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PROTECTING RELIGIOUS FREEDOM AFTER BOERNE
V. FLORES
HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIFTH CONGRESS
FIRST SESSION
July 14, 1997
Serial No. 55
Printed for the use of the Committee on the Judiciary
U.S. GOVERNMENT PRINTING OFFICE
50-378 CC WASHINGTON : 1997
For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-057402-1
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PROTECTING RELIGIOUS FREEDOM AFTER BOERNE V. FLORES

MONDAY, JULY 14, 1997

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2141, Rayburn House Office Building, Hon. Charles Canady (chairman of the subcommittee) presiding.

Present: Representatives Charles Canady, Henry J. Hyde, Robert C. Scott, Bob Goodlatte, and Jerrold Nadler.

Also present: Brett Shogren, clerk, Kathryn Lehman, chief counsel, John Ladd, counsel, Keri Harrison, counsel, Robert Corry, counsel and Perry Apelbaum, minority counsel.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. The subcommittee will be in order.

This morning the Subcommittee on the Constitution convenes to consider proposals to protect the free exercise of religion after the U.S. Supreme Court's recent decision in Boerne v. Flores. In Boerne, the Supreme Court held that the Religious Freedom Restoration Act was not a valid exercise of Congress' power under section 5 of the 14th Amendment. The Religious Freedom Restoration Act, or RFRA, passed by Congress in 1993 requires Government to give a compelling reason for laws which substantially burden religious exercise.

The Boerne decision has left men and women of faith without adequate protection against laws that interfere with their free exercise of religion. Because the freedom to practice one's religion is a fundamental right, we are meeting this morning in the wake of Boerne to consider what sources of authority Congress may utilize to protect this most precious freedom from governmental infringement.

Before we begin, I would like to make two observations: **First, there have been questions raised as to whether RFRA is a valid exercise of Congress' authority with respect to *Federal* laws. The Boerne decision struck down RFRA as being outside of the scope of Congress' enforcement authority under section 5 of the 14th**

Amendment [which authorizes involvement in *state* matters]. The 14th Amendment allows Congress to protect individual rights against *State* infringement. It would appear, therefore, that RFRA is still valid as to the Federal Government. It is, however, noteworthy that the U.S. Supreme Court remanded a case involving an application of RFRA to a Federal bankruptcy issue for
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consideration in light of the Boerne ruling. If the Federal compo nent of RFRA is struck down, I believe Congress would be well within its authority to enact legislation to instruct Federal agencies to accommodate religious practices that are substantially burdened by the Federal Government's actions.

Second, and most importantly, the Court's holding regarding the role of the Congress in interpreting the Constitution and protecting individual liberties raised troubling issues concerning the relationship between the judiciary and the elected representatives of the people in the Legislative branch. Although we will not delve deeply into these issues this morning, we may well give further attention to these components of the decision at a later date.

This morning the witnesses will help us to explore options for preserving our first freedom. I want to thank each of the witnesses for being with us this morning. I look forward to hearing their tes timony.

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I'd like to begin by thank ing you for scheduling the hearing and providing this opportunity for the subcommittee to consider how to address the Supreme Court decision. The Religious Freedom Restoration Act is the prod uct of years of hard work done by uncharacteristically broad coali tions involving religious groups, Members of Congress, civil lib erties organizations, and constitutional scholars. Despite their ac complishments, the Supreme Court has spoken, and now we have to respond.

RFRA's balancing test that the Government may substantially burden a person's exercise of religion only if it demonstrates the application of the burden to the person, is in furtherance of a com pelling governmental interest and is the least restrictive means for furthering the compelling Government interest. Although the Su preme Court has overturned the means by which we attempted to enforce RFRA, the end of ensuring free exercise of religion is still legitimate.

There have been a number of ways suggested to maintain the protection of RFRA: Reconfiguring the statute based on an Interstate Commerce clause or on the Spending Clause are the credible options we have before us.

(Groan) Pursue two unconstitutional detours around the 10th Amendment rather than insist on the Constitutional pathway that SCOTUS usurps for itself! No concern is expressed next for the unconstitutionality of the means; the end justifies the means.

We will, however, have to ensure that
the manner of implementing these protections does not in any way compromise the original intent of RFRA. Although the task before us is a difficult one, I'm confident that we will be able to craft an effective response to the Boerne decision without delay, and I look forward to hearing testimony from today's witnesses and look forward to working with you in developing the ends that we had in RFRA to begin with and working with the coalitions to address this issue.

And I thank you for calling the hearing and also for having wit nesses that can go through, particularly, the legal implications, because for once **I think we have a consensus on what the end is**. It's just a matter of getting there. Usually, we have very diverse views on what our ends would be. So, obviously, getting there is usually very contentious. Thank you.

Mr. CANADY. Thank you, Mr. Scott.

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I'd like to invite the members of our first panel to come forward and take their seats.

The first witness of our first panel this morning will be Charles W. Colson. Mr. Colson is chairman of the board in Prison Fellowship, an outreach organization he founded to assist prisoners, ex-prisoners, victims, and affected families. Mr. Colson is the author of several inspirational books and was awarded the Templeton prize for progress in religion in 1993. Mr. Colson will be accom panied by **Pat Nolan, president of the Justice Fellowship**.

We will then hear from the **Reverend Oliver Thomas**. Reverend Thomas is special counsel for religion and civil liberties to the **Na tional Council of Churches**, the Nation's largest ecumenical body.

Next, we will hear from **Mark V. Stern**. Mr. Stern, co-director of the **American Jewish Congress' Commission on Law and Social Ac tion**, is a legal expert in the areas of church and State matters and civil rights.

The final witness on the first panel will be **Mark E. Chopko**. Mr. Chopko
is general counsel to the **U.S. Catholic Conference** where he advises national organizations chartered by the U.S. Roman Catholic bishops on civil law issues.

Thank you all for appearing this morning. I would like to ask that each of you, please, attempt to summarize your testimony in 5 minutes or less, and without objection, your statement will be in cluded in the record. Although the 5-minute rule is something we attempt to follow, we are not going to strictly enforce it today. So do your best. Again, we want to thank each of you for being with us. Your input on this issue is very important to us, and we'd like to begin with Mr. Colson.

STATEMENT OF CHARLES W. COLSON, PRESIDENT, PRISON

FELLOWSHIP MINISTRIES

Mr. COLSON. Thank you, Mr. Chairman. I appreciate the flexibility on the 5-minute rule, because a politician turned preacher can barely get through his introduction in 5 minutes. [Laughter.]

I thank you very much for holding this hearing. I think I speak for people of all faiths in telling you how much we admire your courage in doing this in the face of this, what I view to be a usurpation by the Supreme Court of the congressional power: the power of the people to make their own decisions according to their moral traditions.

I have with me this morning Pat Nolan, and Pat and I both have the same background: politicians who got—Pat was the minority leader of the California assembly, and both of us had a post-graduate course courtesy of the United States Government, free room and board following our political careers, and so we've seen the justice system from the top and from the bottom, and gives us somewhat of a unique perspective, less unique than it used to be among politicians.

There are three issues, and I will not try to address the written testimony which you have before you, and people can read, but simply try to summarize very quickly the three issues. **The publicity about this decision, the Boerne case, and even the Court s own decision, talks as if Congress is trying to impose some new standard of law. All that Congress was attempting to do in RFRA was**

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reinstate what had been settled constitutional law since 1963, at least was assumed to be settled law. There was nothing new in what the Congress endeavored to do, nor did it establishing some new right or substantive law; Congress was merely going back and correcting an error the Court made. The Court continues to make the same error by misrepresenting its own precedents in its interpretation of the cases on compelling State interest.

The Boerne decision makes religious liberty an inferior right. It's only going to be enforceable if it can be coupled with some other constitutional right, and, therefore, makes it the first hybrid liberty. This is preposterous to those of us in the religious community and should be preposterous to most Americans, because freedom of conscience should be the first of the inalienable rights, something Government does not grant, but rather something Government recognized in the Declaration of Independence and in the founding of the Constitution. The formation of the Constitution saw to it that Government's duty would be to protect that inalienable right which does not come from Government, which preceded Government—the right of free conscience.

The general problem with this from our standpoint is twofold: As the head of a nonprofit, Christian organization, we would see the possibilities for mischief with the repeal of RFRA to be endless. If, for example, in our hiring practices we were to refuse to hire someone, because they did not believe what we believe in our statement of faith, local governing bodies could penalize us or force us to hire people who believe things contrary to what we believe. Or if we were to discharge someone or a church excommunicates someone because of behavior which we believe was prohibited by scripture, but there were laws providing recourse to those aggrieved employees, we could find ourselves in a position in which we could not exercise our own faith in our own organizations.

I use the example of communion in my prepared testimony simply to show how absurd the applications of the laws could be if we repealed the compelling Government interest and made the only test the general applicability of a statute. Hospitals that are— Christian hospitals that would not wish to perform abortions could be made to do so or to lose their accreditation.

In the prisons, the problem is really severe, as Pat and I can testify to. You live at the whim of that warden. We now work in 1,200 prisons in America, and we know the delicate negotiations we go through to get access in order to be able to bring religious programming into the prisons. It is obviously an administrative burden to the officials of that prison, understandably. They're somewhat restrictive of outside activities, but, again, in order to be able to do our job in the prisons, we need some assurance that free exercise will be respected.

I had one commissioner of corrections tell me that if RFRA were repealed, he would shut down any religious programming, and when I argued with him, he said he'd get rid of the chaplains. He said, "Why should I maintain them?" He said, "Anybody can go in their cell and practice their own religious beliefs in their own ways," and he simply reflects a misunderstanding of what Christianity is, because **Christianity is a communal religion**. **It is one in which we have to be together to practice our faith;** to administer

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the sacraments, and to be part of a community of believers; that's what Christian faith is. So, you can't do it just by worshipping privately in your cell.

The irony of restricting it in prisons is particularly painful, because we know from 20 years of work that, religion, faith is the one thing that will turn the lives of these prisoners around. A study was done in New York of the programming of Prison Fellowship, funded by the Templeton Foundation and done by the National Institute of Mental Health. This study discovered that if people were in 10 of our programs in a year, the recidivism rate was reduced from 41 percent, which was the recidivism rate in that prison, to 14 percent among those who went through our programs. Why in the world it would make any sense to restrict religious activities in the prisons when we can show that, in over 20 years' experience, that's the one thing that makes a difference, is a question that I will leave for the Committee.

The second point I want to make very quickly is that, contrary to what the public believes, the Constitution does not give the Supreme Court the right to make ultimate decisions about what is constitutional and what is not. The Constitution is silent, because both the conservatives and the liberals, Hamilton and Jefferson, opposed giving that right to the Supreme Court. The Supreme Court took it in the case of Marbury v. Madison, Chief Justice Marshall's opinion in 1803, but **it didn't take it the way this Court has interpreted it.** This Court has misinterpreted Marbury v. Madison. Marbury v. Madison, Chief Justice Marshall said, "In a case of con troversy which comes before us, a statute is in conflict with the Constitution and is unconstitutional, we have the right to say that that statute is unconstitutional." They assumed the right. It was challenged by Jefferson at the time; it was challenged by Andrew Jackson in the Bank case; it was challenged by Abraham Lincoln in the Dred Scott decision—thank God it was.

But only in recent years has the Court been applying this as recklessly as they have in the Boerne decision. Because in the Boerne decision, they've created brand-new constitutional law. **<u>The Congress must not turn away from this challenge.</u>** What they have said to the Congress is, "You can't pass any kind of law that makes a substantive determination about a constitutional right that either adds to or subtracts from it." [that is, from what SCOTUS says it is.]

If that had been enforced during the civil rights movement in this country, we would still have applica tions of the Dred Scott decision and its successor decisions on the books, because what they're basically saying—strip away all the language and all the mistaken interpretations of court decisions and precedents by the Supreme Court—**what they're basically say ing, is that only the Supreme Court can decide what is a constitu tional right, and only the Supreme Court can enforce what is a con stitutional right.**

Congress is reduced to procedural powers only. This is a prepos terous challenge to the authority of this body which represents the people. When the people of the United States, through their elected

representatives, almost unanimously say this is how we want to protect our first freedom, and for the Supreme Court to say this body acting on behalf of the people does not have authority, is a preposterous challenge. It is throwing down the gauntlet, and if

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this Congress even hints that its answer is a constitutional amendment, you will be ratifying one of the most preposterous decisions that this Court has ever rendered—a far overreaching of the authority of the Court and a usurping of the legislative process and the voice of the people.

I'd just say, finally, Mr. Chairman, that one of the things that I think all of us should fear most is if we now say, "OK, let's have a constitutional amendment," **acknowledging that the Court's interpretation on the Boerne case is correct, what happens to all the other legislation that rests upon section 5 of the 14th Amendment which is designed to protect or define constitutional liberties or even restrict them, as in the case of something I know is close to the chairman's heart and close to my heart. The Partial Birth Abortion Ban Act would be, by the Boerne decision, something Congress does not have the power to do. I hate to say that; I hate to plant that thought,**

but it will be very clear. But there are many others in civil rights and in voting rights where the Congress will end up being told, if it accepts Boerne, that it can no longer legislate in this area.

I just have to say, finally, that the religious community, the Christian community, in this country might be forgiven for feeling that the Court has decided that this is perhaps a new class of people to be set aside for special treatment. If you look at the language of Romer v. Evans in which those motivated by religious feelings were accused of being bigoted in bringing their religious convictions into public policy; if you look at this case where clearly beyond any argument the right of free exercise of religion is reduced to a second-class right under the Constitution, inferior to free speech, enforceable only if you can attach it to free speech protections. Thus, the religious community might be forgiven for thinking that this Court has decided to create another class of people in those who are people of faith.

There are many remedies, Mr. Chairman, and I've outlined some of them in my prepared testimony, such as enforcing RFRA under other provisions of the Constitution; for **repassing RFRA or having a joint resolution of this Congress in which they say, "The Supreme Court clerks had better go back and do their homework, because they made some serious mistakes and this Congress does not wish to be harassed by them—taking a page out of Lincoln's book or Jackson's book or Jefferson's book;** repassing RFRA under the Commerce Clause—

(Groan) that unconstitutional remedy needs to end too. Let's get our Constitution back!

many possible remedies which I hope and pray this
Committee in its deliberations will do before it even thinks in
terms of a constitutional amendment.
Thank you, Mr. Chairman.
[The prepared statement of Mr. Colson follows:]

PREPARED STATEMENT OF CHARLES W. COLSON, PRESIDENT, PRISON FELLOWSHIP MINISTRIES,

I congratulate this Subcommittee and its distinguished chairman, Mr. Canady, for
holding this necessary hearing. It is necessary because the Supreme Court, some
three weeks ago, launched a devastating salvo in a war with this body over two
great issues: what it means to have a right to the free exercise of religion, and **what
body within our constitutional system has the right to render final and binding in
terpretations of the Constitution.**

In the Boerne v. Flores decision, Justice Kennedy, writing for a 6-to-3 majority,
invalidated the Religious Freedom Restoration Act, which Congress passed in 1993
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with only three nay votes, and which President Clinton signed into law with much
fanfare. This legislation was made necessary by the Court's **1989** decision Employ
ment Division v. Smith, which overturned what religious freedom litigators had
thought was a well-established rule, namely, that government had to show a com
pelling interest before it can prohibit religiously motivated conduct (or compel reli
giously prohibited conduct). In Smith, Justice Scalia, writing for a five-vote majority
of the Court, held that the Free Exercise Clause of the First Amendment does not
require religiously-based exemptions from laws that are facially neutral.

What do these terms mean? Imagine a law that said "No wine may be used at
communion services." This would be found to violate the Free Exercise Clause, even
under Smith, because it directly targets a religious practice. **But suppose the law
bans alcoholic beverages throughout the state, and churches that use wine in their
communion services claim an exemption. Before Smith, they would get it. Under
Smith, they're at the mercy of the state legislature.** (Note: all fifty states prohibit
the consumption of alcohol by minors. Now that RFRA has been struck down, states
are free to enforce these laws against churches that make communion wine avail-
able to children.)

Justice Scalia's decision was a jarring departure from a quarter century's worth
of Free Exercise cases. Some scholars, including some who are Christians, took an
optimistic view of this decision, seeing it as simply **a reflection of Scalia's trust in
democracy and his distrust of federal judges: better legislatures than courts, he be
lieves, to police the border zone between personal religious practice and general leg
islation.**

With due respect for Justice Scalia's faith in democratic procedures, and with due
admiration for his general approach to the role of the judiciary in a democratic sys
tem, I stand with the vast majority of religious freedom experts in decrying the dan
gers facing believers **as long as faith-based conduct is deprived of heightened legal
protection**. For those who actually litigate religious freedom cases, **Smith started
causing problems on the ground almost from day one**. I know. I've spent the last
twenty years working in prisons. I've seen the doors slam shut to religious services

on the whim of administrators. I have experienced the arbitrary refusal of some offi cials to allow religious activities. And immediately after the Smith decision, prison officials were able to prevent Jewish prisoners from wearing yarmulkes, deny Catho lic prisoners access to a priest, and restrict Bible studies for evangelical prisoners.
This would be serious enough if only the personal religious rights of prisoners were at issue. But in fact, **there is a societal interest involved here as wel**l. Religious observance by prisoners is strongly correlated with successful rehabilitation. While it seems pretty clear that the First Amendment would prohibit the government from overtly pressuring prisoners to practice religion, it is **sheer social folly to place any obstacles in the way of the many prisoners who, on their own initiative, seek out ministers, priests, rabbis, Bible studies**, and so forth. Yet I myself have spoken with wardens who seem more interested in cost containment than in rehabilitating pris oners, and who have told me that, were it not for prisoners' legal ability to sue for denial of free exercise, they would withhold even ordinary, mainstream, non-con troversial forms of religious accommodation.
Whether in a prison or on the outside, the brute fact is that when confronting an overweening bureaucrat, "I'll sue you" is much more effective than, "I'll have my state representative offer a bill changing the statute under which you're doing this to me."
That's why the response to the Smith decision from a wide range of religious groups was one of: "Thanks but no thanks. We want judges to handle these ques tions and we want them to use the legal standard that was in effect before Smith"— i.e., that religious practice must be accommodated unless refusing to accommodate it is the least restrictive means of achieving a compelling state interest.
Congress heeded the outcry from the religious community, and passed the Reli gious Freedom Restoration Act of 1993, or "RFRA," by lopsided majorities. And now the Court has struck it down. Its formal rationale is the theory that Section 5 of the 14th Amendment, which gives Congress the power to "enforce" the substantive clauses of Section 1, does not empower Congress to **enlarge the meaning of those clauses beyond the interpretations placed on them by the Supreme Court.**
This in itself is a novel and dangerous doctrine. It should be of particular interest to this Subcommittee that the Boerne theory of Section 5 casts doubt on Congress's power to legislate on a number of interesting subjects, including, for instance, partial-birth abortion.
But there's more in Boerne than this dubious view of Congress's power. The ma jority implicitly—and Justice Scalia explicitly, in his concurrence—took the occasion to re-argue Smith as well. It's not just a question of the meaning of Section 5 of the 14th Amendment: the meaning of the Free Exercise clause is also very much
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in issue, and the Court knows it. It is engaged in a high-stakes war with

Congress over this question as well as over the general question of Congress's Section 5 pow

ers. For reasons I have already given, I think the Court's view of the meaning of the Free Exercise clause is out of keeping with the values that the clause was draft ed to protect. But more to the point, **this Congress—our country's national legisla ture, accountable to the people through direct election of both houses, a fact that ought to satisfy Justice Scalia's concern for democratic decision-making—has re-soundingly rejected the Court's view. And the Court has just as resoundingly re jected this body's right to reject its view.**

Right now, nobody can say with certainty what our free exercise rights are. What is the law? Can bureaucrats restrict religious liberty with impunity? One only has to look back over recent years at the constant chiseling away of religious liberties to view with alarm what may happen in the vacuum created by this decision. Reli gious liberties are genuinely imperiled.

