

PANEL DISCUSSION REPORTS

Coalition Building and Legislative Realities

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INTRODUCTION

Coalition building is an integral part of moving state religious freedom restoration acts ("RFRA") through the legislative process. Of the more than twenty RFRA that were introduced into state legislatures last year,¹ the majority were drafted and supported by local religious freedom coalitions.² The membership of these coalitions was typically drawn from a politically diverse array of civil rights and religious groups, who maintained their often-tenuous solidarity through a common commitment to the principle of religious free exercise. In a discussion panel entitled "Coalition Building and Legislative Realities," five civil rights leaders reviewed the efforts of 1998 and highlighted certain themes and lessons from the experiences of these RFRA coalitions. The panel was moderated by attorney Nicholas Miller, executive director of the Council on Religious Freedom. What follows is a summary of the remarks of each panelist.

I. LESSONS ON COALITION BUILDING,
J. BRENT WALKER, ESQ.³

The national Coalition for the Free Exercise of Religion ("Coalition") represents an alliance of more than seventy religious and civil rights groups and encompasses a broad range of political and philosophical perspectives. In building and maintaining this unique organization, a number of points have emerged as fundamental to the success of any religious freedom coalition.

¹ See, e.g., S.B. 604, 1998 Sess. (Ala. 1998); A.B. 1617, 74th Leg., 1997-98 Sess. (Cal. 1998) (vetoed by Governor); S.B. 1938, 15th Leg., 1997 Sess. (Fla. 1997); H.B. 2370, 90th Gen. Assembly, 1997-98 Sess. (Ill. 1997); H.B. 1, 1998 Sess. (Va. 1998).

² See, e.g., Steve Kloehn, *Illinois' Wide Religious Spectrum Comes Together*, CHI. TRIB., Apr. 3, 1998, at 8 (describing coalition behind Illinois RFRA composed of liberal American Jewish Committee and conservative Republican representative); Alberta Lindsey, *Eyes and Ears for the Church Religious Advocates Monitor Laws*, RICH. TIMES-DISPATCH, Jan. 17, 1998, at B1 (quoting Rev. J. Fletcher Lowe, Jr.: "Our issues are not right wing, left wing, Republican or Democrat. It's a matter of a faith position.").

³ General Counsel and Associate Executive Director, Baptist Joint Committee on Public Affairs ("BJC"). As both a member of the Supreme Court Bar and an ordained minister, Mr. Walker is a frequent speaker on church-state issues, and he currently serves as chairman of the National Coalition for the Free Exercise of Religion. In addition to his duties as the chief legal officer of the BJC, Mr. Walker serves as an adjunct Professor of Law at the Georgetown University Law Center.

A. Leadership

While by its very nature there is no self-evident chain of authority in a coalition, it must have a leader, or leaders, to bring focus and coordination to an organizational structure that could otherwise fall into terminal inefficiency. The leader must be a consensus builder that can inspire trust from a broad spectrum of groups. This usually dictates that the coalition leader be from a politically “moderate” organization.

B. Subcommittees

For the efficient and responsible carrying out of tasks, it is important to form various subcommittees that are responsible for key elements of the coalition’s work. These may include a drafting committee, a lobbying taskforce, a media group, and a research committee. The Coalition appointed two leaders to each of its task forces in order to ensure that someone would always be available to chair the committee’s meetings. This also aided leadership diversity by allowing each committee to be chaired by someone from the “left” and the “right,” thus maintaining balance in the coalition’s leadership and efforts.

C. Executive Committee

A coalition needs an executive committee, with clearly defined power and latitude, to act and react quickly if circumstances require. Gathering the whole coalition together can be a ponderous task that at times would prevent decisive and timely responses to rapidly unfolding events.

D. Internal Communication

Effective internal communication is absolutely necessary. Members must be kept informed of coalition activity by some combination of broadcast fax, phone tree, e-mail, or list serve technology. An uninformed membership is an unhappy membership. Just as importantly, the coalition leadership must be willing to acknowledge and respond to the concerns of the membership.

E. Coalition Focus

Religious freedom coalitions bring together groups that have vastly different political and religious views. This will inevitably produce internal conflict over time, and it is essential that the coalition stay focused on its common objectives. Member groups must understand that the coalition cannot become a forum for settling old scores, engaging in political tit for tat, or advancing agendas unrelated to the coalition's goals. Only to the extent that the coalition maintains a clear focus on its goal can this behavior be avoided. Maintaining this focus is largely the work of the leadership, who must clearly articulate the objectives at the outset.

