the building. The debate in the city was always over the percentage of the building to be demolished. There just wasn't a takings issue there.

JUDGE O'SCANNLAIN: Question on this side.

AUDIENCE PARTICIPANT: To Marci, I would say I like to dream. I mean, it may be true that there never will be strict scrutiny in land use, but I actually tend to agree with you that the way for institutions like the church to approach it is, of course, to band together with private property owners to make the scrutiny as strict as possible so the playing field is equal. And to Kevin, I would say that your admiration for the 10th Federalist, your vision of Federalism at least should be tempered by the 51st, that it's not a state preemption doctrine, really, and we don't need to disguise it by calling it states' rights anymore. It was a doctrine that was to set the federal government against the state and local governments from the beginning.

JUDGE O'SCANNLAIN: And now, your question is --

AUDIENCE PARTICIPANT: So, I'm taking issue with the same side of the table while agreeing with you, suggesting that there are holes in your arguments.

JUDGE O'SCANNLAIN: Response?

MR. HASSON: I'm not quite sure which holes you identified. However, let me tell you quickly a war story. Cottonwood Christian Center, Cypress, California, about a year and a half ago, truly went after, nail-and-tong, a church that had spent $14 million painstakingly assembling 18 acres in a redevelopment area where nothing had happened in 10 years, so it could build its sanctuary. Cypress didn't want a church there. Cypress, in its wisdom, wanted a commercial thing in the redevelopment area. So it dragged its heels on everything, conditional use permit and everything else. Finally, when a RLIUPA case came in, they moved to condemn the property, brought a state court action, seized the church's 18 acres so they could sell it to Costco. That was their public purpose. You might recall, the *Wall Street Journal* editorialized against it, as the First Church of Costco. We came in and got the federal court to enjoin the taking, but RLIUPA was there as the main weapon that the federal court used.

Prior to that, that I'm aware of, there were four reported decisions trying to enjoin condemnation proceedings against religious organizations, and they'd all failed. What in the world is the conservative argument that says Cypress, California gets to take the church's property to sell it to Costco?

AUDIENCE PARTICIPANT: But why aren't we trying to overturn Berman v. Parker instead of making a religious exception?

MR. HASSON: What religious exception do you want to make?

AUDIENCE PARTICIPANT: Well, you're saying RLIUPA is the way to do that. *Berman v. Parker* was the decision that said in the name of redevelopment that the government could use its power of eminent domain. If that's the problem, you're going around the problem instead of solving it.

MR. HASSON: That's one of the problems. It's an example of a larger problem that says that people think that the land use regulations are somehow exempt from the Constitution. They're not, anymore than other kinds of local restrictions in businesses are exempt from the Press Clause.

JUDGE O'SCANNLAIN: We're going to take a question from this side of the room now.

AUDIENCE PARTICIPANT: This is also for Professor Hamilton. I was just wondering if you could be perhaps a little more precise about the argument. You seem to be saying that free exercise is a matter of belief rather than of conduct, when you get to the *Oregon v. Smith* case. Let me give you an example because the question here is whether there is, in your mind, any sort of neutral regulation that would create a free exercise problem. I'll give you an example.

In Pittsburgh, where I'm from, the city council passed an exemption to the Historic Preservation Bill for houses of worship and other religious buildings. And there were two arguments that the churches made. One was a more diffuse argument that our free exercise is spending money on the poor. If we have to keep these buildings in their pristine architectural state as landmarks and put in the right kind of tin roof and stained-glass windows, we'll have less money to spend on a soup kitchen.

The other argument was, I think, a better one. And it was that sometimes, the practice of our religion is directly implicated by things like the historic preservation law. When the Catholic Church, after the Vatican Council, changed the architecture of its churches and moved the altar from the back wall up closer to the congregation, that was in response to a change of thinking in the church about their theology. If a historic preservation ordinance says this is a historic church, you can't move that altar, you are interfering with the exercise of theology.

JUDGE O'SCANNLAIN: I think we understand your example. Professor Hamiltion.