But the Court has raised the stakes above the question of the meaning of the Free Exercise Clause, crucial though that is. **The gauntlet has been thrown down—the question no one before has wanted to ask: who has the final word on what the Con stitution means?**

As this Committee probably knows, the Constitution is silent on this critical ques tion.

With regard to meddling in states, Sec 5 gives zero autonomous power to courts. With regard to federal matters, Congress can limit jurisdiction of courts. That conclusively answers that Congress has the final say, if it will exercise it.

Thomas Jefferson, who distrusted both federal power and judges, clearly op posed giving the final say to the Court. His frequent sparring partner, Alexander Hamilton, was scarcely more open than Jefferson to the notion of the judiciary as supreme lawgiver. He wrote in The Federalist, no. 78: "The legislature not only com mands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over ei ther the sword or the purse and can take no active resolution whatever." **The power of the courts to hold an enactment of Congress void is limited, Hamilton said, to instances where that enactment is "contrary to the manifest [obvious, uncontested] tenor of the Constitu tion,"** giving as examples ex post facto laws and bills of attainder, which are ex pressly forbidden by the Constitution. **Hamilton's view gives the Court no room for interpretation.**

It was in its own decision in Marbury v. Madison in 1803 that the Supreme Court awarded itself a broad power to declare laws unconstitutional. The great constitu tional scholar Alexander Bickel (a mentor of Judge Robert Bork), in his book The Least Dangerous Branch: the Supreme Court at the Bar of Politics, aptly character ized Chief Justice **John Marshall's reasoning in Marbury as circular**. Marshall sim ply posed the question: what is the Court to do when asked to give effect to a stat ute repugnant to the Constitution? The answer to him was obvious: decline to give it effect; i.e., strike it down. So, he reasoned, the Court must have the power to do this. But, as Bickel pointed out, how did we know in the first place that the statute was, in fact, repugnant to the Constitution? Because the Court said so? But its power to say so is the very thing Marshall had to prove. He didn't. He simply as sumed it.

But no one at the time or even until modern times believed that power, even if it was rightly assumed by Marshall, to be final. Jefferson, for instance, advocated a theory of coordinate review, in which each of three branches could reach its own conclusion on the constitutionality of congressional enactments or executive actions.

President Andrew Jackson, a Jeffersonian, took this view. When the Court upheld the Second Bank of the United States, over Jackson's objection that Congress lacked the power to create such an institution, the ever-belligerent Jackson is said to have remarked: "Justice Marshall has made his decision. Now let him enforce it."

Abraham Lincoln conceded the Court's power to overturn laws, but with a major reservation. He pointed out in his debates with Stephen Douglas that if the political branches lacked the power to treat Supreme Court decisions as temporary and sub ject to reversal, then the Supreme Court is the sole government of the land. He conceded the Court's power to decide the Dred Scott case as far as the parties in that case were concerned, and he conceded the provisionally binding nature of that deci sion for similar cases, but he also affirmed the right of the other branches of govern ment to overturn that decision by appropriate action.

The next move now is up to Congress. For most of this century, Congress has been remarkably timid, unwilling to challenge the judiciary over its usurpation of the democratic process. Will it flinch again?

With due respect to Rep. Ernest Istook and others who are seeking to protect reli gious liberty through a constitutional amendment, I would point out that the amendment—process which was deliberately and rightly made difficult by the fram ers of our Constitution—has become a stud farm for moribund causes: causes sent there can continue to have a good time, but their racing days are over. Just ask the supporters of term limits, a balanced budget, and protection for the flag. Amend-
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ments on these issues are offered in Congress year after year, failing by a vote here and a vote there, but always providing a rallying cry for the next election.

If that happens to religious liberty as well, then, while the whips are doing their forlorn vote counts up here, Jewish prisoners will not be allowed to wear yarmulkes, Bible studies will be canceled, school children will be denied the right to express themselves on religious topics, and churches will find their tithes plundered by bankruptcy trustees as "fraudulent transfers." (Several such cases have been liti gated—and the churches have relied on RFRA as a defense).

No, this is a time when the other branches of government must be as bold as the Court has been. I believe Congress should announce that, as far as it is concerned, RFRA is still in effect. President Clinton could join in and tell the executive branch, especially the U.S. Attorneys, to take the same view and to decline prosecution in cases where defendants make a credible claim of RFRA protection for their conduct (unless, of course, enforcement of the law against such a defendant can pass the compelling interest test).

There are other strategies as well. Congress could adopt what Judge Bork has ad vocated so cogently in his recent bestseller Slouching Toward Gomorrah: subjecting the Supreme Court's constitutional decisions to a ratification vote in Congress. This would require a constitutional amendment, but it would accurately reflect the intent of the founding fathers more faithfully than our present regime of unlimited judicial review. **Or Congress could invoke its powers under Article III, Section 2, paragraph 3 of the Constitution and curb the judiciary's jurisdiction over free exercise cases.**

Alternatively, Congress could enact a more limited but still valuable RFRA by in voking the spending power: heightened protection for religious exercise would become a condition of receipt of federal funds.

In any event, Congress cannot duck this fight. **To fail to act would be to hand over to the Court the final vestiges of legislative authority.** It would be to abandon the First Amendment. The Court has thrown down the gauntlet. To fail to rein in its rampaging quest for power would simply insure the imposition of an illegitimate elite consensus in many areas of American life, ousting the moral common sense of the American people. Congress must respond. Our tradition of a written Constitution hangs in the balance.

Mr. NADLER. Mr. Chairman.

Mr. CANADY. Thank you, Mr. Colson.

Mr. Nadler.

Mr. NADLER. Mr. Chairman, I ask unanimous consent to go out of order, after I should have, in reading an opening statement.

Mr. CANADY. Without objection.

Mr. NADLER. Thank you. Thank you, Mr. Chairman. I first want to thank you for scheduling this hearing so soon after the Supreme Court's disastrous ruling in Flores. I think the timing of this hear ing appropriately reflects the crisis precipitated by the Court's recent ruling.

For the second time in this decade, the Supreme Court has launched an assault on religious liberty in America. In the Smith case in 1990, the Court said that it was not the job of the courts to protect religious freedom. I can't imagine a worse reading of the First Amendment. I can't imagine any reading of the First Amend ment.

In Flores, the Court told us that Congress lacks the power to pro tect religious freedom. According to the current Supreme Court, the Constitution protects religious freedom, but no one has the author ity to enforce that protection. That's an absurd reading of the Con stitution, one which must not be allowed to stand. The Supreme

Court has mindlessly sacrificed religious liberty on the alter of its own cramped view of the Bill of Rights. Clearly, the best course of action would be for the Court to rethink the Smith decision. One would at least hope that the Justices would seek the benefit of hav ing such significant changes to the First Amendment briefed and argued, something that has never happened.

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Properly and carefully reviewed, I do no believe that Smith would hold up, though I am not confident that a majority of the current Justices would so hold. Nonetheless, as Justice Souter has written, "whatever Smith's virtues, they do not include a com fortable fit with settled law."

In Flores, the majority continued its fixation with the need to find the existence of some discriminatory intent to demonstrate a violation of the Free Exercise Clause. In reviewing RFRA's legisla tive history, the Justices observed that "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."

I continue to believe that if one's free exercise of religion is bur dened or restricted by Government, it is **immaterial whether that came about as a result of bigotry or inadvertence.** The right is nonetheless abridged and the First Amendment should provide a remedy.

In fact, one of Congress' principal concerns was that, **as a prac tical matter, unpopular and minority faiths would receive a less sympathetic hearing as all faiths attempted to use the legislative process to obtain relief from generally-applicable laws having the incidental effect of burdening religion.**

The subject of accommodations is different than messaging like posting 10 commandments. Messaging should be whatever voters authorize through their representatives. Accommodations, as before, should be given so long as it does not impact a compelling interest of free government. Accommodations even for followers of anti-freedom religion might receive accommodations so long as the action in question is not hostile. But an exception for some promotion or aid to anti-Freedom should not be given just because it is called “religion”.

It was clear to Congress when we enacted RFRA that that in-equitable treatment of different faiths in granting such exemptions or the inequitable treatment of religion as opposed to business or other interests in granting exemptions would violate the Free Exer cise Clause as interpreted by Smith. Congress' understanding of how the legislative process works or fails to work—and I have been a part of that process at the State and Federal level for the last

two decades—was reflected in RFRA's structure.
RFRA was based on the recognition that legislatures, which are responsive to the popular will, are inherently less suited to grant ing such exemptions than is the independent judiciary. RFRA was based on the recognition that one's religious freedom should not de pend on political popularity or power. RFRA attempted to return the granting of such exemptions back to the independent judiciary on the basis of an appropriated standard: strict scrutiny.

What I am missing: legislatures can repeal laws, not grant individual exemptions; called bill of attainder.

The independent judiciary's active resistance to fulfilling its role in our system of Government is troubling, but I do not agree with some of our colleagues who have argued that the appropriate re sponse is to join the current majority's assault on this sound bul wark of our rights. Judicial independence was established to pro tect the rights of minorities from the majority. RFRA was premised on the belief that the courts, and not the legislatures, should con tinue in that role.
I am also concerned that, despite the majority's denials, their narrow reading of Congress' power to enforce the 14th Amendment threatens other civil rights legislation. If the Court persists in its line of reasoning, and continues to exalt the rights of States at the expense of the rights of individuals, the legal protections many in this country now take for granted may be seriously diminished by future rulings. Indeed, it has already been reported that **some States and localities are attempting to capitalize on the reasoning in Flores by attacking other civil rights laws.** This situation re-
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quires swift but careful action on the part of Congress. This hear ing is an important first step.
I do not believe that a constitutional amendment is needed or well advised. As today's witnesses and other commentators have correctly pointed out, Congress still has numerous legislative op tions at its disposal. Pursuing the constitutional amendment route, which at best would result in substantial delay and tremendous uncertainty in its results, would under these circumstances be irre sponsible.
If one thing is clear from the Court's decision, it is that **we must pay careful attention to the current law on Congress' power with respect to the States and the court, and we produce a careful and complete record to support the legislation we write.**
Religion is our most fundamental freedom, our first freedom. It is the reason why many of our families came to this country. That commitment to religious liberty unites Americans from across party lines, across the political spectrum, and across denominational lines. That diversity will be our strength as we all work together

to overturn this direct assault on our fundamental freedoms.
Just as a broad and diverse coalition of religious and civil liberties groups, with bipartisan cooperation in the Congress, succeeded in passing the Religious Freedom Restoration Act, I am confident that we will succeed in restoring once more the freedom of religion this Court has so cavalierly stripped from our citizens.
Thank you, Mr. Chairman.
Mr. CANADY. Thank you, Mr. Nadler. We'll go back to the regular order now, and recognize Reverend Thomas.

STATEMENT OF OLIVER THOMAS, SPECIAL COUNSEL FOR RELIGIOUS AND CIVIL LIBERTIES NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.

Mr. THOMAS. Thank you, Mr. Chairman. I am Oliver Thomas, special counsel to the National Council of Churches.
The Supreme Court's decision striking the Religious Freedom Restoration Act is not only a blow to the sovereignty of Congress, it is a blow to the American people. As the Dred Scott decision of a century ago was for African-Americans, so City of Boerne v. Flores is for religious Americans, but as with Dred Scott, Americans working together will overcome this setback to freedom. I want to pause and commend the chairman of this subcommittee as well as the members present for beginning this national conversation.
My overriding message to you today is one of caution. When bad things happen, we oftentimes rush in and try with the very best of intentions and in a commendable effort to remedy the problem. It's encouraging that Congress is doing that today, but as we seek to correct the problem let me encourage us not to run the risk of creating a bigger problem. In particular, I want to discourage efforts, premature efforts, I think, to amend the First Amendment. First, there is the problem with all constitutional amendments: They are broad; they are general; they are risky. While statutes can be drafted with great specificity, constitutional amendments frequently cannot. They speak in broad generalities; they must stand the test of time. Decades pass before the true meaning of the amendment can be deciphered by the courts, and oftentimes, Mr.

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Chairman, we are surprised—indeed, dismayed—by the interpretations that the Court gives the very words that we the people select. Who would have thought that laws prohibiting the free exercise of religion, for example, did not include laws prohibiting the free exer

cise of religion? How could the framers have been more clear? It
is stated in the most absolute terms; yet, the Supreme Court has
decided that only laws *intentionally* discriminating against religion
are barred by that broad, broad provision.

Then there's the problem of exemptions. Mr. Chairman, as the chairman of the coalition that worked on this issue, I can tell you that what brought our coalition together was a single unifying principle: religious liberty for all Americans—no exemptions for prisoners; no exemptions for public schools; no exemptions for landmarked churches; religious liberty for everybody; a sensible balancing test giving due deference in certain situations in the military, and so forth, where there are more important interests at stake, but no exemptions.

We will hear today from a representative of a State, and there are many like him, who found it in themselves to oppose what I think is a very important protection for religion because of its ap plication to prisons. **A relative smidgeon of cases, less than one quarter of 1 percent of all the prison litigation in the State of Texas, for example, involved the Religious Freedom Restoration Act, and a small percentage of those were frivolous claims.** Yet, we saw a great wave of opposition to the Religious Freedom Restora tion Act, and I seriously question whether this coalition and the Congress, were we to agree on a constitutional amendment and get it passed, could get it through those State legislatures right now without exemptions.

Finally, a constitutional amendment should be considered a mat ter of last resort. You know how long it takes to work that process, and it should be considered only when all else has failed. The good news is, all else has not yet failed. This Congress has before it sev eral options, and I'm delighted that you have constitutional schol ars here today to explore those options.

I think you can do something positive to protect religious liberty, short of amending the First Amendment. A joint congressional res olution, I think, first should be done just to educate the American people about what has happened and the course of action that we ought to take. It also serves the benefit of getting your colleagues on record as supporting reasonable efforts to shore up the protec tions for religious liberty. That will be helpful later on when legis lation is introduced by some of the Members perhaps present here today.

Secondly, Federal legislation—you'll hear from scholars today, talking about the options that you have **under the Commerce Clause, under the Spending Clause, under the Necessary and Prop er Clause;** I hope you'll consider those seriously.

Groan. Not again. Uh, necessary and proper? Wonder what that would do?

And finally, a litigation strategy that we'll be carrying on in State and Federal courts simultaneously with what is going on here in the Congress.

Let me conclude by saying that a constitutional amendment, though an important last resort, is not a sprint; it is a marathon,
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and before we begin that marathon let us exhaust all available State and Federal remedies.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Thomas follows:]

PREPARED STATEMENT OF OLIVER THOMAS, SPECIAL COUNSEL FOR RELIGIOUS AND CIVIL LIBERTIES NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.

I am Oliver Thomas, Special Counsel for Religious and Civil Liberties to the Na tional Council of the Churches of Christ in the U.S.A. (NCCC). The NCCC is the nation's premier ecumenical body with 33 Anglican, Orthodox and Protestant mem ber communions with an aggregate membership of over 50 million persons. The Council does not purport to speak for all of its members but rather for its governing body, the General Assembly, in which all of its member communions are rep resented.

I am also the Chair of the Coalition for the Free Exercise of Religion. This coali tion—which worked with members of Congress to draft and secure passage of the Religious Freedom Restoration Act (RFRA)—comprises 68 religious and civil lib erties groups ranging from the Traditional Values Coalition to the American Civil Liberties Union. The Coalition is united in its support of legislation providing reli gious liberty for all Americans. It is divided, however, over the advisability of a con stitutional amendment. For that reason, I do not speak for the Coalition in my re- marks today.

The Supreme Court's decision to strike down the Religious Freedom Restoration Act (RFRA) is a blow not only to the sovereignty of the Congress but to the Amer ican people as well. As the Dred Scott decision of a century ago was for African-Americans, so City of Boerne v. Flores is for religious Americans today. But, as with Dred Scott, Americans working together will overcome this setback to freedom.

Thank you, Chairman Canady and Members of the Subcommittee, for beginning a national conversation on what the proper response to Flores should be.

Although I have spent most of my adult life litigating, lobbying and advocating for religious freedom, my overriding message to you today is one of caution. In your commendable effort to correct what can only be viewed as a profound national wrong, there is the danger that we could upset the delicate balance between the in stitutions of church and state. In particular, if we were to amend the First Amend

ment we would risk creating larger problems than the one we seek to solve.
First, there is the problem with all constitutional amendments. They are broad. They are general. They are risky.
While statutes can be drafted with great specificity, constitutional amendments frequently cannot. As part of the broader legal/social compact, they speak in what the Supreme Court has called "majestic generalities" that must stand the test of time. Decades pass before the true meaning of an amendment can be deciphered by the courts. Oftentimes we are surprised by their interpretations and wonder how they could have strayed
so far from what we understood the language to mean. For example, who would have thought that laws "prohibiting the free exercise" of reli gion did not include laws prohibiting the free exercise of religion? How could the Framers have been more clear? Yet the Supreme Court in Employment Division v. Smith, has interpreted the language to prohibit only the handful of laws that inten tionally discriminate against religion, while omitting those that do so incidentally or accidentally.
Then, there is the problem of exemptions. The Congress and the Coalition were able to unite behind a single unifying idea: religious liberty for all. For that reason, exemptions for prisons, historic districts and public schools all were considered and refused. Yet, many state attorneys general and others came to oppose RFRA simply because a smidgen of prisoners filed frivolous claims. In light of all the negative publicity that has been given to this subject, do we really believe that a constitu tional amendment that did not exempt prisons could be passed in 38 state legisla tures?
Finally, we do well to remember that although **the United States is the most reli giously diverse nation on earth, we have avoided the religious strife and the blood-shed that has characterized other parts of the world.** Many, including myself, would attribute America's success to the genius of the First Amendment.
For all these reasons, a constitutional amendment should be a matter of last re sort—to be utilized only when all else has failed.
But, has all else failed?
Close examination reveals that a number of less drastic remedies should be pur sued first. True, none provides the universal relief that a constitutional amendment
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would offer, but none carries such risks or requires such an investment of time and resources.
Some of the alternatives are:
1. A JOINT CONGRESSIONAL RESOLUTION—One thing Congress can do im mediately is to speak with one voice on the Flores decision through the passage of a joint congressional resolution regarding congressional commitment to address the loss of protection afforded people of faith by the Court's action. Several things could be accomplished with such a resolution. First, Congress could further educate the American people about the inadequacy of the Court's current protections for religious liberty. Second, we could put members on record as supporting reasonable ef forts to shore up federal protections for the free exercise of religion.
2. FEDERAL LEGISLATION—Additional hearings should be held with participa tion from a broad array of constitutional scholars to determine what, if any, sort of curative federal legislation might be possible. Possibilities would seem to exist under a variety of constitutional provisions including the **spending, commerce, and**

necessary and proper clauses. Legislation targeted at **specific problem areas such as the bankruptcy code or zoning laws might also be considered.** Finally, serious thought should be given to determining whether a substantial record of religious discrimination can be proven so as to justify **remedial legislation under Section 5** of the 14th Amendment.

3. LITIGATION STRATEGY— As Congress considers its legislative alternatives, a litigation strategy should be pursued at the state and federal level. **Already, four state supreme courts (Maine, Massachusetts, Minnesota and Wisconsin) and the California Court of Appeals have rejected the rationale of Employment Division V. Smith and have chosen to provide RFRA-type protection for religion on the basis of their own constitutions.** Only Vermont has considered strict scrutiny analysis and rejected it in favor of Smith's more narrow interpretation.

No state litigation strategy can substitute for a long term strategy aimed at overturning Smith. Justice O'Connor's **dissenting opinion in Flores invites us to present the Court with an opportunity to rectify its 1990 decision,** and two—perhaps three—of the justices share her view. Considering that the Court's two most senior mem bers were in the Smith majority and that the President is an ardent advocate of RFRA and of the compelling interest test, it is **likely that the underlying source of our problem could be eliminated in 3 to 5 years. This is a long time to wait, but not when one considers the length of time that would be required for a constitu tional amendment.** Moreover, a series of **temporary measures—such as targeted fed eral legislation and state RFRAs**—could soften the blow until Smith can be overturned.