II. THE NEW LEGISLATIVE REALITY, CAROLINA ROSE⁴

The California RFRA Coalition overcame internal friction and determined opposition to successfully pass a RFRA in the 1998 legislative session, only to have the bill vetoed by Governor Pete Wilson.⁵ The following observations about the new political terrain confronting RFRA proponents have been distilled from the experiences of the California coalition.

A. Religious Freedom as Special Interest

Religious free exercise is increasingly viewed not as a fundamental right, but as merely a "special interest" that must compete in the public policy arena with legitimate governmental prerogatives and other civil rights. Governor Wilson's veto message encapsulated this idea when he stated that the California RFRA bill would "open up the prospect of invalidating laws ranging from the payment of taxes to compulsory vaccination laws, to drug laws, to land use laws, to laws against racial discrimination."⁶

⁴ President of Legislative Research, Inc., which Ms. Rose founded in 1983. For the past 18 years, Ms. Rose has been active in the effort to preserve religious liberty at local, state, and national levels and is a founder of the Interfaith Religious Liberty Association. Before starting her research firm, Ms. Rose spent six years as Chief of Staff to State Senator Nicholas Petris.

⁵ See Governor's Veto Message for Assembly Bill No. 1617 (Sept. 28, 1998), 1997-98 Reg. Sess., 8 ASSEMBLY J., 9647, 9647 (Cal. 1998) (also available at <http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1601-1650/ab_1617_vt_19980928.html>) [hereinafter *Governor's Veto Message*].

⁶ *Id.*

B. *Civil Rights Opposition*

The political landscape now includes strong opponents to RFRA based on its perceived detrimental impact on existing civil rights laws.⁷ In California, concern about this issue, fanned predominantly by gay rights interest groups, led to a proposed amendment exempting antidiscrimination statutes from the scope of RFRA.⁸

C. *Grass Roots Apathy*

The lack of widespread public interest in the passage and ultimate demise of the California RFRA revealed a collective apathy towards the issue of religious free exercise. This can perhaps be viewed as an overcorrection to the political activism of conservative Christian groups in the establishment arena.

D. *Religious Freedom Education*

A long-term commitment on the part of religious and civil rights groups to educate both lawmakers and the public will play a critical role in highlighting the historical status of religious free exercise as a fundamental right, and in clarifying how state RFRAs will operate in relation to other civil rights and legitimate state interests. The obstacles listed above can only be overcome by a coordinated and sustained program of education about the central role religious freedom plays in our civic order.

⁷ See William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 228-29 (1995) (discussing possible use of RFRAs for violations of civil liberty); Marci Hamilton, *Bush Should Rethink Stance on State Religious Freedom Law*, AUSTIN AM.-STATESMAN, Mar. 14, 1999, at E3 (stating that Governor Bush should oppose Texas RFRA that undermines civil rights of minorities and women).

⁸ See Religious Freedom Restoration Act, A.B. 1617, 74th Leg., 1997-98 Reg. Sess. (Cal. 1998) (amended Mar. 19, 1998) (adding section recognizing that courts have found compelling governmental interest in antidiscrimination laws). Governor Wilson subsequently vetoed the Act. See *Governor's Veto Message*, *supra* note 5, at 9647.

III. LEGISLATIVE LESSONS FROM AROUND THE COUNTRY,
MICHAEL LIEBERMAN, ESQ.⁹

Of the more than twenty state RFRA's introduced last year,¹⁰ only four were successful in state legislatures,¹¹ and one of these was defeated by a governor's veto.¹² A review of where RFRA's succeeded, and where they did not, reveals some practical lessons for future supporters of state RFRA's.

A. *Broad Political Muscle*

No magic formula has emerged for enacting state RFRA's, and they must be passed the old fashioned way, by educating legislators and bringing to bear collective political strength. The spectacle of right wing and left wing groups working together draws a strong level of attention, but this attention must be sustained with a substantive program of education and grass roots support.

B. *Legal Expertise*

Substantive issues related to prisoners, land use, and zoning are increasingly being raised as objections to RFRA, and the above mentioned political show of force is not sufficient to deal with these challenges. Legal experts need to be involved in producing thoughtful responses to questions in these areas. In Maryland, the Coalition put on a star-studded panel of religious leaders from many faiths, which seemed to greatly impress the legislative committee.¹³ The impression was temporary, however, as RFRA opponents responded with a panel of legal experts dealing with zoning,

⁹ Washington Counsel for the Anti-Defamation League ("ADL"). One of the three registered lobbyists for the League, Mr. Lieberman helps coordinate the ADL's legislative initiatives and assists in the development of ADL's policy positions. Before coming to ADL in 1982, Mr. Lieberman worked for Rep. Tony Hall and Rep. Dan Glickman. He serves as cochair of the State RFRA Subcommittee of the Coalition for the Free Exercise of Religion.