PROFESSOR HAMILTON: I strongly commend to everybody, instead of reading editorials, to read the Supreme Court's decision in *Employment Division v. Smith*, where the Court said that the rule of law has always applied and will continue to apply to religious entities by all generally applicable neutral laws. And at the end of the opinion, the Court says, but if the legislative process wants to, it can—and we're certain it will in this very religion-friendly society, which we are—consider an accommodation. And they gave the example of exemptions already in place for the use of peyote, which was what the whole case was about.

So, the Court has laid out the process. And the question is, really, which is the better place for the accommodation to occur when it's conduct? I think it has to be the legislature because conduct, as Jefferson said, must be capable of being regulated when it breaks out into overt acts. You hurt people through conduct. So, if the legislature considers it, the Court's already said it may well be constitutional, but I don't think the Free Exercise Clause gives a mandatory rule that says regardless of what the general law says, you get a card out for religion.

JUDGE O'SCANNLAIN: I'm going to take the person at the microphone on this side of the room.

AUDIENCE PARTICIPANT: Hi. Tom Fisher. I work for the Indiana Attorney General. This is largely a question for Alex, although I welcome other views. Looking at *Locke v. Davey*, you talk about it as the constitutionality of the Blaine Amendments, essentially. What about a state constitutional provision that essentially predates the whole Know-Nothing movement? Is it really burdened by that history, but is still a spending limitation that may be beyond what the Establishment Clause would prohibit? Is that going to go the same direction as the Blaine Amendments themselves, or can it be evaluated independently?

HON. ACOSTA: Tom, I don't know if you're referring to anything specific in Indiana. But it's difficult in a vacuum to opine on whether I think that something that predates the

Blaine Amendments is problematic. In the end, history provides a context. It provides a flavor. But the ultimate question is whether or not the federal Constitution, the confluence of the various First Amendment protections, along with the Equal Protection Clause, in the end prohibit a state from having that amendment in its Constitution. Without more, I really can't respond.

JUDGE O'SCANNLAIN: Quick follow-up.

MR. HASSON: There are two different separate arguments that might even make the Washington State Blain Amendment vulnerable. The first is the viewpoint discrimination argument under the First Amendment.

The second is a *Hunter v. Underwood* argument under the Equal Protection Clause. *Hunter v. Underwood* was a case that struck down a provision of the Alabama State Constitution, which disenfranchised people convicted of crimes of moral turpitude. I forget whether it was Hunter or Underwood, but whoever he was, he undoubtedly convicted of a crime and it was undoubtedly a crime of moral turpitude. He was disenfranchised and said he wanted his vote back because the constitutional provision was a Jim Crow provision that was designed specifically to create an excuse for disenfranchising ex-slaves whose family situations were so irregular that everybody was technically committing a crime of moral turpitude in those days.

Alabama defended by saying, "Well, that was then; this is now. We don't selectively enforce it anymore." The Supreme Court unamimously, in an opinion by Rehnquist, said it doesn't matter. It started out as a disability to a specific group, and it still works to its disability now. It's unconstitutional. Washington State violates both of those. The provision predates the Blaine era and the Know-Nothing era, and it may have more innocently attempted to do the same thing. It may not violate the Hunter v. Underwood argument, but it still might be very vulnerable to the viewpoint discrimination.

JUDGE O'SCANNLAIN: Thank you. Reverend Lynn.

REVEREND LYNN: I do think the Blaine Amendment issue is a bit of a red herring. For example, in Massachusetts where you have this arguable, bigoted start to the process of anti-aid amendments to their Constitution, the legislature changed that provision twice since the days of the Blaine Amenfdments. And in two referenda, the citizens of the State of Massachusetts refused to overturn that provision of the state Constitution, which had, as I said, been adjusted already twice.

I don't think that it is possible or conceivable that the result in *Davey* is going to overturn all of these provisions, including those that predate or that have stand-alone justifications for guaranteeing a greater separation of church and state than may be required by the First Amendment. In a decision in the late '90s, the Eighth Circuit said the fact that Missouri has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question. Amen.