By striking down the Religious Freedom Restoration Act, the Supreme Court has placed America's first freedom in jeopardy. For that reason, Congress must carefully consider all of the options available to it as it seeks to provide relief.

A constitutional amendment, though an important last resort, is not a sprint. It is a marathon. We should exhaust all of our available remedies at the state and national level before seriously considering such a radical alternative.

Mr. CANADY. Thank you, Reverend Thomas.

Mr. Stern.

STATEMENT OF MARC D. STERN, DIRECTOR, LEGAL DEPARTMENT, AMERICAN JEWISH CONGRESS

Mr. STERN. *One of the difficulties of following a Southern Baptist preacher is you're necessarily going to sound boring*. I won't even attempt to equal Reverend Thomas.

I would like to turn to what I think are the legal and sociological issues that confront us at this time.

I don't expect religious persecution to pop up everywhere as a re sult of the Supreme Court's decision in Boerne. The Supreme Court has made it clear that if, in fact, any municipality or State Govern ment or the Federal Government intentionally discriminates against any particular faith, a panoply of Federal protections will still be available.

The first difficulty is one of proof. I have myself represented churches and synagogues at zoning hearings, where the popular

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clamor against a particular grant of a zoning variance, or a zoning permission, is clearly based in bias, but the hearing officers, the zoning board, they have a lawyer, and they're clever enough not to couch their decision in those terms. So you have incredible difficul ties of proof. Everybody in a town knows what is happening. But, the courts tend to look at formal decisions, and the formal decisions are always entirely neutral.

One case I know of where intentional discrimination was ulti mately found, the litigation expenses must have run to over $1 million, and included the efforts of the United States Government. So that's, it seems to me, something Congress ought to be looking at: how common that problem of proof is. The Supreme Court has, I think, left open the possibility of legislating to deal with the dif ficulty of proof. The zoning context is a uniquely fertile one for that. I think the people sitting in the room can probably give you a dozen or two dozen cases of where that's happened.

But more importantly, the major threats to religious liberty today don't really involve intentional persecution of religious groups. They represent a changed circumstance from the 18th to 19th century: the emergence of the regulatory State. The danger to religion today comes not so much from malicious and evil State governments or local governments, but people who are in good faith enforcing other policies of government. Typically, nobody's given any thought to the impact on religious liberty. That is where the problem is; that is where American religion comes into conflict with government, that is where RFRA helped the most, and that is where religious liberty is today most at risk.

This is not simply a question of special pleading on behalf of those of us who make a living presenting religious institutions. American religion's vitality stems very directly from two factors: One is low entry costs. It was always easy to set yourself up as a church—and I use "church" in a very generic sense here, obvi ously—and secondly, you could do your own thing. Unless you were engaged in cannibalism (or, bigamy), you were pretty much free to try your vision out on the American people, and see if you could sell it in the marketplace of ideas. That's no longer the case.

Zoning is, again, a paradigm. To start a congregation today in most suburban communities has become a matter of great expense and great burden. You've got to go through the zoning process. You can't just a buy a plot of land and throw up a church. In many communities, you can't even rent a storefront anymore and set up a congregation; you've got to get zoning approval.

There are communities—I've encountered them—in which you cannot set up a congregation in a storefront, because they want to preserve the land and the facilities for business. I've also encoun tered communities that want to keep out storefront churches, because they think they serve minority groups, and it will change the composition of the community. But even on a purely neutral ground, that zoning has become a significant entry cost; that's a huge change in the status of American religion, and it has to be addressed.

Let me suggest just quickly—and there are others have more ex-

pert than I—that there are avenues available to you which will both, as Reverend Colson has suggested, assert congressional au-
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thority without yielding the field to the Supreme Court, which is what happens if you go first to a constitutional amendment, but will not precipitate a larger constitutional crisis. And here, I part company with Reverend Colson on one important point; I think what the Court did Boerne was wrong in substance, but not a de parture from the tradition of Marbury v. Madison.

I think the Congress ought not to sort of throw it in the face of the Supreme Court, nor ought it to go quietly into the night as if the Court had the last word, and I think what that requires is very careful attention to details, as some of the Members talked.

Compiling the record of that will persuade the Court.

Under the Commerce Clause, for example, which is a basis for most of the early sixties civil rights legislation, I think it can be demonstrated, first of all, the **large impact that religious institu tions and religious believers have on the national economy, and that might itself be a basis for legislation.**

Secondly, I believe—although this might or might not prove to be true upon investigation—that you'll be able to demonstrate that if in some states there are no religious exemptions regulatory stat utes, you will find people choosing where they work and where they live based on the compatibility of that State's traditions with their own religious practices. **Jewish families are unlikely to move to States, for example, that treated children who skipped class on Rosh Hashana and Yom Kippur as truants, and I'm sure my good friend Mark Chopko would not advise anybody to move to a State that wouldn't allow minors to take communion because the wine was alcoholic, and they refuse to have an exemption for minors to drink communion wine.**

So, I think that will have an impact on commerce; that's exactly the sort of theory that underlies the public accommodation section of the 1964 Civil Rights Act. In 1964, Congress compiled a record that made that case. I think we ought to be doing that per religion as well.

I think under section 5 of the 14th Amendment the difficulties of proof that I spoke about, if we can demonstrate them, will justify legislation. I think, as well, if we can find particular areas—zoning, again, comes quickly to mind; the prisons come to mind—where it can be demonstrated that as a class of cases discrimination is a common phenomenon—doesn't necessarily have to be, I think, 50 or 60 percent of the cases, but it is a common phenomenon, that is very difficult to prove and smoke out. I think the Court's opinion leaves open the possibility of legislation directed either to those cases specifically or perhaps more generally.

I think the spending power is another power that Congress has. The narrowest version of the spending power that I think is clearly constitutional would be for Congress to say, "We give money to

State and local governments, and we want all taxpayers who pro vided those funds to be able to use them. If in the course of admin istering that program States or localities have practices which sub stantially burdens religious practice, and people cannot participate because they don't want to compromise their religious views, Fed eral tax dollars are being used fairly. We insist as a condition of your taking Federal funds that every taxpayer and every citizen be able to use them." That's the narrowest version of the Spending
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Clause. There are broader versions of Congress power under the Clause. The Court has in South Dakota v. Dole, some limits.
Let me just close with one word about constitutional amend ments. I agree with what's been said, both by the Members and my co-panelists, that a constitutional amendment is not now the appro priate response to Boerne. It's not right because, first of all, it yields the power of Congress to the Court. It simply throws in the towel, and says, "You're right. We'll play the game another way."
Secondly, as Reverend Thomas said, it's not so easy to get States to pass constitutional amendments that are aimed only at them- selves, because, as the chairman said, the power of the Congress to enact legislation governing how the Federal Government oper ates seems uncontested.
And thirdly, there is the principle which has served the country well: that constitutional amendments ought not to be used promis cuously; only in case of last resort and need, and we haven't yet exhausted the need. In particular, though, there are two ways of— as a practical matter, now that Congress confronts two methods of amending the Constitution to deal with the Boerne case. The first, is a freestanding amendment directed only at Boerne. If to go to a constitutional amendment becomes necessary, that would be my strong preference.
What I think would be particularly unhelpful would be to engage in the common practice of tacking an uncertain proposal onto a popular one. Now that happens all the time. I've been guilty of try ing to do it myself on occasion. But in terms of a constitutional amendment, it seems to me singularly bad policy to take an amendment dealing with the Establishment Clause, on which there is great disagreement, and there's been for a long time. It's legiti mate; it's hard fought, and I don't question anybody's motives, but **there's no consensus on what an amendment to the Establishment Clause will look like if we need one at all.**
There certainly is a consensus in the religious community and in large parts of the civil liberties community, about what a free exer cise amendment ought to look like. It would be a real abuse of the process for us to take an amendment which enjoys broad support and have tacked onto that something that couldn't make it on its own.
And, second, it will be a terrible precedent for amending the Con

stitution. If you look at the Amendment—**since the 14th Amend ment, there is not one amendment which covers more than one subject.** I think that's a policy that served the nation well. I would urge the committee not to, should we come to that.

Thank you for letting me—if I may just tell you a quick story that Nathan Lewin tells. Apparently, he took two of his justices of the Israeli Supreme Court to watch an argument in the United States Supreme Court. It was a hotly contested argument; two very skilled advocates. When the argument finishes he walked out with the justices of the Israeli Supreme Court, and he says to them, "What impressed you the most?" thinking they'd tell him the room, the argument, and so on. They said, "We want that red light on the podium; we can't get our lawyers to shut up." [Laughter.]

[The prepared statement of Mr. Stern follows:]

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PREPARED STATEMENT OF MARC D. STERN, DIRECTOR, LEGAL DEPARTMENT, AMERICAN JEWISH CONGRESS

Mr. Chairman and members of the Subcommittee, on behalf of the American Jew ish Congress,1 I wish to express appreciation to the Chair and members of this Sub- committee for so promptly convening hearings to explore possible congressional re sponses to the decision of the United States Supreme Court in City of Boerne v. Flo res.

City of Boerne not only leaves religious liberty without effective federal protec tion—that is bad enough—but also cuts a wide swathe through Congress' power to address pressing national social problems under § 5 of the Fourteenth Amendment.

The Court's decision is particularly problematic because it does not lay down any discernable rule by which Congress can determine in advance whether a particular piece of legislation does or does not pass muster under § 5.

Instead, the Court has reserved to itself the right to determine whether an exer cise of congressional power is proportionate to a problem as the Court sees it. This new test—for which the Court was able to cite exactly no case or other authority— massively shifts power from Congress to the courts. It puts in doubt important pieces of congressional legislation enacted with broad bipartisan support: the Ameri cans With Disability Act, particularly as it applies to local government (there are already many suits challenging application of the ADA to state prisons and local jails); the Violence Against Women Act; and others. I doubt that anyone other than the Justices can say with certainty what exercises of congressional power under § 5 today would pass muster under the Court's amorphous [lacking organization or shape; formless] test. It is even unclear whether a practice which passes muster as of the time of enactment would still pass muster years later if the circumstances have changed.

We of course recognize that there are profound differences amongst members of Congress about when the federal government ought to intrude on state and local governmental authority. Both liberals and conservatives have objected to various federal initiatives as a breach of "our federalism." We do not seek to eliminate fed eralism from our political tradition. Federalism is an integral part of American po litical tradition. The American Jewish Congress believes that it should remain part of our political discourse.

And because judicial review is also part of our political tradition, it is the case that the courts, and particularly the Supreme Court, will review exercises of con gressional power to ensure that they do not breach "our federalism. But the test the Court has created out of whole cloth to invalidate RFRA is a wholly subjective one—does the Court judge the response proportionate to the problem? This is a quintessentially legislative judgment. That a majority comprised of Justices generally suspicious of expansive notions of judicial power over legislative initiatives should adopt as expansive a judicial check over the Congress as is to be found in the pages of the United States Reports is one of the crowning ironies of the City of Boerne decision.

That the first three legal citations in support of the judgement date from the eighteenth or early nineteenth centuries—in a case which presented the question of how a post-Civil War amendment altered federalism—is startling but revealing. The need for affirmative federal protection of religious freedom is a direct result of the growth of the twentieth century regulatory state. It rested firmly on an amendment [the 14th] which presupposed that the states and local governments would often not be suffi ciently protective of fundamental rights. It is no wonder that a Court looking to precedents from the eighteenth and early nineteenth centuries would deliver a judg ment wholly out-of-touch with twentieth century realities.

The distortion of federalism occasioned by City of Boerne must not overshadow the fact that for the first time since World War II, religious practitioners have no re-

course under federal law when government interferes with religious practice. That
this state of legal affairs comes at a time of increased diversity in American religion is yet another irony of the City of Boerne decision.

The decision in City of Boerne is, by its terms, no license for government to target religious groups for onerous legislation. Such actions, though often difficult to prove, remain unconstitutional. I do not expect that Jews will be targeted for oppressive legislation as they have been in societies far less welcoming than this one. But it is of small comfort that zoning officials can bar synagogues from a community only if they are willing to also bar churches pursuant to a neutral rule (although I am understating the ability of neutral rules to mask discriminatory administration).

1 Neither the American Jewish Congress nor I currently hold, any federal grant, contract or subcontract. Nor have we held any within the last two years. My curriculum vitae is attached as Appendix A.

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In any event, it is also the case that the challenge to religion today in the United States comes not only from faiths intent on suppressing competition, but also from those of little or no faith, who see no special value in religious practice, and who are perfectly willing to have the regulatory state squelch or impede religious views with which they disagree. The danger to religious liberty comes not only from those who would use the machinery of the state to suppress competing faiths, or to compel belief, but also from those who would uniformly require churches to abandon visions nourished by faith for those nourished by utilitarian analyses of pragmatic cost-benefit analysis.

As Jews, we know the importance of mandatory accommodation, whether it be in the form of excusals from public schools on Jewish holidays—or from Christmas pageants—to school rules barring the wearing of skullcaps, to decisions relaxing the zoning laws for religious institutions. Jewish prison inmates, too, have depended on the Free Exercise Clause or RFRA to obtain the most minimum of accommodation. Unfortunately, prison officials in some states have refused accommodations long ago adopted by other states or by the federal prison system. When there was federal law requiring accommodation, those rejections could be tested to see if they were justi fied by legitimate consideration of prison security. Today they need not be.

I would add only that **Justice Scalia has urged that accommodation will be reached through the democratic processes. This will often be nothing more than a pious hope. If the Catholic Church cannot build a new church in the largely Catholic City of Boerne, what hope is there for less well organized (and smaller) churches?**

Each of these problems—that of protecting religious liberty and preserving the in tegrity of congressional power—is serious. Each deserves a substantial response. If left unaddressed, each of the adverse impacts created by the City of Boerne decision will create social problems of substantial impact, and each will minimize ordered liberty, rather than enhance it.

That both problems need to be addressed adequately and expeditiously is beyond question. But just as it is important that these problems be addressed promptly is the need to see to it that they are addressed soberly and soundly. A rush to legislate with legislation that has not been thoroughly considered is no boon to religious lib erty. Nor is it helpful to pass legislation which will inevitably be struck down by the Supreme Court in the name of federalism or separation of powers.

Some have urged that the appropriate response is a constitutional amendment, either one addressing only free exercise issues, or one which is piggy-backed onto existing proposals to address the Establishment Clause issues. The latter proposal is wholly unacceptable; the former simply premature.

As members of the Subcommittee know, the American Jewish Congress and al most the entire Jewish community is unalterably **opposed to proposed constitutional amendments to mandate school prayer, or to require government to fund religious enterprises on fully equal terms with secular ones.**[2] We are not alone in that opposi tion. Many religious groups and other concerned citizens also oppose such an amendment. As repeated efforts to enact such an amendment over the last three decades indicate, **no consensus exists around the need, desirability or substance of a constitutional change in the Establishment Clause.** It also certainly cannot be said that the Supreme Court has frozen its Establishment Clause doctrine such that an amendment is the only available response. **Cases such as Agostini v. Felton and Rosenberger v. Board of Visitors, W.V., as vague and uncertain as they are, dem onstrate that the law of Establishment Clause is in flux**.[3] That process is ongoing and should not be short-circuited now.

We recognize that tacking a less popular proposal onto a more popular one is an accepted legislative technique. But it is not one that has been used in amending the Constitution, nor should it be now. Our nation's fundamental law should be changed only where there is a broad popular consensus on the need for a change. That change should be judged on its own merits, not as an adjunct to some other proposal on which there is a consensus. There may be a consensus about protecting free exer cise of religion, but there plainly is **no consensus about amending the Establishment Clause, much less on how the Clause should be amended.** A fortiori, Congress

2 To the best of my knowledge, not a single Jewish organization of any importance or size has endorsed Representative Istook's proposed school prayer amendment.

3 The flux is relevant to the question of governmental aid to religion. The Court has not wavered in its holding that government may not itself endorse religion, proselytize, or coerce participation in religious exercises. That consensus reflects a considered judgment both about original intent and the meaning of constitutional principle. The burden is on those who seek a change to demonstrate a need to depart from this consensus. Unfortunately, the most promi nent proposal to amend the Constitution now pending before this Subcommittee would, either by deliberate design or careless drafting, overturn these decisions without such a showing.

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should not sneak through changes to the Establishment Clause on the back of a for tified Free Exercise Clause.

There is no question that a constitutional amendment protecting the Free Exer cise of religion could, if carefully drafted, effectively restore protection for freedom of religion for all Americans, and do so as a matter of right. However, if Congress were to act promptly, the process of obtaining ratification would be slow. Given that three-quarters of states **would have to ratify an amendment aimed solely at themselves**, ratification is hardly a sure thing.

It may well be that at some point in the future it will be necessary to consider such an amendment which, like RFRA, will require a second look at any law or reg ulation that effectively interferes with religious practice. As an organization, we do not foreclose the possibility of endorsing such an amendment should it be the only available means of providing real protection for religious practice. We do not believe

that this is yet the case.
In our view, constitutional amendments should reflect not only a broad consensus that a change is necessary, but address a need that only an amendment can satisfy.
If, for example, the entire Court had adopted Justice Stevens' suggestion that statu tory exemptions were infirm as establishments of religion, then the only remedy available would be a constitutional amendment. But that is, as best as we can tell, not where we are.
As we read City of Boerne, it simply holds that §5 of the Fourteenth Amendment, the source of authority Congress relied upon did not sustain the broad scope of the Religious Freedom Restoration Act. It does not foreclose the possibility—as Justice Stevens would—of legislation based on other bases of congressional authority. While none of these standing alone might be as comprehensive as RFRA, together with state constitutional protection, and, one hopes, **state RFRA's,** they might prove suffi ciently comprehensive to obviate the need for a constitutional amendment.
Moreover, should Congress simply pass a constitutional amendment now, it will have ceded to the Supreme Court without so much as a protest, much of its author ity under § 5 of the Fourteenth Amendment. We think that would be undesirable.
Several possibilities suggest themselves for immediate congressional action. First and foremost, should the lower courts hold that so much of RFRA that applies to the federal government is not severable from the invalidated parts, Congress should promptly reenact a federal-only RFRA.
Second, under the Taxing and Spending Clause, Congress could insist that, **in any program receiving federal funds,** states and local governments apply RFRA stand ards to laws, regulations or practices that substantially burden religious practice.
The federal government, which has bound itself not to interfere with religious prac tice without a narrowly targeted compelling interest, has a legitimate interest in seeing to it that its funds are used in keeping with this policy. It likewise has an interest in seeing to it that all taxpayers can enjoy the benefits of tax funds, and are not excluded by application of rules which, as a practical matter, exclude them from federally funded programs because of a clash with their religious principles.
Some have suggested a broader use of the spending power, to condition any fed eral aid on compliance with RFRA. That is to say, a state or
local government which
accepts any federal funding would be bound in all of its activities by RFRA stand ards. While we would, other things being equal, endorse this proposal, we are doubt ful that it would pass muster with the Supreme Court. We see little benefit in chal lenging the Court s authority once again when it is doubtful that under existing au thority it would pass muster.
In **South Dakota v. Dole, 483 U.S. 203 (1987),** *the Court explained that the spend ing power can be used to impose restrictions on the states only if: (1) they further the general welfare; (2) the conditions are stated unambiguously; (3) the conditions are related to the particular interest in the national program; and (4) they do not violate some other constitutional provision.*
A RFRA-like condition targeted at federally funded programs surely satisfies the first, second and fourth provisions. If limited to the program receiving federal funds, it would satisfy even the narrowest reading of the third provision since the regula tion would have as its purpose guaranteeing full access to federally funded pro- grams. We would suggest that the definition of "program" be taken from existing civil rights legislation, notably Title VI of the 1964 Civil Rights Act, as amended,

42 U.S.C. §2000(d)-4(a).
The exact scope of the third condition is unclear. The Court in Dole noted that some have sought a restriction to regulations which are "directly related" to the pur poses of the grant. The Court left open the question of whether to accept that read ing, or to grant Congress some broader leeway. 483 U.S. at 2797, n.3. We believe that the Subcommittee should explore, with constitutional scholars, the exact pa rameters of this requirement. Perhaps it will be the consensus of scholars that the
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spending clause will sustain broader regulations than just a program-specific one. For example, it might be possible to offer financial incentives to states to enact state RFRA's, or perhaps, federal grants to offset the (minimal) costs imposed by religious accommodation. If so, Congress should take the fullest possible advantage of its au thority.
The **Commerce Clause, too,** should be available as a source of authority to sustain some RFRA-like legislation. The Commerce Clause has sustained other civil rights legislation, beginning with the desegregation of interstate transportation in the 1940's and culminating in the ban on racial and religious discrimination in Title II of the 1964 Civil Rights Act, sustained easily by the Court in Heart of Atlanta Motel v. Katzenbach. More recently, the Violence Against Women Act has been built in part on the Commerce Clause.