¹⁰ See *supra* notes 1-2 and accompanying text.

¹¹ See CONN. GEN. STAT. § 52.571b (1998); FLA. STAT. ch. 761.01 (1998); R.I. GEN. LAWS § 42-80.1-1 (1998); A.B. 1617, 74th Leg., 1997-98 Sess. (Cal. 1998) (vetoed by Governor); Verla Gilmor, *States Pass New Protections for Religious Expression*, CHRISTIANITY TODAY, Jan. 11, 1999, at 20 (stating that California, Connecticut, Florida, and Rhode Island legislatures passed RFRA laws).

¹² See *Governor's Veto Message*, *supra* note 5, at 9647.

¹³ See David Conn, *A Crushing Defeat*, BALT. JEWISH TIMES, Mar. 27, 1998, at 18 (describing prominent religious leaders' efforts to lobby Maryland Assembly in support of Maryland's religious freedom bill).

prisoner, and child welfare issues.¹⁴ The coalition had not prepared to deal with this challenge, and the legislative momentum swung over to RFRA opponents, and there was no bill in 1998.

C. *Future Challenges*

Experience has demonstrated time and again that it is easier to block legislation than it is to enact it. An issue moving to the forefront is the antidiscrimination concern raised by the ACLU and gay activist groups, both at the federal and state level. It is unlikely that Federal RFRA-like legislation will move forward without something being done to assuage the concerns of these groups and the same may be true in at least some of the states.

IV. WHY "PROGRESSIVE" ORGANIZATIONS SHOULD CARE ABOUT STATE RFRAS, JULIE SEGAL, ESQ.¹⁵

The extensive involvement of progressive organizations in RFRA coalitions has dispelled the myth that religious free exercise is the exclusive concern of the more conservative religious and civil rights groups. Outlined below are three fundamental reasons why liberal organizations should participate in the legislative efforts of RFRA coalitions.

A. *Maintaining a Free Exercise/Establishment Balance*

The First Amendment contains not just an edict against establishment, but also a positive affirmation of free exercise. This recognition of the healthy tension between the Constitution's religion clauses demands a trade off. In practical terms, this means that if progressive groups demand that religious organizations not receive certain governmental benefits, such as funding for parochial

¹⁴ See David Conn, *Holy Union: Sectarian Groups Back a Religious Freedom Bill*, BALT. JEWISH TIMES, March 13, 1998, at 22 (describing religious freedom bill opponent's arguments that new religious exercise "definitions are so favorable toward religion that people could plead valid or phony religious beliefs in defying everything from zoning rules to prison safety").

¹⁵ Legislative Counsel of Americans United for the Separation of Church and State. As the chief lobbyist and legislative director for Americans United, Ms. Segal is an active member of many diverse religious and civil liberties organizations and has written and spoken extensively on the law and policy of the separation of church and state. Ms. Segal previously served as Legislative Assistant for Congresswoman Eleanor Holmes Norton (D-DC). She also worked for the Washington Lawyers Committee for Civil Rights and Urban Affairs, and for the law firm of Dow, Lohnes & Albertson.

schools or for church social service programs, they should equally support the right of religious groups to exercise their beliefs without substantial burdens imposed by noncompelling state interests.

B. Keeping the Coalition Honest

By ensuring that coalitions adhere to the principle of neutrality in drafting RFRA legislation, liberal organizations represent a vital counterweight to the interests of coalition partners on the other end of the political spectrum. The presence of a wide range of voices will prevent this legitimate issue from being hijacked for more partisan purposes.

C. Protecting Minority Religious Groups

Progressive organizations also have an important role to play in representing and protecting the interests of minority religions. Unlike these smaller religious groups, mainstream religious organizations are willing and able to engage in the political process to protect their interests, and usually have ample representation on RFRA coalitions. Further, minority religions are often disproportionately affected by "neutral, generally applicable" laws, because their beliefs are less well known or understood in the community.

V. WHAT CONSERVATIVES AND OTHERS CAN LEARN FROM ROUND ONE, STEVE MCFARLAND, ESQ.¹⁶

In the past year only three of the more than twenty state RFRAs introduced were successfully steered through the legislative process.¹⁷ This low victory rate in round one of the state RFRA effort reveals a number of important lessons about both "packaging" RFRAs and managing state coalitions.

