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Afterword

by Phillip E. Johnson*

As the editors have given me the last word, I'll use the opportunity to draw attention to a few considerations that other contributors may have overlooked.

First, many who were unhappy with the *Boerne* decision must have been pleased by two other decisions that the Supreme Court handed down during the same week. In *Agostini v. Felton*, 117 S. Ct. 1997, the Court overturned one of its own precedents to allow state-financed remedial education for disadvantaged youngsters to be presented on-site at parochial schools. In *Washington v. Glucksberg*, 117 S. Ct. 2258, the Court reversed a decision that had found a constitutional right to assisted suicide in the notorious "mystery passage" of *Planned Parenthood of Southeastern*

Pennsylvania v. Casey, 505 U.S. 833 (1992).

The package of decisions gives just about everyone something to applaud and something to deplore, and thus makes it difficult to make a case that the Court has done something terrible that justifies some drastic response.

"The package of decisions [handed down the week Boerne was decided] gives just about everyone something to applaud and something to deplore"

Don't misunderstand me. I am not suggesting that the Supreme Court has genuinely turned away from its long-term program of making constitutional law congruent with agnostic liberal rationalism. On the contrary, the *Agostini* decision merely cut back on one of the

most extreme manifestations of the "no aid to religion" ideology, by a 5-4 decision that could itself be reversed by the next appointment of a Justice. In the assisted suicide cases the Justices were unanimous as to the result, but

separate opinions indicate that, for several of them, the relevant question still is “How far should we go this week in reading the currently fashionable ideas of the liberal elite into the Constitution?”

My point is not that the Court has changed directions, but that the decisions of the current Term constitute a package that offers something to everybody. Those critics like my good friend Charles Colson, who hope that the *Boerne* decision will provide sufficient motivation for Congress to challenge the judiciary’s claim to a monopoly on interpreting the Constitution, should be prepared for yet another disappointment. Even conservative Christians are divided over whether we have more to complain about or to cheer about in the current decisions, and also over whether we really want to trust our liberty to a Congress that can overrule the judiciary.

Second, the *Boerne* decision provides little basis for the often well-founded criticism of an “imperial judiciary” that is determined to meddle in affairs better left to elected officials or administrators. This time it was Congress that wanted to increase the meddlesomeness of the federal judiciary, by assigning it the duty of reviewing countless specific applications of valid statutes to decide whether they unnecessarily burden the exercise of some religious interest. On this occasion it was the Court, and not Congress, that stood up for the position that we should be governed by state legislators and local officials applying political and administrative standards, rather than by federal judges applying legal standards. Of course those local officials may do things we don’t like, but are we sure we will like the decision of the judges any better?

That brings me to my point, which is that RFRA was an extraordinarily open-ended statute, not only because of the huge amount of judicial discretion involved in deciding whether

a particular burden on religion is justified by a compelling state interest, but even more because the Act failed to define the crucial term “religion.” This was no accidental omission, because Supreme Court Justices and constitutional law scholars alike have been unable to explain specifically how religion differs from non-religion. Without a principled definition it seems arbitrary to treat a “religious” objection to some regulation more or less favorably than an equally passionate “secular” objection. This has practical consequences. When exemptions from legal requirements are granted to persons qualifying as religious, “religion” will inevitably be defined very broadly to avoid giving an arbitrary preference to God-believers. (That is what happened in the conscientious objector cases, where agnostic pacifists were treated like theistic pacifists.) In these circumstances religion comes to mean “strong belief”—regardless of content of that belief. I have to wonder if gay rights activists, radical feminists, and recipients of grants from the National Endowment for the Arts can qualify as “religious,” and hence to relief from regulations that burden their interests. Please don’t try to reassure me by telling me that the courts will apply common sense to such claims.