Aarrgh! Aarrgh! Aarrgh! Aarrgh!

Just this Term the Court held that not-for-profit institutions are protected by the interstate Commerce Clause. There is no question that institutional religion is suffi ciently large to have a substantial effect on interstate commerce, over which Con gress has largely plenary authority. Moreover, it is also the case that states which regulate in ways which burden religious practice are not likely to be attractive to persons who hold such burdened practices. Other things being equal, Catholics are likely to shun a state which does not allow minors to drink communion wine, and Jews will not readily move to a state whose schools treat students absent for Rosh Ha-Shana and Yom Kippur as mere truants.

So why is this so tangential to the original and only logical intent of the commerce clause as to be unconstitutional? Blacks would be likely to not move to a state that will enslave them, or that would not let them vote, also, but if banning slavery were a constitutional use of the commerce clause, why do you suppose anyone saw a need for the 14th and 15th Amendments? The original idea behind the 10th Amendment was that states could be different, and compete with one another, and try different incentives to keep people and draw others. If Congress had the power to force every state to adopt the laws or systems or bureaucracies that Congress thought more attractive to people, *or to any particular group of people,* what would limit Congress? Congress might think Nebraska's system of having only one legislative chamber most attractive and might force all states to adopt it. Congress might think California's homeless policies might be most attractive to homeless people and force other states to adopt it.

Unfortunately, U.S. v. Lopez casts an uncertain shadow on the scope of Congress' use of the Commerce Clause as a basis for regulation. The decision may mean only that the statute had no requirement of demonstrating a nexus between possession of a gun in a school and interstate commerce, and the legislative record did not supply one. It may, however, mean that the Court is about to second guess Congress' judgments about the impact of particular actions on interstate commerce. Still worse, Lopez may mean that the Court's new-found enthusiasm for states' rights is an independent check on the Commerce Clause power.

Wikipedia: In a 2005 medical marijuana case, Gonzales v. Raich, the U.S. Supreme Court rejected the argument that the ban on growing medical marijuana for personal use exceeded the powers of Congress under the Commerce Clause. (The government argued that if a single exception were made to the Controlled Substances Act, it would become unenforceable in practice.) Even if no goods were sold or transported across state lines, the Court found that there could be an indirect effect on interstate commerce and relied heavily on a New Deal case, Wickard v. Filburn, which held that the government may regulate personal cultivation and consumption of crops because the aggregate effect of individual consumption could have an indirect effect on interstate commerce (Even respondents acknowledge the existence of an illicit market in marijuana; indeed, Raich has personally participated in that market, and Monson expresses a willingness to do so in the future. More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. Wickard, 317 U.S., at 128. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity)

Me: Logically the power is to standardize activities within states that *affect* other states' *commerce*; like standards for highways, railroads, radio signals. SCOTUS overturned a child labor law, but that should have come under 14th Amendment, not commerce. Rights of children.

We believe that despite the uncertainties, Congress should proceed under the Commerce Clause, and that it should do so based upon detailed legislative findings both about the impact of religious institutions on the national economy and more particular impacts on the ability of believers and institutions to move freely between states. Compiling such a record will take time, but in our judgment will be worth the effort.

Neither City of Boerne nor Employment Division v. Smith challenges in any way the proposition that intentional legislative religious discrimination is unconstitu tional. The Court appears to have concluded that there was not a sufficient quan tum of such discrimination extant to justify RFRA as a means of countering unprovable discrimination. Since the Court reaffirmed the validity of the 1982 Amendments to the Voting Rights Act, it is plain that the Court continues to believe that prophylactic legislation requiring justification of illicit effects as a means of compensating for the difficulty of proving intentional discrimination remains a via ble basis of authority under § 5. The Court's judgment that intentional discrimina tion is not a major problem is, as best as we can tell, premised on the relative hand ful of cases finding intentional religious discrimination. Curiously, the Court seems to have not been bothered that of the two cases it has decided on this ground, Larsen v. Valente and Church of the Lukumi Babalu Aye v. City of Hialeah, one in volved reversals of two lower court decisions failing to find intentional discrimina tion when the Court itself had no difficulty in finding such discrimination.

But the Court's focus on cases which are decided on the grounds of intentional discrimination is entirely too narrow as a basis for assessing the reality of religious discrimination. Often religious discrimination surfaces in particular religious liberty disputes, which are resolved short of formal judicial findings, or are resolved for the religious institution on other grounds. In some cases the institution or the believer simply do not have the resources to pursue the matter. And in some the difficulties of proof mask illicit conduct.

I have personally been involved in several zoning matters in which popular oppo sition to a proposed zoning decision is explicitly premised on religious bias of one sort or another, but the formal decision is cast in ostensibly neutral terms. It defies belief that zoning authorities are deaf to the political pressure generated by reli gious bias, even if they are sophisticated enough to cast their decisions in other, more acceptable, terms.

The problems of religious discrimination are apparent in many areas of discre tionary governmental authority—zoning, schools, prisons and others. If given suffi cient lead-time, the religion and civil liberties communities will, I believe, be able to demonstrate both that discrimination is far more common than the Court be lieved, and that it is often very difficult to prove. At the least such a showing would

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justify legislation addressed to specific areas (e.g., zoning, schools, and the like), and, perhaps, more general RFRA-like legislation.

More narrowly, Congress ought to give serious attention to the question of wheth er the remedies for intentional religious discrimination are adequate. Over the last decade, the Supreme Court has limited the availability of damages as a remedy for non-pecuniary losses of constitutional rights and erected a formidable series of im munities to suits against government and public officials. The result is that, when compounded with the difficulty of proving intentional religious discrimination, there are powerful reasons for state and local governments to go with the political flow rather than to comply with the sometimes politically unpopular constitutional mandates of religious equality.

In other words religious equality is unpopular, and politicians who do what is popular are shielded from accountability. Not sure what fits this concern.

Congress without question has the power to redress this imbalance. It could address this problem by lowering the plaintiff's burden of proof, by diluting or elimi nating immunities, at least from suit if not damages, and by increasing the available damages. We are uncertain whether Congress could do so only for intentional religious discrimination, or should include as well racial, ethnic and gender discrimi nation. That, too, is a problem which merits careful consideration.

These steps will not directly provide redress in cases where a state or local gov ernment acting out of purely benign motives restricts religious liberty unnecessarily. It will, however, redress those cases where there is some indication of religious bias.

The increased risks of losing a case premised on bias are likely to make govern ments more amenable to some reasonable compromise than if it is unlikely that any serious penalties attach to a finding of illicit discrimination.

The entire problem we address today is a creation of the Court's decision in Em ployment Division v. Smith, holding that the Free Exercise Clause does not prohibit enforcement of facially neutral laws despite their impact on religious practice. Were the Court to reverse itself about Smith, the problem addressed by RFRA would once again be addressed by the Constitution. The task is to ensure that the Court under- takes such a recommendation.

An important step Congress could take to facilitate such a plenary re- examina tion would be to create a category of mandatory appellate jurisdiction for cases claiming an impingement of free exercise. Such a category would force the Court to confront the issue head-on, and not hide behind denials of certiorari.

Really? Such a category is possible? Constitutionally and practically? Maybe for circuit courts.

CONCLUSION

The religious toleration which characterizes American government is in large part the result of stated legal norms which have appeared to require, or at least favor, accommodation of religious practices. There were, to be sure, departures from the norm. Historically, these departures have come from insensitivity or hostility by ma jorities toward religious minorities. But because the legal norms as stated have tended to emphasize tolerance, those entrusted with governmental powers have tended not to exercise their authority to the fullest, and have, where reasonably pos sible, tended to accommodate religion, if through nothing more than an exercise of prosecutorial discretion (a practice itself subject to abuse because it can so easily be exercised in discriminatory fashion).

The myth of equality of all religions is never challenged in these testimonies, though it leads to absurd results.

Now, however, that the Supreme Court has twice told governments that they need not take religion into account, the message will go out to bureaucracies across the country that they need take no special account of religion, that the may enforce laws no matter how they interfere with religious practice, that happy tradition is certain to erode unless something is done. We have outlined some of the steps we believe Congress can take. We urge you to pursue these and the suggestions which will be made by others, in prompt, but deliberate, fashion. We pledge to work with you in this important cause.

Mr. CANADY. Thank you.

Mr. Chopko.

STATEMENT OF MARK E. CHOPKO, GENERAL COUNSEL, U.S. CATHOLIC CONFERENCE

Mr. CHOPKO. Good morning. I thank the subcommittee for the opportunity to appear. I also thank the committee for its continued interest in exploring ways to strengthen the protection for religious liberty in the United States.

With your permission, I would address four points briefly. **First, the context in which we speak; second, the position of the Catholic**

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Conference; third, why Americans should care about religious lib erty, and fourth, "Now what do we do?"

In dealing with the context, my co-panelists have already addressed much about the City of Boerne litigation, the Religious Freedom Restoration Act, and the particular dangers to religious freedom. My point, setting context, is that I would urge the com mittee to avoid the linguistics of restoration and instead adopt a standard to protect religious liberty. What I think the Supreme Court did in the City of Boerne litigation had more to do with addressing rhetoric than following law. The Court made references to the rhetoric of restoring the constitutional status quo, and ne glected its opportunity to apply its precedent faithfully, which is more than adequately set out in the brief of Archbishop Flores, written and argued by Professor Douglas Laycock. My first point is to avoid the linguistics of restoration and instead focus on pro tecting religious liberty.

Second point—the position of the Catholic bishops. Bishops in the United States are administrators of complex organizations and in stitutions in this society, dioceses. We work with pastors and reli gious superiors and our brothers and sisters in other communities in every part of the country. We educate the young; we serve the poor; we house the homeless; we deliver health care; we own prop erty; we minister to prisoners; we strengthen and support families; we conduct worship; we administer the sacraments.

In each area of mission and ministry, we must deal with countless administrators and regulators, and in an increasingly secular world, religion tends to be treated like everything else. Even though we are all minorities in different parts of this country and in the country as a whole, the Catholic community is still the larg est faith community. Therefore, it is no wonder that the conflict that became the Supreme Court decision was spawned between the city of Boerne and St. Peter Catholic Church.

The event itself in the life of St. Peter was not insignificant. We Catholics believe that we worship in community, in a space that is consecrated and dedicated for that purpose. There, we are part of the body of Christ. **It does make a difference whether we worship in consecrated space or in a rented town hall.** In the words of the Catechism of the Catholic Church, "When the exercise of religious liberty is not thwarted, **Christians construct buildings for divine worship. These visible churches are not simply gathering places, but signify and make visible the Church living in this place; the dwelling of God with men reconciled and united in Christ."**

The words of the Holy Father and the Fathers of the church are significant for the City of Boerne case. **The inability of the Catholics of St. Peter to worship together in community in space consecrated and dedicated for that purpose was an affront to their dignity and their religious rights, their human rights, and a substantial burden to that religious community.**

Third, why should Americans care? Because there are thousands

of "St. Peter churches" in every part of this country, in the many different ways in which we experience our religious life, and the myriad ways in which our religious institution serve our human needs.
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Two faces and two forces in American life pervade almost everything that we do: religion and government. The committee faces the choice of which rule of law shall apply. **Shall religion be the supplicant going to government, always looking for something, or shall religion be accommodated as a rule of law?** I would urge the committee to choose the latter, as it did before. Our history, our tradition, our law demand as much. I believe that it is consistent with our expectations as American people.

But to my brothers and sisters in the religious community, I would point out that religion still needs to make the case, in the 1990's, why it should be accommodated. We need to remind Ameri cans that our mission and ministry is not just one to their hearts and minds, but is found in their streets, their hospitals, their schools, their nursing homes, their shelters.

Fourth, what shall we do? I think three things: First, I think we need to reestablish Congress' commitment to religious liberty. Rev erend Thomas suggests a joint resolution or similar device to put Congress back on record. I think the people deserve as much and would demand as much.

Second, I think we need to study avenues to pass uniform legisla tion. Many have been suggested in this testimony already. I would remind you of them, and, again, emphasize the Spending Clause, the Commerce Clause, privileges and immunities. I think the Court invites, in the City of Boerne case a record, if one can be made, on section 5 of the 14th Amendment. Other avenues are explored in my testimony, Mr. Stern's testimony, and in other places.

If we can, I think the committee should take the time that it needs now, engage experts, and study the various constitutional di mensions of the problem. If it can, I think the committee should study ways in which to pass appropriate legislation in the fall, not to restore the Religious Freedom Restoration Act, but to protect re ligious liberty.

Finally, if there were no other avenues available to the Congress after it has conducted this study, it should consider alternatives. These alternatives, I think, would include strengthening State laws; considering a broader-based litigation strategy and, as a last resort, a constitutional amendment. I do not believe that a con stitutional amendment is something that we should rush to in any manner, way, shape, or form. I think that are alternatives and that the Congress has not exhausted them.

In closing, I turn to the words of the Canticle of Zechariah (Luke 1:68-79) which restates the promise that God made to Abraham. We are reminded there that God came to set His people free, not free to engage the operations of corporate America, but free to wor ship him without fear. "Free to worship him without fear, all the days of our lives."

Luke 1:68-75 KJV Blessed be the Lord God of Israel; for he hath visited and redeemed his people, (69) And hath raised up an horn of salvation for us in the house of his servant David; (70) As he spake by the mouth of his holy prophets, which have been since the world began: (71) **That we should be saved from our enemies, and from the hand of all that hate us;** (72) To perform the mercy promised to our fathers, and to remember his holy covenant; (73) The oath which he sware to our father Abraham, (74) That he would grant unto us, **that we being delivered out of the hand of our enemies might serve him without fear,** (75) In holiness and righteousness before him, all the days of our life.

We pray and we worship in words and in actions. Our American tradition is that we have room in this country for faith alive. That faith makes us better as a people. That room is what Congress should assure once again.

Thank you.

[The prepared statement of Mr. Chopko follows:]

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PREPARED STATEMENT OF MARK E. CHOPKO, GENERAL COUNSEL, U.S. CATHOLIC CONFERENCE

Thank you, Mr. Chairman, for the opportunity to present the views of the United States Catholic Conference (USCC) on the recent Supreme Court decision invalidating the Religious Freedom Restoration Act of 1993. As leaders of a major religious denomination in this country, the Catholic Bishops deeply appreciate the critical need to protect religious freedom, and for that reason joined the quest for a solution to the Supreme Court's 1990 decision in Employment Division v. Smith, 494 U.S. 872 (1990). The Bishops recognize the human rights of individuals and religious organizations to practice their religion free of unwarranted government intrusion at any level. Embodied in the Religion Clauses of the First Amendment, this principle is at the core of our heritage and has served our country well.

Our Tradition of Accommodation

The "religion question" in America runs deep. Religion is truly personal, but lived corporately through many thousands of worshiping religious communities. From colonial times, it has always been diverse and pluralistic. At the heart of the religious experience in America, I believe, is the conviction that religious values and practices place upon a believer a set of obligations, different than those embraced for convenience or even choice. **Forcing a religious observer to choose between God and country in a sense was always considered unconscionable. It was from this shared experience, I believe, that there developed a spirit of accommodation**. The history of accommodation reflected in judicial interpretation and colonial experience is thoroughly reviewed by Professor Michael McConnell, who testifies in these same hearings, in his seminal article about the Origins of the Free Exercise Clause. THE ORIGINS AND HISTORICAL UNDERSTANDING OF FREE EXERCISE OF RELIGION, 103 Harv.L.Rev. 1409 (1990). The spirit of accommodation reflected the idea that, to get along in peace, we sometimes have to make exceptions for others' differences. We tried, sometimes imperfectly, to model "doing unto others, as we would have them do unto us." For this reason, I think accommodation, not conformity, was the national golden rule and it found expression in our laws and traditions. In 1952 in Zorach v. Clausen, 343 U.S. 306, 314, Justice William Douglas reminded Americans that, when public institutions make adjustments in the conduct of their affairs to account for "sectarian needs, it follows the best of our traditions."

Religious people no longer live in these times. In 1997, we live in a time of in
creasingly complex and highly regulated social structures. We routinely deal with
large and often unaccommodating government bureaucracies. The world of our pred
ecessors, like the America of the Framers, has been transformed. The presence and
power of the government is pervasive and compelling in ways not imagined by them.
Social, educational, and health and welfare services, formerly and in colonial times
delivered almost exclusively by churches, now are vast public programs character
ized by conformity to bureaucratic and administrative convenience. The breadth and
penetration of regulation has made government, not individual choice or religious
value, the most dominant force in our society. America is becoming rapidly more
secular and the governmental bureaucracies with which we must contend have be-
come increasingly inflexible.

The Question of Religion

For religious observers, there was always hope. The Free Exercise Clause of the
Constitution held open a promise that government could not "prohibit the free exer
cise" of their religion. Over time, the Supreme Court of the United States enforced
this promise by requiring those who would burden religious practices to show that
the burden was the narrowest means necessary to fulfill a compelling governmental
interest. Administrative convenience was not good enough. Conformity was not ex
pected. Rather, the government had to demonstrate why its proposed inroad on reli
gious practice was justified. Over time, especially in the 1980's, the Supreme Court
eroded this promise, sometimes applying and sometimes not applying the compelling
interest test. More often than not, courts shifted to a test where religion was bal
anced against the asserted government interest. As I noted in testimony before the
Subcommittee in 1992, in the years prior to Employment Division v. Smith, 494 U.S.
872 (1990), the Supreme Court had not always applied a compelling interest analy
sis and religion often did not fare well. The track record for religious claims in the
lower courts was even worse. Religious scholar and Federal Judge John Noonan
aptly demonstrated this trend in his dissenting opinion in EEOC v. Townley Engi
neering, 859 F.2d 610, 622-25 (9th Cir. 1988). In an appendix to his dissenting opin
ion, Judge Noonan listed 72 decisions under federal circuit courts of appeals, 65 of
which were decided against the religious claimant. Thus, perhaps it was a small
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step for the Supreme Court in 1990 to abandon the pretext of compelling interest
analysis and substitute a simple rational relation test.

More importantly, in the Smith decision in 1990, the burdens of proof and persua
sion were dramatically altered. Any litigator will quickly note that who bears the
burdens is at a disadvantage. Prior to Smith, the governmental entity imposing the
regulation or denying the exemption had the burden to prove that it was justified.
Even though a true compelling interest test was not always applied, the burdens
placed on the government were not insignificant. After Smith, absent deliberate dis
crimination or where another right is implicated, the burden is now on the religious
claimant in a Free Exercise case to show why the government acted unreasonably.
In declining to follow a strict scrutiny or compelling interest analysis, and deciding
to shift burdens to the religious claimant, the Supreme Court made religious values,
once accorded the highest treatment in the American society because of the widely
recognized dilemma that a conflict between religious obligation and governmental
prescription would create, subject to a mere rational basis test. Religion was not
well protected in Smith, and something needed to be done.