¹⁶ Director of the Center for Law and Religious Freedom (the advocacy and information arm of the Christian Legal Society). Since 1975, the Center has been a persuasive voice in the courts, legislatures, governmental agencies, and school boards across the country in defense of religious exercise and expression by all faiths. Before coming to the Center, Mr. McFarland was a trial attorney with Lane, Powell, Moss & Miller and a partner with Ellis, Li, & McKinstry, both in Seattle, Washington. He plays an active role in the work of the Coalition for the Free Exercise of Religion, serving as cochair of the States Subcommittee.

¹⁷ See CONN. GEN. STAT. § 52.571b (1998); FLA. STAT. ch. 761.01 (1998); R.I. GEN. LAWS § 42-80.1-1 (1998); Gilmore, *supra* note 11, at 20 (stating that Connecticut, Florida, and Rhode Island passed RFRA laws).

A. *Religious Freedom for All*

The power of a RFRA coalition lies in its ecumenical commitment to free exercise protection for all claims and all claimants. Accepting exemptions to RFRA — either for prisoners or civil rights laws generally — dissolves the unity and trust within a coalition, and sends a message to RFRA’s political opponents that the coalition is no longer insisting on free exercise as a fundamental right, as opposed to just another “special interest.”

B. *Engaging the Grass Roots*

Early solicitation of grass roots support is vital in building momentum for a bill and in overcoming legislative roadblocks, such as attempted exemptions or vetoes. Legislators that are unmoved by bare statistics or “outside” lobbyists can often be won over simply by hearing from their constituents. Related to this is the principle that all politics is local, and a vigorous state coalition is essential; a state RFRA campaign cannot effectively be run from Washington, D.C. or New York.

C. *The Dangers of Overselling and Underselling*

The potential impact of a state RFRA should neither be underestimated nor exaggerated when talking to lawmakers. On one hand, there is the risk of creating a perception that RFRA is not worth the effort if only a few cases per year will be affected under it. But conversely, raising the specter of an avalanche of new claims or sweeping changes in church/state relations is equally unproductive.

D. *Selecting “Poster Children” Wisely*

Stories that paint personal and compelling pictures of the victims of diminished free exercise protection are essential in winning support for RFRA bills. But “poster children” need to be chosen carefully — it may be difficult for people to empathize with a Sikh child’s desire to carry a four inch ceremonial knife to school, or a parent using only nonmedical intervention in their child’s illness.

E. *Needed: Legal Experts and Litigators*

The novelty of liberals and conservatives sitting together at the same committee hearing table in support of RFRA is not enough to carry the day. A coalition should prepare itself for opposition — from landmark preservationists, child welfare agencies, correctional facility officials, and gay rights groups, to name just a few. It is vital to have constitutional experts and civil liberties litigators that can answer the tough questions and provide accurate information at hearings.

F. *Keeping the Bill Pure*

The often precarious trust between the “left” and “right” wings of a RFRA coalition will be destroyed by any attempt to freight the bill with partisan “add-ons,” such as school prayer or charitable choice amendments. This is an absolute breach of faith that will cause the coalition to implode.

G. *State Constitutions Are Sometimes Sufficient*

RFRA's are not necessary where a state's constitution already triggers strict scrutiny,¹⁸ as is the case in Wisconsin, Michigan, Washington, and Minnesota.¹⁹ Introducing RFRA's in these states would not only be a redundant exercise, but there is also a risk that the legislation will include prisoner or civil rights exemptions. In these states, a coalition's best course of action is to declare victory and go home.

¹⁸ See Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, ST. THOMAS L. REV. 235, 238-39 (discussing evolution of free exercise jurisprudence under state constitutions after *Employment Division v. Smith*).

¹⁹ See *Porth v. Roman Catholic Diocese of Kalamazoo*, 532 N.W.2d 195, 199 (Mich. Ct. App. 1995) (holding that free exercise of religion requires strict scrutiny under MICH. CONST. art. I, § 4); *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 864-65 (Minn. 1992) (stating that compelling state interest balancing test applies under MINN. CONST. art. 1, § 16); *Washington v. Balzer*, 954 P.2d 931, 935 (Wash. Ct. App. 1998) (applying compelling state interest standard to religious free exercise claim under WASH. CONST. art. I, § 11); *Wisconsin v. Miller*, 549 N.W.2d 235, 239-41 (Wis. 1996) (stating that compelling state interest/least restrictive alternative test applies under WIS. CONST. art. I, § 18).