Fourth, the RFRA controversy involves a very curious lineup of political forces. J. Brent Walker notes that the Act was supported not only by a broad coalition of religious groups, but by Senators from Orrin Hatch to Ted Kennedy, by 532 members of Congress, and by “almost every civil liberties organization from the American Civil Liberties Union to the Traditional Values Coalition, as well as the American Bar Association.” Mr. Walker takes that as evidence that RFRA is a good idea. I take it as an indication that the conservative religious groups that supported the Act should have been asking themselves “What’s

the catch?”

The plot thickens when we look at the lineup on the Supreme Court. The Justice most emphatically in support of the principle that “religion” provides no basis for exemption from generally applicable regulations is Antonin Scalia, author of the majority opinion in *Oregon Div. of Unemployment v. Smith* (which RFRA sought to overturn). Scalia is also the Justice who is most clearly identified as a believer in traditional, supernatural religion. Now take a look at the moderate or liberal concurring Justices (O’Connor, Breyer, Souter), who support the power of the Court to control the meaning of the Free Exercise Clause, but who want the Court itself to overturn *Smith* and go back to adjudicating claims for religious exemption on a case-by-case basis. O’Connor (the perennial swing vote) wrote the majority opinion in *Agostini*, where Breyer and Souter dissented. Obviously, the disagreement over the desirability of religious exemptions cannot be explained by any simplistic “pro-or-anti-religion” formula. What does help to explain the lineup is that political liberals tend to be indulgent towards harmless individuals and small groups who have quaint beliefs, while being intensely suspicious of “organized religion”—meaning groups like the Catholic Church and evangelical Protestants, who might challenge the liberal hegemony.

I can explain the “catch” with the aid of a famous aphorism attributed to the sociologist Peter Berger. If India is the most religious country in the world and Sweden is the least religious, then the United States of America is a country of Indians who are ruled by Swedes. Swedes (or British sahibs) who rule a tumultuous subcontinent like India know they have to be careful not to outrage the passions of their subjects—even (or even especially) when those passions are irrational. Wise sahibs do

not, for example, insist that their sepoy soldiers bite cartridges that have been greased with pig fat, or even cartridges that are erroneously thought to have been greased with pig fat. (This was the occasion for the bloody Sepoy Mutiny of the mid-19th century.) The sahibs do not take the intellectual opinions of the sepoys seriously, but they do take their passions seriously. This is precisely the view that the intellectual leaders of American society take towards those Christians who do not understand that their “religious beliefs” fit into the same category as the primitive animism of aborigines.

In America, the sepoys have included Jehovah’s Witnesses who refuse to salute the flag, Seventh-day Adventists who refuse to work on Saturday, and Amish who wish to keep their children out of high school. Native Americans are even more like the archetypal sepoys, and they have “victim” status in liberal ideology that guarantees them support from the media. The more quaint the aboriginal beliefs, the more willing are the ruling liberals to indulge them. This creates a morality play demonstrating that the liberals are uniquely rational, and also that they are uniquely tolerant. In furtherance of this morality play we see some strange propositions being taken seriously: even counselors in a drug abuse program may not be fired for using drugs in furtherance of their “religious” practices.

Do you wish to be a sepoy (tolerated because of your quaintness, or your potential for making trouble) or a citizen (entitled to advocate laws based on the propositions you think to be true)? I have been pondering this question as an Elder in the Session (governing council) of the First Presbyterian Church of Berkeley. Our local church wants to tear down a thoroughly undistinguished and unoccupied building on our own property, to make room for an expansion of our Christian educa-

tion facility. The Berkeley city council has denied our request due to the influence of fanatical historical preservationists (who might be entitled to "religion" status under RFRA) and other folks who are just irrational and vindictive. We have reluctantly gone to litigation to obtain justice. If the Supreme Court had decided the *Boerne* case in favor of the church, we would have had another legal weapon to use and a part of me would have rejoiced.

But not for long. I know my fellow church members, and many of us would be reluctant to win at the cost of establishing a principle that federal judges have a power to exempt an open-ended category of "religious activities" from non-discriminatory regulations which other citizens must obey. Judicial remedies are meant to curb arbitrary power, but sometimes they just create more of it.

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