I must also acknowledge that, although USCC came to embrace the Religious

Freedom Restoration Act, in my 1992 testimony, buttressed by a 1991 analysis and other critiques, we expressed reservations about the precise legislative bill then pending in the Congress. We were absolutely convinced that the statute, despite its name, was not restoration. It embraced a broader application of the compelling in terest test than had been applied in the cases immediately prior to Smith and would apply the test in a broader class of cases. More importantly, we were convinced that this was not simply a revision or rewrite of constitutional language. We were not "restoring the Free Exercise Clause" as some would have wanted the American pub lic and others to think. Only the Supreme Court can "restore" the Free Exercise Clause. USCC recognized from the outset that Congress was writing a new statu tory right, making it unlawful for persons in government to take any action that would have the effect of burdening a religious practice unless there was some com pelling reason to do so. When adjustments were made by the sponsoring coalitions and drafters in the Congress, USCC strongly endorsed the legislative model because we were convinced that the Supreme Court would not readily abandon the rule of decision that it had adopted only three years before in Smith. Our concern about whether the compelling interest test would be a legitimate basis on which to contend with government, to be frank, has been shown to be not well taken as, in fact, under the Religious Freedom Restoration Act, religion did far better than many of us thought it would. The courts took seriously Justice Antonin Scalia's warning in Smith that a true "compelling interest test" would be the highest and most difficult test for the government to pass. Under RFRA, accommodation was once again the rule. ???????????

Finally, I would be remiss if I did not note that Employment Division v. Smith is only part of the problem confronting religion across the board. Taken together, Employment v. Smith and Aguilar v. Felton, 473 U.S. 402 (1985), penalized religion to a very great extent. For those whom the Religion Clauses were ordinarily designed to protect, religious people and their religious organizations, the law had been turned inside out. Aguilar placed the burden on the religious claimant to show that a beneficial state program involving religious organizations (in that case, reme dial education of poor children), was itself constitutional to a certainty. Despite a record in which there was a never a violation of any constitutional precept, Aguilar ruled that, because the government could not prove to a certainty that there would never be a problem, the program was declared unconstitutional and enjoined. To the same extent, Employment Division v. Smith placed the burden on the religious prac titioner to show that the government was acting unreasonably. Thus, conduct bene ficial to religion, either attained through governmental programs or sought as an accommodation between religious obligation and governmental regulation, was sub jected to additional litigation burdens before it could be sustained.

Throughout these last several years I asked whether the judicial process itself was contributing to a spirit of hostility towards religion. Indeed, **Smith laid the problem back at the feet of legislators, noting that if religion wanted some accommo dation it should seek accommodations through the legislative process**.

Hmmm. But wouldn't that require "interpreting the Constitution" which Boerne doesn't allow?

At the same
time, cases like Aguilar and Texas Monthly v. Bullock, 489 U.S. 1 (1989), raised the

specter that, if an accommodation were in fact obtained, it could be declared uncon stitutional under the Establishment Clause because it would have failed the very high threshold created by the Court. This situation created, in my view, the politics of doing nothing. Why should government regulators give an accommodation if it would be subject to invalidation under the Establishment Clause? The Religious Freedom Restoration Act addressed some of this problem. The June 23 Supreme Court decision on Agostini v. Felton, U.S. , 65 U.S.L.W. 4524 (1997),
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reversed Aguilar and may prove very significant in the long run to promote better cooperative relations between government and religion. For forty eight hours at the end of June, things were looking up. Unfortunately, on June 25, the Court's action in the City of Boerne v. Flores, U.S. , 65 U.S.L.W 4612 (1997), has brought us back to where we are today.

The Boerne Case

In City of Boerne v. Flores, the Court followed the restoration rhetoric and not the law. The Court took seriously the proposition that the Religious Freedom Res toration Act "restored the Free Exercise Clause" to its pre-eminent position in Amer ican life. It was a political proposition, not a statutory rule. The rhetoric was not law. If RFRA were simply restoring the Free Exercise Clause, USCC and others might have continued to resist RFRA as potentially unconstitutional. Congress does not have the authority simply to restore the Free Exercise Clause.

Indeed, doesn't Congress have the remedial authority to neutralize threats to Free Exercise by courts, through jurisdiction stripping?

But the Con
gress, we thought, and still think, does have the power to enact a statutory remedy to protect religious rights. The brief of Archbishop Patrick Flores, ably prepared and argued by one of the preeminent constitutional lawyers in the United States today, Professor Douglas Laycock, lays out the reasons why the Religious Freedom Res toration Act was well supported by the Court's precedent in the Voting Rights Act and other cases. If the Court had followed the law and followed the theme of its own decisions, instead of the rhetoric, it would have reached the same conclusion as the federal courts of appeals: that the Religious Freedom Restoration Act was constitutional.

What the Court did was write a decision about power and the allocation of con stitutional power, not a decision about religious liberty. Certainly, there is almost no mention about the idea of religious liberty and the need to protect it extensively except in the dissenting opinions.

Indeed, great point. This was all about challenging Congress' "last word" authority. Religion was "collateral damage".

Smith is (and was) the law on Free Exercise and
there may not be sufficient votes on the Court to revisit Smith anytime soon. With- out the Religious Freedom Restoration Act, we are thrown back into the chaos that confronted religious organizations from 1990 to 1993. Others, notably the Baptist Joint Committee on Public Affairs, have catalogued the litigation results in cases following Smith. As the analyses prepared prior to the adoption of the Religious Freedom Restoration Act bear out, courts which applied the Smith analysis to a va riety of civil statutes and claimants almost inevitably reached the result that reli gion loses and the government prevails. This is not a good state of affairs for reli

gious claimants and it is distinctively un-American.
RFRA followed the best of our traditions. It required adjustments to the regu latory and service machinery of government for religious persons and practices un less some countervailing important reason was being sacrificed in the process and could not itself be obtained in some other way. It tipped the scales of justice slightly back in the direction of religion. Given our history and public traditions, the near united support among the American people and the Congress, RFRA seemed to strike a responsive chord in the soul of our country. We were finding ways to accom modate our differences in a complex highly regulated society. In simpler times, we might have been able to do so by persuasion or by making accommodations as "the right thing to do." **In our litigious society, dealing with bureaucracies that expect conformity and lack mechanisms to make exceptions or evaluate the strength or weakness of various requests for exemption, RFRA served as an important tool in negotiation, bargaining, and reaching compromise** in more instances than we can count.
Why a Religious Freedom Act is Needed
It is for this reason, primarily, that USCC still advocates some legislative remedy to protect the religious freedom of all Americans. We do not believe that anti-reli gious discrimination is rampant. In fact the Smith case, confirmed several years later in Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), notes that gov ernmental entities which target religious practice for adverse treatment must show a compelling interest in order to sustain this kind of action. Intentional discrimina tion is not the rule and discrimination is not tolerated in this society. But anti-reli gious feelings, especially about religious minorities—and we are all a minority some-where in this country—is still felt even if it is not express.

Indeed, my own reservations about Satanism and Islam are not “anti-religious”. They are “anti-insurrection”. “Anti-crime”. White washing them, lying about their threatening elements, is “anti-reality”. Individual followers should not be prosecuted for less than crime or incitement. But the religion itself should not be promoted, its criminal elements whitewashed, and other citizens forced to “accommodate” or “respect” them. Civil rights laws need to be modified to match reality. Renting, hiring, bank accounts, need to be set free to take cognizance of threats to law, honesty, and freedom.

Moreover, it is also wide
ly recognized that burdens can be created for religious practitioners and on religious practices in myriad unintended ways. The litigation which gave rise to the conflict in the City of Boerne is an apt illustration. **There, the facade of the Church ex-tended into a historic district. The Church leadership was willing to make an accom modation and preserve the facade but it needed to expand its sanctuary in order for that Catholic parish to worship as a community.**
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We Catholics find the Body of Christ in community. The need to worship together as one body is a sign of our unity and solidarity not just with each other but with

our risen Lord. Catechism of the Catholic Church, ¶¶1108, 1140-41. We celebrate together in community as an essential element of our worship. Id. at ¶1179. The inability for the Catholics of St. Peters to worship together in community in the con secrated space dedicated for that purpose was a direct affront and a substantial burden to that community. As restated in the Catechism (¶1180), "When the exercise of religious liberty is not thwarted, Christians construct buildings for divine wor ship. These visible churches are not simply gathering places but signify and make visible the Church living in this place, the dwelling of God with men reconciled and united in Christ." The inability of the City leadership to make an accommodation in that instance, therefore, penalized the rights of the worshiping community and burdened their religious practices. The Religious Freedom Restoration Act held out a strong, but not exclusive, avenue for relief.

There are thousands of St. Peters churches across the country. They do not all have zoning problems. Churches, mosques, synagogues, and individual practitioners routinely conflict with the demands of the bureaucratic, highly regulated society. We do not always understand the impact of even asking a witness to swear an oath, as some faith communities will not allow their members to do so. We do not always understand why asking a Sikh to remove his head covering in a court to show rev erence for the judge ascending the bench is an affront to his religious belief. We do not always understand how autopsy or uniform donation of organ rules can ad versely impact the rights of religious believers who, when their bodies are violated, can be denied eternal life. When we lose the right to be different, we lose the right to be free. When we lose the sense that we need to get along, to preserve the civic peace which is a value at the core of our constitutional democracy, we threaten the very heart of what it means to be an American. Our tradition is that we find ways to get along. Our tradition is that religion has always been accorded different and beneficial treatment

Religion has always been accorded special status under the law. It is the First Right mentioned in the Bill of Rights. It has often been understood that religion places obligations on its adherents that are different from even the claims of a moral, but secular, conscience. To be denied the right to conduct a ritual that one believes in strongly for secular reasons does not have the same potential impact for that person as it does for a religious observer who may not worship in community in consecrated space. The choice between a peaceful life now and a peaceful life in the hereafter is not one that many of us would want to foist on ourselves or our neighbors. RFRA allowed us a way out. We need to find another one.

What Shall We Do?

I must note that my own thoughts about how to deal with the City of Boerne v. Flores decision are still in a very preliminary state. Indeed, they are evolving the more that I have discussions and the more that I read and research. I also confess that I must rely, and **I would urge the Committee to rely, on experts on Separation of Powers and Section 5 of the Fourteenth Amendment.** Although I believe that I have some learning in the law, especially on constitutional process, religious liberty, and liability theories, Separation of Powers, federalism, and the intricacies of Sec tion 5 and other avenues of Congressional authority are not my strong suit. I would urge the Committee to seek experts to provide opinions on what the limits and reach of Congress' authority would be in light of the decision in City of Boerne. I would especially invite the Committee to ask those who have been critical of the approach adopted in the Religious Freedom Restoration Act to outline possible legis lative remedies. Some are already outlined in the legislative record compiled in

1992. There is more work to be done.

My own view is that the Congress should explore a statute first. Only if it is satis
fied that a statute would not solve the problem which the City of Boerne decision
created, should Congress consider a constitutional amendment. In designing a stat
ute, obviously, the Congress would have to explore alternative and different bases
for legislative action. These would include the Spending Clause, the Commerce
Clause, Privileges and Immunities, and even Section 5 if a record can be compiled
showing the precise nature of the problem and the way in which the problem must
be solved. Second, it is important that Congress itself be on record, not against
Boerne and not necessarily against Smith, but for religion and for religious
liberty.
The Congress can recommit itself to this value in any number of ways but it should
be on record to seek solutions for religion, recognizing that it will explore other ways
in which it can exercise its power to protect the American public.
Third, I would also note that some exploration of the intricacy of state laws, of
litigation and of a constitutional amendment should also occur. There are disadvan-
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tages associated with each of these concepts and, therefore, I assign them a lower
priority on my own set of remedies. State laws will create a hodgepodge of rules
that will create uneven protection for religion across the country. **We could be creat
ing new and unique problems, especially in those states which have Blaine amend
ments that have denied religion the benefit of public programs.** A litigation strategy
may be a way of testing whether there is strength beyond the three dissenters in
the City of Boerne case or the proposition that Smith should be revisited and aban
doned. The Court revisited and abandoned Aguilar when there was a sufficient pas-
sage of time and a sufficient change in law. The Court did not reverse Aguilar be-
cause it created an inequity in the delivery of services to poor children, but because
Establishment Clause jurisprudence had evolved. So, too, I do not think that the
Court will revisit Smith because it has created practical problems for the religious
community in the United States.

Prisoners recidivism and zoning discrimination are not "practical problems"?!!

The Court would have to be persuaded that Smith
does not adequately or accurately state the constitutional law. It is not at all clear
that the Court will do so anytime soon.
Finally, a constitutional amendment process would be divisive, and there are
many issues that would have to be evaluated and resolved in order for an amend
ment to move forward. USCC believes that some of the present difficulty for religion
has occurred because **the Religion Clauses have often been read and
interpreted as somehow in competition with each other. The Court
contributed to this problem through separate interpretations of these
Clauses in the 1940's** and separate and differing constructions in the
evolving litigation process. A constitutional amendment would have the

opportunity, I think, to address this problem and perhaps get at the root of the difficulty, namely, a unitary construction of the Religion Clauses in a way that it is beneficial to religion. **USCC has tried to contribute to this debate by writing briefs, first attacking Smith in Church of Babalu Aye case noted above, by the brief that we filed in the Agostini case, and through scholarly articles.** I would be happy to provide copes of these briefs and articles either for the record of these hearings, if this Committee believes it appropriate, or later if the Committee or its staff wants to explore a broader approach to the question of religion in America.

In conclusion, the Congress has a difficult but important job ahead of it. City of Boerne v. Flores has thrown the national religious community back to where we were in 1990. We have learned much in the interim about the need for legislation to protect religion and the ways in which the religious community and the Congress could work together to solve problems. We need to join our efforts again to address this difficult situation and move forward effectively to protect religious liberty in the United States. USCC will be pleased to assist in that process.

Mr. CANADY. Thank you, Mr. Chopko, and, again, I want to thank all the members of this panel for your testimony.

I want to join in, I think, the unanimous opinion that's been expressed thus far today that it would be ill-advised for us to embark on an attempt to amend the Constitution in response to this deci sion at this point. I think that there are important avenues for us to explore legislatively that can address the problems raised by the opinion, and that should be the course that we follow rather than trotting out with a constitutional amendment, which most likely would not pass in any event and which would be at the very best premature at this point. And what I would envision is this Con gress looking at the various legislative routes available to us under the spending power, in particular. In looking at the information I've seen, it seems that that could very well be the most fruitful route for us to follow.

I don't want to prejudge that, but there is a long history of Con gress acting under the Spending power. We have title 6 of the Civil Rights Act. In this context of religious freedom, we have the Equal Access Act which was linked to the Spending power, so there are a variety of things that I think we can pursue, and there's a good precedent to support action in that arena, and it would only be if, after doing that and enacting measures pursuant to those other powers that if the Court struck our action down in that context,

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then I think we would have to look at other alternatives. I think that's consistent with what a number of people have suggested.

Let me focus on one aspect of this that I raised in my initial statement, and that is, what impact the Boerne decision has on RFRA as applied to actions of the Federal Government. I think that the major concern under RFRA was motivated by things going on at the State and local level, but RFRA does apply to the Federal Government as well, and I understand that a case involving the ap plication of RFRA to Federal bankruptcy law was remanded by the Supreme Court for consideration in light of the Boerne decision. I wonder if any of you have a comment on that aspect of this issue, and what we need to be doing as Congress to focus our attention on the application of RFRA at the Federal level?

Mr. STERN. If I might, sir—

Mr. CANADY. Mr. Stern.

Mr. STERN. First of all, Mr. Laycock—who will be, I think, testi fying later—represents the bankrupts in that case and can prob ably speak somewhat authoritatively than I, but to answer your question for the moment, there are at least two questions that come to mind: One is severability. The Court will have to decide, having struck most of the statute, does the other part go with it? I can tell you when we drafted RFRA **we got caught in a sort of warp between the House and the Senate, because one of the bod ies—and I don't remember which—insists on a severability clause; the other absolutely refuses to put them in, and we sort of finally gave up and left it to the Congress to work out, but that question does remain.**

There is, as well, in the Boerne opinion language, which I think was not determinative, that talks not so much about federalism and Congress' power under section 5 of the 14th Amendment, but talks about the Court's prerogatives vis-a-vis the Congress, and it is at least a possible reading—I think a wrong one—but a possible reading of the decision that the entire act is infected with a con gressional usurpation of the Court's role—

Interesting that what became very clear later was initially a matter of speculation: Boerne allows RFRA against federal authority, but states can pass their own.

Mr. CANADY. It's a separation of powers issue.

Mr. STERN. Right, a separation of powers argument. We're just going to have to wait and see. I can tell you that the—as I think you may know—that **the White House has taken a position, and is instructing *Federal* agencies that they are to continue to work as if RFRA applied.** In the bankruptcy case some of the parties who are *independent* of the Federal Government will be arguing that they're *not* bound by RFRA.

Mr. CANADY. Anyone else want to comment on that? Mr. Chopko.

Mr. CHOPKO. I agree with Mr. Stern's observations and theories. This opinion, **much language about separation of powers.** At page 23, for example, the Court criticizes the Congress for attempting a substantive change in constitutional protections. That is not lan guage which is limited simply to a concern about federalism, but to **a broader concern about composition and interpretation of con stitutional language. So I think this is one area in which the Con**

gress should tread carefully.
As a practical matter, I think that, regardless of whether you be
lieve in a broad or a narrow construction of the City of Boerne deci
sion, in any legislative remedy, the Congress could consider, for ex-
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ample, separate sections that lay out specifically Federal protec
tions, State protections, a severability clause, and additional find
ings, and so on. Anything that you do is going to be back in the
courts, and that would probably enhance the clarity of legislative
action and the likelihood of its passing judicial muster.
Mr. STERN. If I might add one thing to my answer?
Mr. CANADY. Mr. Stern.
Mr. STERN. It occurs to me that, **given that remand and the fact
that the Eighth Circuit will be reconsidering it, and given this lan
guage that may talk about judicial prerogatives—at least at first
thought, and I haven't thought it through—it might be unwise to
proceed immediately to try and short-circuit that with a formal
congressional decision in the form of a law that said, "We now de
termine that that part of RFRA that affects the Federal Govern
ment remains in place." If, in fact, the Court is concerned about its
prerogatives against Congressional in intervention in pending liti
gation, I'm not sure how wise it is to sort of quickly throw the
gauntlet down right now.** It may pay to wait an Eighth Circuit de
cision; see where that comes down, and then act in response to that
if that's necessary, but, again, I'd like to hear from Mr. Laycock
myself.
Mr. CANADY. Anyone else with a comment on that point? Mr.
Thomas.
Mr. THOMAS. I do think that it's very important that Congress
move as rapidly as possible. **Religious liberty is a wildly popular
concept in the abstract, but when, as you know, as from some of
these prison cases, when you start applying it to specific cases,
that's where we split apart.** **We have an extraordinary, unprece
dented coalition of religious and political and civil liberties groups
working together now, ranging literally from the Traditional Val
ues Coalition to the American Civil Liberties Union—I could go
on—68 national organizations.** And having been through this one
time, I know that **when the religious community finally gets to
gether with the Congress, we can do something pretty quickly**. We
spent a lot of time haggling among ourselves—some of that was my
fault—haggling within the religious community, but at this point
I feel like we have a real consensus on how to do this; what the
broad principle ought to be, and once the constitutional scholar-
ships satisfies the Members as to the proper avenue—is it the
Spending Clause?—which I tend to agree with the chairman on—
or is it another provision? Then, I think we ought to move as quick
ly as we can.
Mr. CANADY. Mr. Colson.
Mr. COLSON. I'd just like to add one thing to that, if I might, Mr.
Chairman. I've been struck, today, by the extraordinary unanimity

of opinion in the four panelists except for one point, and that is Mr. Stern and I disagree somewhat on the implications of the RFRA de cision. I think it's the biggest constitutional challenge that has been laid down by the Supreme Court, certainly, in my lifetime and in my reading of the law well before that, perhaps going back to the Civil War. But what Marbury v. Madison really said—and it was an assertion of power that was not given by the Founders— was that "If in the case of controversy, the law is different than the Constitution, the Constitution prevails." That's obvious. **It never**

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said the Congress did not have the right to substantively legislate in protection of constitutional liberties. This Court has said that.