JUDGE O'SCANNLAIN: Question on this side of the floor.

AUDIENCE PARTICIPANT: My name is Matthew Hank. I have a brief question for Mr. Hasson. I'm not certain, but I think I understood you to say that RLIUPA does not provide any protections for religion that the First Amendment doesn't already provide. My question is twofold. Did I understand you correctly, and if I did, doesn't that render the statute superfluous?

MR. HASSON: It codifies both the First Amendment and the 14th Amendment. It doesn't render it superfluous because there's something that focuses a court's attention about a federal statute that doesn't focus an argument from counsel based on the Free Exercise Clause. And you literally were in the middle of a case when RLIUPA came down, and the judge spun on his heels and it was over.

JUDGE O'SCANNLAIN: Comment?

PROFESSOR HAMILTON: Just two quick points about that. One is that if it did replicate the constitutional protections, which it does not, but if it did, it has a feature that, in itself, is unconstitutional, which is that it switches the burden normally borne by the plaintiff in these cases over to the government, which is problematic. And two, the claim that it reflects the Constitution rests on dictum in Smith and nothing else, not even a whisper about land use law in the Supreme Court. So, it's wishful thinking from my perspective.

JUDGE O'SCANNLAIN: Question on this side.

AUDIENCE PARTICIPANT: Question for Reverend Lynn and Professor Hamilton. As I understand your view—as I understand Smith to be, and apparently you're in favor of it, the Free Exercise Clause cannot be read to require a selective exclusive or a selective benefit, however you look at it, based on religion, from an otherwise generally applicable law. How can we, in the *Davey* case, read the Establishment Clause to require a selective exclusion from an otherwise generally available benefit when there is no facial discrimination on the statute itself?

REVEREND LYNN: I don't like the Smith decision, and I did like some of the variations—in particular the state freedom restoration acts. I do differ from Professor Hamilton on some of that. But I think that when it comes to the taxing authority here, the states, based on a belief that in order to preserve conscience, another religious idea, taxpayers of a state should not be required to fund persons on their road to ministry. That's perfectly rational, that's not viewpoint discriminatory, and that it is a perfectly acceptable decision to be made by Washington State and 36 others.

PROFESSOR HAMILTON: My greatest concern right now is not doctrinal on the Establishment Clause, but rather the rolling size of the governmental support of religious groups and what that's done to religion in Europe. I think this is the worst possible set of circumstances for religion to remain independent and capable of challenging government, which is its most useful element in the political process.

So, now that we're going to fund their mission, which is what faith-based funding is about, now we're going to mandatorily require the funding of their education. When does it stop, I guess, is my question. And it needs to because it is a danger to religion, as it is anything else.

JUDGE O'SCANNLAIN: This is going to be the last question.

AUDIENCE PARTICIPANT: My name is Gerarda Walsh and my question is for Professor Hamilton. I would like to point out, Professor Hamilton, the protection of the private property owner is a particularly flattering coat on you, and I encourage you to keep it on. But I'm confused about your position on the private property owner's right in the face of the federal government. I'm confused about that in light of the Fifth Amendment, where it says that a national government may not take land without just compensation, which implicitly says that the national government does have a right to take land for public good. And, couldn't it possibly be that it is within the public good of this great nation to have faith?

JUDGE O'SCANNLAIN: Professor Hamilton, I think that question is for you.

PROFESSOR HAMILTON: First of all, I don't think you will ever meet—and you won't believe this—but you won't ever meet a more religious person than I am. I have a very religious family. We pray together every day; we go to church every week. My husband and I have been together 26 years, and we've never missed church, except in Budapest where they shut us out because they thought we were tourists. And we looked like tourists.

So, I agree with you that faith is important. I just disagree with the importance of the federal government coming in to local cities and local governments and scaring them to death in a circumstance where there's no evidence of discrimination. I say go to the federal government when they're on a righteous mission. I just don't think this is a righteous mission.

JUDGE O'SCANNLAIN: Join me in thanking our panel for a very, very interesting presentation today.