Now, this Court has shown a certain degree of elasticity in its reading of prior decisions, to say the least. The legal gymnastics it has gone through —but it could never go through contortions great enough that once - they say the Congress *doesn't* have power with respect to the 14th Amendment; it *does* have it with respect to Federal jurisdiction.	The grammar is awkward to the extent of apparently omitting a negative. Based on Colson's general testimony, I think he means "This Court could never go through contortions great enough to not only deny Congress authority through Section 5 of the 14th Amendment, but to also deny Congress authority to limit Federal jurisdiction."

This issue is over - as far as RFRA's application: It will be no longer valid in the Federal jurisdiction where they could reason their selves into that, given the decision they've written.

So, the time to act is now. The only thing I would say, Mr. Chair- man, is act with dispatch, because the longer there is a pause be- tween this shocking decision of the Supreme Court and silence on the part of the Congress, the more you are ratifying the Court's saying, "You don't have the power to substantively legislate in en forcement of constitutional rights," which is a preposterous doc- trine.

Mr. CANADY. Well, let me quote Mr. Stern in connection with the point you make, because in Mr. Stern's written testimony he says, 'The Court's decision is particularly problematic, because it does not lay down any discernable rule by which Congress can deter- mine in advance whether a particular piece of legislation does or does not pass muster under section 5. Instead, the Court has re- served to itself the right to determine whether an exercise of con gressional power is proportionate to a problem as the Court sees it." This new test, for which the Court was able to cite exactly no case or other authority, massively shifts power from Congress to the courts, and I agree with Mr. Stern's analysis there. When you're finished reading the case, you can conclude that "Well, we know if we can act if the Court says we can act." They go through the process of trying to distinguish these civil rights laws from which they have upheld from this enactment, this civil rights en actment, but there is no discernable principle for Congress to deter- mine when we are acting within the scope of what the Court thinks is appropriate other than the after-the-fact judgment of the Court. I think that this points, as Mr. Colson says, to a disturbing lack of respect for the role of the Congress in protecting the rights, the constitutional rights, of the people in this country.

Mr. Stern, if you'd like to respond?

Mr. STERN. I agree with what I wrote. [Laughter.]

Mr. CANADY. I thought you would.

Mr. STERN. Having said that, there's the question of how Con gress responds. Here, I think there is a fundamental disagreement between Mr. Colson and myself. I think that there is a distinction between how the Court uses [usurps] judicial review and [actual constitutional] power of judicial review. In any event, they have now taken the power; they've had it for a very long time; it's part of our established constitutional structure. My concern is in the political prudence of, declaring war between the Congress and the Supreme Court on this issue now. If that's the tactic that's used—and some have suggested that—then you've got to see that war through, and, frankly, my interest, my immediate interest, is in protecting religious liberty. I'd like to do that more quickly than I think you can finish the battle between

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Congress and the Court. That's a long term battle that's gone on for a long time.

Exactly. Courts took that power, have had it for a very long time, and the obstacle to winning this war is timidity about the "prudence" of waging it. At this time, 2025, with a violent Moslem about to control New York City and drive out its Jews, and Satanists demanding "equality", "protecting religious liberty" is going to require waging, and winning, this war, and taking back the court's usurped power, with its "equality from Hell" doctrine that is tearing Freedom apart.

The Court could turn around tomorrow, and come back to where its been, and we'll go on with some other issue. So, while, yes, I think the Congress has to assert itself, I think that's one of the rea sons why it would be a mistake—and Mr. Colson and I agree about this—to go right to a constitutional amendment, because that yields to the Court this standard, this standardless standard.

I also don't think it's wise to act in ways that are nothing more than a declaration of war. That the cautious approach that I've out- lined in my testimony suggests that there are powers of Congress that the Court has recognized; that are well settled; that you can make the record that would put to the Court, "We're coming back, because we think we are within our powers in reaching these sub stantive results. Here's another way of looking at it." I think that challenges the Court without declaring war, and that's—I think it's Professor Ely who talks about a dialog between the Congress and the courts. I think that's likely to result more quickly in protection for religious liberty than an unvarnished attack on the Court, be- cause an unvarnished attack on the Court, I think, given the lan guage in Boerne is going to result in another invalidation.

Not if, as Colson points out, it stands on jurisdiction stripping.

It will be two, three, four, five years down the road; we still don't have protection for religious liberty; we may still not know exactly where Congress and the Court stand.

So, my disagreement is not about the substantive wrongness of this decision, but a way of advancing both needs: the need to pro tect the power of Congress and the need to protect religious liberty as quickly as possible.

Mr. CANADY. Thank you, Mr. Stern. Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Let me ask a kind of fundamental question first: Do any of the witnesses see anything in the decision that would restrict a State from passing RFRA?

Mr. THOMAS. Many are considering that, and some have already taken action. Michigan, for example, just last week passed a State RFRA; Connecticut and Rhode Island have already done that. We have gotten calls in the coalition from other States as well. I don't see anything that necessarily precludes a State from doing that, and so, we, as a coalition, are encouraging States to take that step. It remains a possibility that a State supreme court on its own con struction of its separation of powers doctrine might, as these six Justices have done, reach out and say, "I'm sorry, you've gotten over into our turf; you can't do that." I think it's much less likely at the State level, particularly given the nature of many State con stitutions.

Mr. SCOTT. Well, if the States—if there's no prohibition against the States passing it, then we wouldn't have a problem with the Spending Clause, from a Federal perspective, requiring, as a condi tion of receiving money, that States pass these statutes.

Mr. THOMAS. Well, that's another good reason to seriously con sider the Spending Clause, which I think is perhaps your best al ternative.

Mr. COLSON. The State solution, though, Mr. Scott, I don't be lieve is one that would be satisfactory to the religious community,
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because you'd have a patchwork quilt of different laws and dif ferent exemptions. In many States, prisoners—the group that I think need protection the most—would likely be excluded. So that

for Congress to leave it now to the States would be a terrible admission that the Court was right. I mean, I don't think the Con gress can turn away from the challenge.

Mr. THOMAS. I didn't hear that. What I heard, is that favorable state law strengthens your hand to pass legislation under the Spending Clause which we would support, because we agree with Mr. Colson that otherwise we end up with this crazy patchwork of protections with people wanting to move into a particular State because their religious is protected there. Many States will put ex emptions on their RFRAs, and we will not have a uniform protec tion for religious exercise.

Mr. STERN. Mr. Scott, may I? I agree with the need both for State RFRAs and for Federal action. There are, however, I think, two things you ought to keep in mind: One, is Justice Stevens' con curring opinion, which I think does not command at the moment any other support, but which **suggests that any preferential treat ment for religion is an establishment of religion. I expect that that argument will be repeated in State supreme courts.**

Mr. SCOTT. Was he the only Justice—

Mr. STERN. He was the only Justice now who joined that; it's been his view for a long time.

The second point I would make about State RFRAs is that the tendency is to assume bipolar litigation; that is, a religious believer or his institution seeks exemption and the defendant is the State or a local government. In fact, as the bankruptcies show, there are frequently cases where third parties become involved and sort of stand in for government. That's not unheard of, and so if you have—I gather your question is, "Well, if the States pass RFRAs, why are they going challenge our spending power?" And one of the answers to that might be that there are going to be cases where it's not the State who's the defendant; some private defendant who's clothed with State authority may act to challenge it, so I don't think you can—it follows necessarily from the fact that the States have—if every State were to enact RFRA exactly as the Con gress wrote it the first time, so you didn't have the exemptions that we've talked about, it doesn't follow that nobody challenge Con gress' spending power.

For instance, a prison guard sued separately might challenge it if the remedies were more drastic under Federal law than under State law. I mean, I think in general I agree with what both Mr. Colson and Mr. Thomas have said, but I think for completeness of the record there are some possibilities that are not foreclosed.

Mr. CHOPKO. If I can add just a word. To a lesser extent than any other panelist, **I am an agnostic, maybe an opponent, of mov ing quickly into a patchwork of State religious legislation. We have asked our State people to go slowly on that question to allow an opportunity for the Congress to act.** State laws would create study this to avoid a patchwork quilt of protection with unequal applica tion. Your idea's intriguing,
but you would have to then figure out

how it would fit within the framework of State law. Many States have Blaine amendments which restrict benefits from government
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to religion that have been interpreted in a way that is especially hostile to religion. So there are separate State law problems that might actually be made worse in a State regime than in a Federal regime.
Finally, I would not, if I were in your position, want to abdicate the important role of the Congress in protecting religious liberty. In a sense, you would be throwing up your hands and saying, "We'll let the States do it. In fact, we'll give them the schematic to do it, but we'll let the States do it." I don't think we're there yet. I think there are numerous avenues that need to be explored.
Mr. SCOTT. **One of the things that the Supreme Court pointed out in their decision was that there was a lack of a legislative record of what the problem is. Could the witnesses, for the record, cite cases where the discrimination is a problem that needs to be remedied?**
Mr. CHOPKO. There are examples, Mr. Scott, in every religious community. The City of Boerne case is a good example, and, again, it's not one where I think that regulators and zoning and housing administrators are going out of their way to specifically discrimi nate intentionally against religion, but there are numerous dis criminatory effects that occur.
There are parking cases or building cases involving the Catholic diocese in Palm Beach, Florida and Buffalo, New York. There was the problem in which the earthquake damaged unusable the cathe dral in Los Angeles. It was attempted to be *preserved* on account of its historic significance when no one could use it. The city and the county of Los Angeles were on record as hoping the Archdiocese of Los Angeles would build a *new* cathedral and center so that they could attract private money to rebuild parts of the city of Los Ange les.
Mr. SCOTT. Are there some general themes, overall themes, of where the problem is, so that next time this comes to the Supreme Court we'll have a record of exactly what we're aiming at?
Mr. STERN. Yes. I think there are some. They could have looked at their own opinions. In Larsen v. Valente, they invalidated a charitable solicitation ordinance, because, as they found, the ex emptions in the act had been drafted to exclude one particular church. In Church of the Babalu Aye v. City of Hialeah, which Pro fessor Laycock—disregarding my sage advice—took to the Supreme Court, because I thought he couldn't persuade the Court that this was an ordinance directed at the church—managed to persuade nine Justices unanimously that it was discriminatory. But if you look at the record and the trial below, a very able trial judge and three very able circuit court judges found no evidence of religious discrimination.
The city of Starkville, Mississippi had given zoning variances to every church from parking requirements until a mosque came

along, and asked for the same variance. They get turned get down. The Fifth Circuit doesn't quite say that it's discriminatory. They stopped just short of that, and found a more polite way of ordering that the variance be granted.

In Airmont, New York, a village was incorporated specifically to carve itself out of another community which had a large orthodox Jewish population. I was consulted early on; I saw the early state-

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ments of the incorporators. They were about as violent, anti-semitic public campaign as I have ever witnessed in 20 years working for the Jewish community. The case comes to a district judge; of course, it's all cleaned up, and "It's not why we did it." The district judge finds no evidence of discrimination. The case gets to the sec ond circuit and they finally find intentional discrimination.

Currently pending in the city of Beachwood—there is a rather unpleasant intra-Jewish debate about whether an orthodox Jewish school will be allowed into the community, and the flyers handed out at the community said, "Do you want those people coming into our community. They don't send their children to our public schools; they're going to hurt the community; they're going to hurt the tax base." The matter gets decided by the zoning board, and the record shows the zoning board deciding, "Well, this is an inap propriate use for a big street. There are other places in the commu nity you can get them." So, that happens.

I don't know of a single case in which the Church of Latter Day Saints in Utah has had a zoning problem, but I do know within the last four or 5 months I've been consulted twice by people who want to keep the Church of Latter Day Saints out of New York and Mas sachusetts. One is hard-pressed to resist the conclusion that atti tudes towards the Church of Latter Day Saints play some signifi cant role in that.

A case that was well known immediately before the passage of RFRA involved an autopsy of a Hmong individual in Rhode Island. When the coroner was asked, "Why are you doing this autopsy?"—to which there were religious objections—he could give no reason. Now, the district court in that case, under prior law, didn't have to find intentional discrimination, and didn't, but you can't read the record in that case and conclude that it's anything else but dis regard for an unpopular faith. If I were representing an orthodox Jew objecting to an autopsy, I am quite convinced, based on having done it many times, I would not have been given the back of the hand of the way the Hmong were done. These are just sort of off-the-top-of-my-head examples, and there are others in the room who have others. I'm sure we could, given the time, we could document that so that even the Supreme Court would be satisfied.

Mr. THOMAS. Mr. Scott, one resource that members of the sub-committee might want to consult and make part of this record is the very thorough brief that was filed by the Church of Jesus Christ of Latter Day Saints in the Flores decision documenting re peated instances in which neutral zoning laws were used to keep

Mormon congregations and temples out of communities in the
United States. So, that is one resource that has not just anecdotal
evidence, but well documented.
And if I might, Mr. Scott, also, I don't want to be too sanguine
in suggesting that these State RFRAs are going to be smooth sail
ing. Mr. Stern is right about the establishment problems under
some State constitutions because of Blain amendments and more
strict establishment clauses. I saw within the last month an opin
ion by **one State attorney general suggesting that RFRA-type legis
lation might be a violation of their State constitution.** So, it will be
a patchwork, and it will not suffice for Federal legislation.
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Mr. COLSON. Just one thing, Mr. Scott, to add to your focus upon
the question of whether there has been a history of this: Certainly
there has in the prison field with which I'm most familiar, and we
work in 1,200 prisons. It's a lot of negotiating in every single prison
to get free religious access, because of the authority that the war-
den must have. I've been in litigation pre-RFRA, post-RFRA; many
cases where Jewish prisoners were not allowed to wear yarmulkes
during that interim period between the Smith decision and the pas-
sage of RFRA; where communion was canceled for Catholic pris
oners in a Los Angeles jail and restored by RFRA. But the argu
ment is specious on its face that there has to be a pattern of dis
crimination before Congress could act. It's like saying that we
didn't need the ballistic missiles because none were ever fired. The
existence of RFRA protects a religious liberty, and it isn't necessary
that there has to be a long train of grievances before you can jus
tify Congress acting in this area. The very act itself prevents those
grievances.
Mr. CANADY. Mr. Hyde.
Mr. HYDE. Well, thank you, Mr. Chairman, and I thank you for
having these hearings, and this is only the beginning of—despite
the expressions of expeditious action, I think it's important that we
do this thoughtfully, and we do it well, with as wide a scope of ad-
vice as we can get, because **agreeing with Mr. Colson, I think this
is one of the most important questions that I've ever encountered
too, because it will involve the debate on judicial supremacy we
never had in this country.** It involves a reevaluation of the separa
tion of church and States nuances as it is applied. No one disagrees
with the principle, but implementing the principle gives us prob
lems. It will involve prayer in school; it will involve the whole rela
tionship of the State and churches and **the principle of neutrality**
as against hostility. There is a plethora of issues that are really im
portant, and **once in a generation, or once in 200 years, you get the
opportunity to debate these in a thoughtful way,** and hopefully,

prayerfully, resolve them.
So, I couldn't agree more about the significance of this, and Mr. Canady is the right person to chair this subcommittee and to deal with it, and we have some very thoughtful members on this: Mr. Scott, Mr. Nadler, and others, and so I think something good will come of this, but it may not be as fast as you want, but it will be, I think, a good product.
Mr. Chopko, our mutual friend, Judge John Noonan of the Ninth Circuit, in his dissent in EEOC v. Townly Engineering, noted that religious claimants haven't fared particularly well under the com pelling interest standard of review, losing 65 out of 72 times by Judge Noonan's count. **I wonder if we should consider a means other than the compelling interest standard to protect religious freedom.** Have you any thoughts on that?
Mr. CHOPKO. Well, I have two things to say about that: First is that I think **if there were a way that we could find that would actu ally strengthen, make stronger a test like compelling interest, than Congress should adopt it.** I've made suggestions
before about ways
in which we can either strengthen the scope of review or strength-en the litigation requirement, on Government **to make sure that if a burden is imposed on religion, it is only for the most stringentive**
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and exigent reasons, affecting something like public health and safety, and not just throwing it into a general calculus about public welfare.
The second thing is an observation. The courts have interpreted the Religious Freedom Restoration Act in a way stronger than ini tially I thought it would. **The courts—and I must confess to my surprise—took seriously the words of Justice Scalia in Smith, that if Congress passed a compelling interest test, and applied it, and really signified that that was the test that should be applied, it would be a very difficult burden for government litigants on the other side to sustain. To my surprise, in a sense, the Religious Freedom Restoration Act has actually worked more favorably to-wards religion.**

I'm reminded that Scalia's position in Smith is mine, to the extent "neutrality" runs amok. Maybe that was his concern too, and maybe he didn't think of attacking "neutrality" instead of attacking "freedom of religious expression"???

So, if in the first analysis some more extreme protection for reli gion could occur, that would be my preferred alternative, but if it couldn't, I think confirming the compelling interest analysis with Justice Scalia's warning in mind, would be not a bad way to go.
Mr. HYDE. Thank you, and—
Mr. STERN. May I address that?
Mr. HYDE. Surely.
Mr. STERN. **There's a tendency to count impacts of legislation by**

court decisions, and particularly appellate court decisions that tend to get reported, but in the real world laws have larger impacts. Just weeks before Employment Division v. Smith, somebody called me about a school district in South Carolina that was enforc ing a rule that barred hats; told a Jewish student they couldn't wear a yarmulke into class, and I sent word back that they had 24 hours to rethink their policy or I would be on the airplane with a lawsuit, and they would be paying me attorney's fees in another 24 hours. You can't find that reported anywhere. It's not written up in a newspaper anywhere; it certainly never reached a level of judicial decision. The school board simply yielded.

When State legislatures in the presence of RFRA consider wheth er we should write a specific exemption in; when a zoning board considers the appeal of the church there are impacts I've been be- fore zoning boards, and I've said to them, "Well, RFRA requires you to do x, y, or z," and they say, "Oh, we're not bound by that Federal law." Nevertheless all of sudden you get the result you weren't going to get before anyway. That's the impact of that law. If we have a tradition, as we have had, of Sherbert and then of RFRA, administrators, when they come to administer neutral laws, have tended to exercise prosecutorial discretion. Can't find that written up anywhere. Judge Noonan, who's a fine scholar, can't really tab ulate it very well, but it's very much part of the real world. Part of the task of the committee in the coming weeks is to sort of docu ment those impacts, and document the cases that are solved in those ways, because I think that's part of the record the Supreme Court has not had and not seen and that the appellate level doesn't think about.

Mr. HYDE. And lastly, I agree with the comment made, I think by yourself, possibly by Mr. Thomas, that the approach we use should not be all out war, confrontational. It should be more of a reconciliation attitude, **because it's very important that Congress not have its role in constitutional interpretation diminished.** At the

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same time, we must recognize the role of the court, and some mu tuality is required rather than arm wrestling, and so I think that's a good suggestion, and I can assure you that's the way we'll handle it. Thank you.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you. Mr. Nadler.

Mr. [Congressman] NADLER. Thank you. Let me ask Mr. Stern, first, then any- body else: I was struck in reading the Court decisions on section 5, essentially saying that Congress had no role in enforcing—in de termining constitutional rights. We can enforce what the Court de termined to be a constitutional right, but we couldn't extend that or add our own interpretation of what a constitutional right was. I was struck by the fact that none of the dissenters seemed to dis agree with that; that the dissenters said that the Court should have taken this opportunity to rethink the underlying question in Smith, but that on the question of the enforcing power of Congress, we seemed to have a unanimous Court which doesn't seem to give us too much to work on. Could you comment on that?

Mr. STERN. **I was struck by the fact that the Court doesn't even make an attempt to deal with what Morgan seems to hold; what everybody in the legal profession seemed to think that Morgan held.**

There has been some concern by some of the Justices—Justice Rehnquist, for example; Justice Stevens at one point—-over whether Morgan was as broad as some people had interpreted it, and I don't find anything in City of Boerne that grapples with that. I mean, you'd never really know that, as you said, that Morgan seems to have a far broader section 5 power in mind. However, the fact that even the Justices sympathetic to the bottom line of upholding RFRA—we're not prepared to write opinions saying that Congress acted, as I think it did, in reliance on Morgan—indicates it's not going to be a very profitable avenue to mine without very, very clear factual findings.

If it's a question of pulling over a Justice or two, you can try that. But if you don't—if you have the sense, and they don't even take the theory—and it's one of the reasons for my caution, because I just don't see where we have a foothold to begin to argue with the Court.

Exactly. This court is not going to give up its Hell-inspired "neutrality" between God, Satan, and Satan's terrorists, with polite arguments. It will require stripping their jurisdiction.

Mr. NADLER. Let me ask one further question: Does anybody have anything other than what Marc just said to comment on that?

Mr. COLSON. No, just to underscore it, because that's why this case is so radical; that's why, as Chairman Hyde said, it's one of those opportunities, one of those issues, that comes along only once in a generation or perhaps once in the life of the Republic, because this question's never, ever been confronted. And I agree—Mr. Stern, maybe is a better Jew than I am a Christian, because I get **my hackles up when the Court says to the people they can't legis late in accordance with their own moral traditions to protect a pre-existing right, a self-evident inalienable right our founders believed in.** So, I would get a little bit angrier, and it's the reason I don't think you can let this issue slide, because **they've thrown it in your face. This is new law.**

Mr. NADLER. Let me ask a different question: The Flores decision talks about a legislative record. I, for one, thought the testimony of the extent to which people's rights were being violated and were in need of a remedy, before this decision was, to coin a phrase, "compelling." I thought it was clear that we were anticipating that minority religions would receive less favorable treatment from the political branches of government in violation of Smith, and we were seeking to prevent that violation from occurring. This seems an ap propriate exercise of our section 5 powers. What else could have been included in the record that wasn't that would have created more of a record that this Supreme Court might have found to be a sufficient record that we didn't already have other than—

Mr. STERN. Pictures.

Mr. NADLER. Pictures.

Mr. THOMAS. A lot of the information, Mr. Nadler, came second-hand through us. The Hmong gentleman was in one of the hear ings, but most of us came and told you about the problems we had had, and we didn't have the actual people who were affected testi fying. I think that's why we got the little reference in Flores to an ecdotal evidence. The other thing that we didn't know we had to do, which Justice Kennedy makes clear that we do have to do, is show a number of violations where religious discrimination hap-pens under the guise of facially neutral generally applicable laws, a kind of string of Hialeah-type case and I think we might be able to put that together but its more challenging.

Mr. NADLER. Let me ask the last question then. We have this July 9, 1997 Los Angeles Times article, about this case in Los An geles, about an Orthodox synagogue and the zoning dispute in a largely Jewish, but non-orthodox community, where essentially the synagogue is told, no, you can't have a synagogue there, it's a resi dential neighborhood and of course what that means is that ortho dox people can't live in that neighborhood because the synagogue has to be in walking distance because of the Sabbath, and it seems clear from the article that what was really going on was that they didn't want the Orthodox moving in as opposed to they really cared about this place of assembly which, since everybody—they wouldn't use cars—you wouldn't even know it, anyway. Do you think this is the kind of thing that makes sense to show? And if it is, haven't we had plenty of such cases beforehand? I mean, why is this dif ferent?

Mr. STERN. There have been plenty of cases. Not every case in which a church gets into a zoning conflict is one in which the church is in the right. One of the things that the brief that, Rev erend Thomas, referred to earlier, the Church of the Latter Day Saints brief documents—is not only specific instances where churches have been subject to discrimination, but if you simply look at the record of cases involving churches, you would think that orthodox Jews and small, fundamentalist churches were the domi nant churches in the United States, because they're the only ones who ever litigate zoning cases, until my good friend, Mr. Chopko, managed to lose the City of Boerne case. [Laughter.]

Mr. CHOPKO. I'm used to being blamed for whatever the problem

is. [Laughter.]
I'm trying to restore, but that's just been the problem—
Mr. STERN. Your colleagues told me I should say that.
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But
 if you look at that, just that list, and then you compare it
to the demographics of the United States, it makes fairly compel-
ling evidence that there's something going on here beyond just the
neutral application of zoning laws.
I think what the Supreme Court wants is facts and figures. They
want that shown. They want cases. They want some—I think they
want some approximation of, is this a common problem; is it an ab
erration? They want—can you smoke it out? Can you show it? I
think you can do that in the way that—and the model here, the
model referred to was really the 1982 Voting Rights Act. But the
model here really is not the 1982 Voting Rights Act hearings, but
the 1964 and 1965 both voting rights, public accommodation, and
employment discrimination hearings, where there was far broader,
real testimony, as Reverend Thomas said, by people who'd actually
been the victims and what its statistical impact was.
Mr. CHOPKO. I think you can also look, Mr. Nadler, at the record
that's been alluded to before in the Equal Access Act and those de-
bates in 1983 and 1984. I went back and looked at the record,
along with some of the case law preparing for these hearings. It
struck me that, this is anecdotal evidence. At the outset the Con
gress said it was trying to protect the First Amendment rights of
students. The record is replete with examples from every corner of
the country as to where students' rights have been suppressed.
Mr. NADLER. Thank you. Mr. Chairman. I ask unanimous con-
sent to put this in the record. And I simply want to add—
Mr. CANADY. Without objection.
Mr. NADLER. Thank you.
I simply—I noticed the rabbi isn't going to—I haven't any further
questions. I want to add one piece of anecdotal evidence that, 25
years ago. I was a member of the local community planning board
on the West Side of Manhattan. And the Mormon Church came in
and wanted a zoning variance to the building that now stands
across the street from Lincoln Center. And the subcommittee, the
committee, the zoning committee, on the community board unani
mously recommended no problem with the zoning variance. When
it came to the full board, someone got up and said, "You know, the
Church of Jesus Christ of Latter Day Saints doesn't allow blacks
to become priests." And on the basis of that objection to their reli
gious doctrine, the board then voted down the zoning variance,
with mine being the only dissenting vote.
It was reversed by the City Board of Estimate, but the whole de-
bate was, "We don't like their religious doctrine, and we're not
going to allow them to have the zoning variance."
Mr. CANADY. Mr. Goodlatte.

Mr. [Congressman] GOODLATTE. Thank you, Mr. Chairman. I want to commend
you for holding these hearings on this very important matter and
very disappointing decision on the part of the Supreme Court. And
I agree with Chairman Hyde that this may well be one of the most
fundamental issues that we have dealt with, certainly in my short
tenure on this committee, and maybe in many decades.
This is a very serious problem from the standpoint of free exer
cise of religion in this country. But it goes beyond that. The Smith
case was one of a long, long chain of cases, not just related to reli
gious freedom, but related to a great many other areas where I
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think the Supreme Court has, without changing a word in the doc
ument, rewritten the United States Constitution.
And it troubles me, because I don't think our Founding Fathers
intended that. I think they intended, quite frankly, that the Con
gress would be the principal decider of what the rights of individ
uals were under the Constitution. Along came Justice Marshall and
the Marbury v. Madison decision and bestowed upon the Court,
taking unto itself the role of being that final arbiter, and now I
think they've taken it to an even higher standard by effectively
saying that the Congress is cut out of that process, much less hav
ing a secondary role, which we clearly have had for a good, long
time.
You know, the only alternative that the Congress ultimately had,
and it always surprised me that we thought we had a great alter-
native here, was to pass a statute that was narrowly tailored to re-
verse the Smith case. We did have dicta in the case from Justice
Scalia that suggested that, if we were specific enough, we could
pass such a statute, but if we weren't specific than we couldn't do
that. But, effectively, we wanted to reverse Smith.

So a “narrowly tailored” law would provide “Fundamental right” status to religion, but ..

We wanted to
say that there was a higher standard that had to be imposed by
any arbiter before an individual's right of religious freedom could
be taken away from them. And so doing that by statute seemed to
be a very desirable thing. It passed this Congress overwhelmingly.
I think we had two dissenting votes here in the House, and a com
parable margin of passage in the Senate. But in the end, I can't
say that I am overwhelmingly surprised that, notwithstanding
some of the language in the Smith case, that the Court did reverse
it. But for us to overturn that now, and to change it, requires hold
ing together that same consensus. And maybe we can do that with

a constitutional amendment, but it's always proven very histori
cally difficult to do, and perhaps should be difficult to do. A three
quarters—a two-thirds in both the House and the Senate, and
three-quarters of State legislatures ratifying it.

On the other hand, the Supreme Court can change the United States Constitution with a narrow 5—4 decision, saying "This is what those words mean." They don't change the words; they just change the meaning of the words, which is clearly what they did in the Smith case, based upon precedent up to that time.

Which again is why limiting jurisdiction is the only remedy courts can't overturn.

So we're faced with a narrow number of alternatives here.

1 Certainly one of those is to push a **constitutional amendment.**

2 There are those on this panel who advocate **another statutory attempt** with a different alternative.

3 There are those here in the Congress
who say, well, perhaps we ought to go back to what President Jack-
son said many, many years ago: "Justice Marshall has made his de
cision, **now let him enforce it.**"

4 By attempting to point some lever-
age in this, by saying, well, if you deny people their rights under
our interpretation of the Constitution, we're not going to give your
community, your State, whatever, any **money**, you know, that's cer
tainly one way to go about it through the back door.

5 Are any of you interested in a broader approach to this, which
has been the subject of a great deal of debate in this Congress for
the first time in a long time—that **perhaps the Court needs to be
reined in,** in other respects, not just on the narrow decision of this
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case, but in terms of whether or not we need to make sure that the
people, through their elected representatives, have the authority to
act in ways that I think the Founding Fathers intended?
Mr. Colson.

Mr. COLSON. Well, without any question, Congressman, that's ex
actly the issue the Court has raised and—

Mr. GOODLATTE. That's true. They've raised it, isn't it? Now
we've got to address it.

Mr. COLSON. Exactly. I mean, they've thrown down the gauntlet.
And so I think, personally, that the broader issue does need to be
addressed.

A group of 40 Christian leaders, including three Roman Catholic Cardinals, seven bishops, Jim Dobson, Bill Brite, Jim Kennedy, the leaders of the Orthodox Church, issued a manifesto on July 4th of this year in which we decry the judicial usurpation and believe that Congress must address this question or lose the capacity of self-government. Because, you're quite right, of interpretation, the Constitution has now been reserved as the—sole provence of the Court, which was never the intent of the Founders. And this deci sion brings it all into focus.

However, I have to sit here as chairman of Prison Fellowship and say to you that I think this issue needs to be addressed first, and quickly, because the longer you wait, the more you're acquiescing to the decision of the Court, affecting the First Liberty. This has to be dealt with.

Mr. GOODLATTE. Mr. Chopko.

Mr. CHOPKO. I think that, with all due respect to the leaders of my own community who signed the statement, that I would not go full sail into studying the ways in which to strengthen the role of Congress or even to revisit traditional understandings about sepa ration of powers. I think that the religious question is at the fore-front right now and the need to protect religious liberty is of ut most importance as a policy matter. As a practical matter, I'm not sure that we have a consensus in order to fundamentally change the way in which traditional understandings of separation of power are experienced.

Of course not. We need to explain it. Especially those of us who already understand it. We who understand it should not hold back explaining it because our audience is not already convinced by our silence. A great place to start explaining is a resolution.

So, with respect to the people who joined the statement alluded to by Mr. Colson, I don't think that that's the approach that we ought to take. It's not the approach that I would urge on the Con gress, but rather to focus on the question of religion.

Finally, if the Congress wanted to focus on religion at the end of whatever debate it went through about protecting religious lib erty, that is a narrower question. I think there are a list of fun damental issues about separation of church and state, the appro priate role of institutional autonomy, protecting the legitimate role of government, protecting the legitimate province of religion. All of those questions would need to be explored and there would be no consensus, but they deserve a conversation.

Mr. STERN. Congressman, I don't think anybody in the room doubts that I think that this decision on the City of Boerne was wrongly decided as a matter of substantive constitutional law. **On the other hand, it was decided the way it was largely by Justices who have taken a narrow view of the judicial role, who have been— who were nominated by Presidents who were critical of the Court,**
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who have themselves urged doctrines of interpretation on the court.—

Mr. GOODLATTE. Mr. Stern, that's all

the more alarming, not consoling that—

Mr. STERN. I would have been happy if we had other people on the Court. We might have had a better result. But the fact is, it illustrates my point, which is that **the Supreme Court works on a vision of federalism and separation of powers, and the substantive meaning of constitutional liberties, individual liberties, which we can disagree with or not disagree with in a particular case. But if we are to take the Court out of that role, which I think, contrary to what Mr. Colson said, was in fact intended by the Founding Fathers, then we have again altered the separation of powers in ways that I don't think the Founders intended.** The Founders were not populists. They created a divided government; they created a republican government; they were afraid of mob rule, and they thought the Court was going to stand in the breach in large measure. And as unpalatable as it is to me to accept this decision, **I think it would be far less palatable if we were not to have the Court as an institution that said "no" and "yes" sometimes.**

Ah, genuine disagreement. Hamilton said courts can only say “no” when “no” is “manifest”.

Mr. GOODLATTE. Well, how do you address the concern that I expressed that in making it as difficult—and you say they were not populists and I'll buy that—in making it as difficult as they did for the duly-elected populists, if you will, the elected representatives of the people to change the Constitution, do you truly think they intended to make it as easy as it has become for the Supreme Court to change the Constitution? Because I think it is very difficult for you to argue that the Court has not evolved the meaning of the Constitution in very dramatic ways down through two centuries of Court decisions—many, many of them on a narrow 5-4 majority amongst nine, un-elected, lifetime-tenure individuals. That is a dramatically simple way to change our Constitution through means that may not be populist, but certainly are very easy to reflect, if not the values of the times, the values of the times of nine Justices. And that concerns me greatly.

Amen! Touche! Well said!

Mr. STERN. There is an open question which is debated widely—exactly **what sort of interpretation the Founders intended. Did they intend a narrow, historical-based interpretation, what we meant at a particular time when we wrote a particular clause, or did they mean a broader charter which the Congress and the courts would interpret as circumstances arose?** That's an open historical ques tion—which of those the Founding Fathers intended.

It has been our judicial tradition every since Justice Marshall wrote, "it's the Constitution we are interpreting" until, really, Jus tice Scalia re-opened the argument on the Court. Justice Scalia is on the wrong side of both of these decisions, I point out to you, that we have a broader interpretation.

Exactly what you mean by interpreting, "changing the meaning of the Constitution," is a subject that requires, I think, greater pre cision. And the easiest example is the Interstate Commerce Clause. There is no question, in the 1930's the Court changed the interpre tation of the Commerce Clause. It is also clearly the case—I mean, I wasn't around, but from what I gather, in the thirties, and cer-

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tainly today, that we have a different economy than we had in the 18th century. We no longer have local industries supplying local wants. As I travel, I walk into the supermarket; I get the same product in New York, in Connecticut, or in California. We have a national economy. So which is changed? The meaning of the Con stitution or the economy to which the Commerce Clause has to be applied?

The clause meant uniformity needed for commerce, not just anything that crosses state lines as courts take it today.

Mr. GOODLATTE. I'd answer "both."

Mr. STERN. And let me just—I'll stop with this. When they— **when the Free Exercise Clause was written, when the Establish ment Clause was written, and Justice Rehnquist has written pow erfully about this, we had a very small and limited Federal Govern ment. But we now have a very different sort of Federal Govern ment that subsidizes a huge range of activities. That gives rise to Mr. Chopko's concerns and the concerns of others that the tradi tional no aid position is unfair because it's applied—even if you concede that the no aid position was the one intended in the 18th century, which I'm sure he doesn't, but if he were to concede that, he'd say "but that's a different government now, and it doesn't have the same impact."**

And the same is true of the Free Exercise Clause. We no longer have the small, unimportant Federal Government where you had trouble getting Cabinet officers because they didn't have enough to do, to the regulatory state that we confront today. Nevertheless, I think the Court's a useful device, as a whole, to deal with those things and I wouldn't attack the Court's position in doing that.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Goodlatte.

Again, we thank all the members of this panel for your contribu tion. We will look forward to working with you as we move forward in formulating a way of addressing the problem that we've been discussing today, and we thank you.

Now I would ask the members of the second panel to come for- ward. I want to welcome each of you to the hearing today. The first witness on our second panel today will be Douglas Laycock. Mr. Laycock comes to us from the University of Texas Law School where he serves as associate dean for research, specializing in con stitutional law and church and State legal issues.

Next on this panel, we will hear from Jeffrey Sutton. Mr. Sutton is solicitor for the State of Ohio, overseeing appeals on behalf of the State's attorney general and participating in constitutional litiga tion.

And finally this morning, we will hear testimony from Thomas Berg, an associate professor of law at Samford University's Cum berland School of Law. Professor Berg teaches constitutional law, and is an expert on the law concerning religious liberty.

I want to thank all of you for coming today. I would ask that you please do your best to summarize your testimony in no more than 5 minutes, although, as you have witnessed, we're not strictly en- forcing the 5-minute rule today. And, of course, without objection, your testimony, your full, written testimony, will be included in the record of the hearing. Again, we thank you.

Professor Laycock.

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STATEMENT OF DOUGLAS LAYCOCK, ASSOCIATE DEAN FOR RESEARCH, UNIVERSITY OF TEXAS LAW SCHOOL

Mr. LAYCOCK. Thank you, Mr. Chairman.

Five years ago, I confidently testified to this committee that RFRA would be constitutional, so I don't know why you would take my advice today. [Laughter.]

I argued to the Supreme Court that it was constitutional, and as someone on the panel noted, we didn't get a single vote. All I can say is, the law has changed. Some people saw it coming. Mr. Sut ton, I think, had a better feel for the Court's political mood than I did, but a lot of precedent got distinguished away rather quickly in the Boerne case.

Rather than argue about that, let me just note that **before the decision in Boerne, six appellate courts had considered the constitu tionality of RFRA; all six had upheld RFRA. The four of those opin ions that came from Federal courts of appeals were each written by distinguished, conservative judges appointed by Ronald Reagan. So I was not the only one who was surprised by this decision or who thought that Congress clearly had power.**

In my view, separation of power exists to protect liberty. It works best when all three branches have independent power to protect the liberty of the American people. It is most important for one branch to step in when another branch has dropped the ball or failed for some reason to protect liberty. RFRA was separation of powers at its best. The Supreme Court has now announced a dif ferent vision and Congress has to comply. **I think the Court is enti tled to respect. But Congress does not have to be persuaded.** I think Congress, within the limits the Court has set, can continue to act on its own view of how best to protect the liberties of the American people.

As people have noted, the Boerne opinion is vague. The standard is that there must be a "congruence and proportionality" between the problem to be solved and the legislative solution. As ambiguous as that is, it is made more ambiguous because there is an ambigu ity about what Smith means. Mr. Nadler asked, what kind of record would we have to make, what kind of findings must Con gress make? And that depends upon what Smith means, so let me highlight two kinds of violations of Smith.

The most obvious violation of the Free Exercise Clause, as inter preted in Smith, is intentional discrimination. We don't want those Orthodox Jews moving into town, so let's keep out their synagogue and that will keep them out. We don't want Santeria being able to practice in our city, so let's make it impossible for them to build a church. That's the one that first comes to mind, and those hap- pen and we can build a record of those. The Supreme Court be lieves they're rare, but that was speculation. The Court had no record.

But there's another kind of violation of Smith that doesn't come to mind so quickly, that is not so immediately obvious, but is far, far more common. Smith says, Lukumi repeats, and this language appears again in Boerne: If there are secular exceptions, and no comparable religious exception, the law is not neutral and gen erally applicable. Now, the members know the political process—squeaky secular wheels get exceptions all the time. There are very

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few laws that are truly generally applicable and haven't exempted somebody who wanted to be cut out. The historic district in Boerne exempted a squeaky wheel property owner who wanted to be cut out, and then it was extended to the church by a separate law that applied only to the church. It wasn't generally applicable. It wasn't applicable to anybody—it applies only to the church.

A lot of people don't think of these cases as Smith violations. I believe they are Smith violations. I think someone said part of why we lost so big in Boerne was that the Court reacted to the rhetoric of Congress and of the Coalition. I think that's true and we have to be careful with rhetoric. We have to be clear: the problem is not just the truly generally-applicable law that applies to everybody; that's part of the problem, but a very widespread part of the prob lem is the law that applies to some people and not to other people, and among those it applies to is the church.

The kind of record that has to be made and the kind of rhetoric that is most effective is that there are lots of violations of Smith out there, but many of them are very difficult and expensive to liti gate—it may be hard to persuade a Federal judge that the city had a bad motive or that the exempted activity and the religious activ ity are sufficiently analogous that the differential treatment ought to be viewed as discrimination.

What can Congress do now? Further legislation on the enforce ment power depends upon building the kind of factual record that we've been talking about. The civil liberties community and the re ligious community have to bring those facts to Congress, and I think it can be done. Some of those facts are cited in my written testimony.

Beyond that, I think Congress should think not of a single, global
solution to the Boerne problem, but of a series of overlapping par
tial solutions. One that, clearly, would do a lot of good would be
Commerce Clause legislation: **any religious practice in or affecting
commerce** is [in this scenario] subjected to the RFRA standard. The model for this
is the 1964 Civil Rights Act and also the Privacy Protection Act
which protects newspaper offices against searches—enacted pursu
ant to the commerce power.

Many of the religious practices and **many of the regulatory bur-
dens on religious institutions plainly affect commerce. Because of
the regulation in Boerne, a million-dollar construction project is not
going to happen. Materials would have been ordered interstate;
contractors might have come interstate. We don't know how much
we would reach under the Commerce Clause, but, plainly, we
would reach a lot.**

Again, that expansion of the Commerce Clause gives Congress no limit. The original intent was not to let Congress regulate anything that crosses state lines, which is just about everything, but the uniformity of standards needed for commerce to occur. Standardization of railroad widths, sharing of limited radio and TV bandwidth, size of bricks, etc.

Second, Congress has power to enact a partial solution under the
Spending Clause. And the Spending Clause would effectively reach
many things not reached by the Commerce Clause. It would reach
the individual practices of persons who for some reason are subject
to the authority of a State bureaucracy that is receiving Federal
funding. The model for a Spending Clause statute would be Title
VI of the Civil Rights Act of 1964, or the Equal Access Act: "No
person may be denied the benefits of, or refused participation in,
or otherwise discriminated against in any federally financially-as
sisted program because of his religious practice or belief, unless
there's a compelling interest.

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Finally, let me briefly mention one other source of a partial solu
tion that could not support as high a standard, but could provide
intermediate scrutiny, I think, universally—a statute as broad as
RFRA. That would be legislation to implement Congress' under-
standing of our religious liberty obligations under the International
Covenant on Civil and Political Rights.

Now I understand there's a legitimate **concern in the Congress
that American policy not be turned over to international organiza
tions.** And I want to be very clear that I'm not proposing that.
What I am proposing is that Congress **use its power and its judg
ment to enact a statute that it believes is necessary to implement
our treaty obligation with respect to religious liberty.** Both Houses
of Congress would have to agree—**this isn't some special deal for
the Senate—and the President would have to sign.** If Congress be

lieves it's necessary, then Congress would create rights.
I've elaborated this point at somewhat greater length in my writ-
ten testimony. I cite an article by an international law scholar who
is the real expert here, but the important point I wanted to make
orally is that **the treaty power proposal is not a proposal that any international organization can tell Congress what to do. It is a pro posal that Congress has the power to decide what religious liberty requires.**
Just as we turn to the Commerce Clause and the Spending
Clause to implement Congress' view of religious liberty because the
Court says that view can't be implemented directly, so one more
option is to turn to the treaty power to implement Congress' view
of what religious liberty requires because the Court says you can't
do it directly.
I believe it would be wise to reaffirm re-enact RFRA as applied to the Federal Government to eliminate any issue about severabil ity or implied repeal. There will be litigation over whether RFRA is constitutional as applied to Federal activity; we may be back in the Supreme Court on that issue, but I expect to win on that issue. The rhetoric of the Boerne case is hostile to RFRA, but the reason ing and the source of authority is completely different.
Section 5 of the 14th Amendment has nothing to do with apply
ing RFRA to Federal power. I think we'll eventually win on the
constitutionality of federal applications. **Congress could shorten that litigation** by eliminating any issues about severability and im
plied repeal.
Thank you, Mr. Chairman. I'll wait for questions.
[The prepared statement of Mr. Laycock follows:]
PREPARED STATEMENT OF DOUGLAS LAYCOCK, ASSOCIATE DEAN FOR RESEARCH,
UNIVERSITY OF TEXAS LAW SCHOOL
PROTECTING RELIGIOUS FREEDOM AFTER BOERNE V. FLORES SUMMARY OF
STATEMENT
OF DOUGLAS LAYCOCK
City of Boerne v. Flores deprives Congress of much of its constitutional role in pro
tecting the civil liberties of the American people. The remaining Congressional
power to enforce the Fourteenth Amendment is ill-defined; it apparently depends on
the Court's assessment of the problem to be solved.
The remaining constitutional protection for the free exercise of religion is also ill-
defined. Religious practices are often burdened by laws that are not generally appli
cable, and under Employment Division v. Smith, this discrimination is subject to the
compelling interest test. It remains to be seen whether the courts will vigorously
enforce this part of Smith.
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Congress can help with a series of partial solutions:
1. Congress could enact legislation to implement Article 18 of the International
Covenant on Civil and Political Rights, which requires more protection for religious
exercise than Smith provides. Such legislation could have RFRA's universal scope,
but the standard of protection would be less stringent than the compelling interest
test. Such legislation would recognize that the Covenant is not self-executing and
that enforceable rights are created only by normal legislation passed by both Houses

of Congress.
2. Congress could enact RFRA's compelling interest standard with respect to all religious practices that affect **commerce**. Congress could enact presumptions to sim plify the litigation of whether commerce is affected.
3. Congress could enact RFRA's compelling interest test with respect to all **feder ally assisted programs.**
4. Congress could enact RFRA's compelling interest test with respect to **any field of regulation where Congress finds that religion is often burdened by laws of less than general applicability.** It is important for Congress and the religious and civil liberties communities to document the problems addressed.
5. Congress should state explicitly that RFRA has not been repealed and that it still applies to federal law.
6. For all this legislation, Congress should enact enforcement provisions such as those in RFRA.

BIOGRAPHICAL SKETCH DOUGLAS LAYCOCK

Douglas Laycock holds the Alice McKean Young Regents Chair in Law at The University of Texas. He is a member of the American Law Institute and a Fellow of the American Academy of Arts and Sciences. He has studied the law of religious liberty for twenty years, publishing many articles in the leading law reviews and in major symposia.

He was appellate counsel for the churches in Church of the Lukumi Babalu Aye v. City of Hialeah, the last successful free exercise claim in the Supreme Court, and in City of Boerne v. Flores, unsuccessfully defending the validity of the Religious Freedom Restoration Act as applied to state and local government. He currently rep resents the church in In re Young, in which a trustee in bankruptcy is belatedly seeking to challenge the validity of RFRA as applied to federal law. He appears at this hearing in his personal capacity.

Mr. Chairman, Thank you for the opportunity to testify this morning on possible Congressional responses to City of Boerne v. Flores.

I have taught' and written about the law of religious liberty for twenty years, and I have taught upper level courses in Constitutional Law for much of that time. I hold the Alice McKean Young Regents Chair in Law at The University of Texas at Austin, but The University of course takes no position on any issue before the Com mittee. This statement is submitted in my personal capacity as a scholar.

I have published many articles on religious liberty and other constitutional issues, including several on the Religious Freedom Restoration Act. I was appellate counsel for the churches in Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), the last successful free exercise claim in the Supreme Court, and in City of Boerne v. Flores, 65 U.S.L.W. 4612 (1997), unsuccessfully defending RFRA's valid ity as applied to state and local government. I also represent the church in In re Young, 82 F.3d 1407 (8th Cir. 1996), in which a trustee in bankruptcy is belatedly seeking to challenge the validity of RFRA as applied to federal law. Young was va cated and remanded for reconsideration in light of Boerne. 65 U.S.L.W. 3850 (1997).

I.

THE SHRINKING OF CONGRESSIONAL POWER

City of Boerne v. Flores holds that the Religious Freedom Restoration Act is un constitutional as applied to state and local governments. The decision is based on newly announced limits to Congressional power to enforce the Fourteenth Amend ment. The decision does not affect RFRA's application to federal law, which is based on Article I powers and in no way depends on the Fourteenth Amendment. I am informed that the Administration shares my view that federal applications of RFRA are unaffected.

When the Supreme Court announces a limit on the powers of Congress or of the states, it is central to our system of government that the Court's decision is entitled to obedience.

Yah, Hamilton-, Lincoln-, Jefferson-, and Jackson-style.

The Court itself is entitled to respect, and I do not doubt that the Jus tices believe they have delivered the best possible interpretation of the Constitution. But respect does not mean immunity from criticism, and the Boerne opinion has se rious problems. I briefly note those problems here, because they complicate the task of assessing what Congressional power remains.

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I confidently testified in earlier hearings that Congress had power to enact RFRA. Either I badly misunderstood the law, or the Court has changed the law. I take some comfort from the fact that six appellate courts considered the constitutionality of RFRA prior to the Supreme Court's decision in Boerne, and all six upheld the Act.1 Five of these decisions upheld RFRA as applied to state or local law. Four of these decisions came from federal courts of appeals, and each of these was written by a well-respected conservative judge appointed by Ronald Reagan—Patrick Higginbotham, Richard Posner, John Noonan, and James Buckley. I think that Boerne has dramatically changed the law, but if not, I am not the only one who was confused.

Boerne significantly limits Congress's independent power to protect the civil lib erties of the American people. With respect to the states, that power is expressly granted by the Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments. That power is no constitutional anomaly; it is as central to our system of government as the Supreme Court's power to invalidate statutes. Governmental power in our system is separated and divided so that each branch has the power and the duty to protect liberty. The Supreme Court has announced a different vi sion, and Congress must obey, but it need not be persuaded.

Obey? A ruling just exposed as unconstitutional? Not limit jurisdiction?

The choice between these competing visions of separation of powers will continue to be litigated, because the Boerne opinion announces a vague standard of uncertain scope, and because plausible readings of that standard call in question the validity of many other Acts of Congress. **The Court reaffirms that Congressional power to enforce the Fourteenth Amendment includes power to enforce rights incorporated into that Amendment from elsewhere in the Constitution, 65 U.S.L.W. at 4615, and it reaffirms that Congress may "prohibit!] conduct which is not itself unconstitu tional." Id. at 4614. But Congress may prohibit such conduct only as a means to "deter[] or remed[y] constitutional violations" as defined by the Court, id., and "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end."** Id. at 4615. "[T]he line is not easy to discern, and Congress must have wide latitude in determining where it lies." Id.

But here, the Court determined that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or de-

signed to prevent, unconstitutional behavior." Id. at 4618.
This standard seems to require an empirical judgment: Congressional enforcement legislation is valid if the number of violations of the Constitution as interpreted by the Court is sufficiently large in proportion to the number of violations of the stat ute. The Court plainly believed that this proportion is small in the case of RFRA, and that it was larger in the case of other enforcement legislation previously upheld. But the Court had no data on any of these proportions, and it made its guesses about the number of free exercise violations without addressing a significant dis agreement about what would count as a violation. The facts relevant to this propor tion did not get much attention in the briefing, because no one had reason to antici pate that such facts would be dispositive. **In any event, facts about the relative mag nitude of societal problems should be legislative facts, not judicial ones. [Should be established by findings of facts by legislatures, not courts.]**
The standard of "congruence and proportionality" is inherently vague, and the liti gation process is probably incapable of producing good data on the relevant propor tions. Under this standard, it is little more than guesswork to decide which enforce ment legislation is valid and which invalid. With respect to future legislation, Con gress would be well advised to compile a detailed factual record of constitutional violations as the Court defines them.
Which is a strong reason for lengthy findings of facts.
With respect to past enforcement legislation, we may expect constitutional challenges to the Voting Rights Amendments of 1982, to the Civil Rights Acts of 1964 and 1991 as they apply to state and local employment, to the Pregnancy Discrimination Act as it applies to state and local government, and generally to all other enforcement legislation that has not already been upheld by the Supreme Court. I have no better data than the Court, but reading in the re- ported cases suggests that for many of these statutes, the proportion of constitu tional violations to statutory violations is far smaller than for RFRA. The Court avoided this difficulty by simply not discussing these statutes; it focused instead on

1 Mockaitis v. Harcleroad, 104 F.3d 1522 (9th Cir. 1997) (Noonan, J.); Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996) (Posner, J.), vacated, 65 U.S.L.W. 3850 (1997); EEOC v. Catholic Univ., 83 F.3d 455, 469-70 (D.C. Cir. 1996) (Buckley, J.) (as applied to federal law); Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996) (Higginbotham, J.), rev'd, 65 U.S.L.W. 4612 (1977); State v. Miller, 538 N.W.2d 573, 577 (Wis. App. 1995), aff'd on other grounds, 549 N.W.2d 235 (Wis. 1996); South Jersey Catholic School Teachers Ass'n v. St. Teresa Elem. School, 675 A.2d 1155, 1167 (N.J. Super. App. Div.), certification granted on other grounds, 683 A.2d 1162 (N.J. 1996).

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the Voting Rights Act of 1965, which is unique among modern civil rights legislation in the magnitude of the constitutional problem to which it responded.
Of course Boerne is not the only recent decision restricting Congressional power, and it is not the only recent decision overruling or distinguishing away past prece dent. Constitutional law is changing, and what Congress has power to do based on past precedent it may not have power to do after the Court's next decision. My ear lier testimony that RFRA would be valid demonstrates that I have little power to predict how far the Court will cut back. What I can do is outline Congressional re sponses that are clearly constitutional under existing precedent.
I would also note that the coalition that came together to support RFRA, both in

and out of Congress, would not agree on the appropriate scope of Congressional power in other areas of regulation.

Hmm. Right. There is more support for Free Exercise than for "Congress shall enforce" rights.

Some parts of the coalition would undoubtedly prefer to see Congress less active in some areas of regulation. But I think that all parts of this coalition agree that Congress should not lose its power, and Congress should not abandon the effort, to protect basic human liberties that are explicitly guaranteed in the text of the Constitution. That is the wrong place to cut back on Congressional power.

II. THE SHRINKING OF RELIGIOUS LIBERTY

Religious liberty is far less secure today, under the rule of Employment Division v. Smith, 494 U.S. 872 (1990), than it appeared to be a month ago under RFRA. But it is not obvious just how much protection has been removed. The meaning of Smith is disputed, and under Boerne, that dispute is relevant to the scope of Con gressional power.

In 1990, in the immediate wake of Smith, I noted deep ambiguities in the Smith opinion:

Smith announces a general rule that the Free Exercise Clause provides no substantive protection for religious conduct. It also notes enough excep tions and limitations to swallow most of its new rule. Everything seems to depend on judicial willingness to enforce the exceptions and police the neu trality requirement.

Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 54.

Hearings on RFRA were held in 1991 and 1992. At that time, the few lower court decisions under Smith were giving it the worst possible interpretation. Neither the exceptions nor the neutrality requirement appeared to have any content. Even laws that expressly applied only to churches or to religious practices were being held neu tral and generally applicable.2 And RFRA's advocates naturally emphasized this worst case scenario, which maximized the need for legislative remedies.

This legislative record was held against RFRA in Boerne. The Court inferred that Congress did not really believe that there are many violations of Smith in America today. In the Court's view, this hearing record showed that even Congress believed that the proportion of constitutional violations to RFRA violations would be small. And it followed, in the Court's view, that Congress was not interested in facilitating the proof of Smith violations, but in reaching other conduct that even Congress did not believe violated the Constitution as interpreted in Smith.

But in the meantime, the Court decided Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), and gave real content to the requirements of neu trality and general applicability. Lukumi compared the local ordinances regulating religious practices to a broad range of other state and local laws dealing with analo gous secular conduct and with secular conduct that caused analogous harms. It wrote into holding Smith's dictum that if a state permits exceptions for secular con- duct, it must have compelling reason for refusing exceptions for analogous religious conduct. 508 U.S. at 537.

Some lower court interpretations of Smith began to change in light of Lukumi.

One district court held that a rule requiring all university freshmen to live in the dorm was not neutral and generally applicable, because nearly a third of freshmen

were covered by various exceptions. The Free Exercise Clause—not RFRA—there fore required an exception for a freshman who wanted to live in a religious group house. Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996). Another district court held that a landmarking law was not neutral and generally applicable, because it contained three exceptions for various secular situations. The Free Exercise

2 Church of the Lukumi Babalu Aye v. City of Hialeah, unreported, (11th Cir. 1991), rev'd, 508 U.S. 520 (1993); Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654 (D. Minn. 1990), rev'd in part, on other grounds, 948 F.2d 464 (8th Cir. 1991).

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Clause—not RFRA—therefore required an exception for a church stuck with a useless landmark. Keeler v. City of Cumberland, 940 F. Supp. 879 (D. Md. 1996).

If these decisions are good law, and I think they are, then there are many viola tions of Smith in the land. Federal, state, and local laws are full of exceptions for influential secular interests. Moreover, the details of federal, state, and local laws are frequently filled in through individualized processes that provide ample oppor tunity to exempt favored interests and refuse exemptions to less favored interests, often including religious practice. Where a law has secular exceptions or an individ ualized exemption process, any burden on religion requires compelling justification under reasonable interpretations of Smith.

The problem, of course, is that these violations are difficult to litigate. There is room for endless argument whether the secular exception is really analogous to the claimed religious exception, and whether the lawmaking and exemption process is really individualized. In the very best case, all free exercise litigation will be far more complicated and expensive, and many good claims will be lost. In the more likely case, courts will defer to regulators and only the most egregious discrimina tion against religion will ever be adjudicated.

There is also continued dispute about the meaning of Smith even in principle. The discrimination against religious practice in Lukumi was so extreme that it can be distinguished from the more widespread discrimination of the sort found in Rader and Keeler. In its discussion of Smith in Boerne, the Court reaffirmed the hybrid rights exception to Smith, and it reaffirmed the rule that exemptions for secular hardship require exemptions for religious hardship. 65 U.S.L.W. 4613. But when it considered whether RFRA was a proportionate response to violations of Smith, it used the phrase "religious bigotry" as a shorthand for what Smith required. Id. at 4619. This shorthand made it easier to argue that RFRA was a disproportionate re sponse to a small number of actual violations, but as a summary of Smith, it is ei ther inaccurate or a term of art. The word "bigotry" never appears in either the Smith or Lukumi opinions; the Smith-Lukumi test is an objective test of differential treatment, not a subjective test of governmental motive. "Religious bigotry" must be a label for unjustified differential treatment of religion; **we should not assume that the new phrase was meant to change the Smith-Lukumi standard without expla nation and once again dramatically shrink constitutional protection for religious lib erty without briefing or argument. Lower court judges will almost never find a Smith violation if they conclude that doing so requires them to find state or local officials guilty of religious bigotry in a subjective sense.**

I explain this ambiguity in detail that may be excessive, because it is critical both to the scope of remaining free exercise protection and to the scope of Congressional power. Loose Congressional rhetoric to the effect that Smith eliminates nearly all protection for free exercise can actually shrink Congressional power, as Boerne illus trates. Congressional factfinding preliminary to enforcement legislation must focus

on regulatory fields in which violations of Smith may be widespread but are difficult
to prove. The more such regulatory fields there are, the greater the reach of
Congress's power to enforce the Fourteenth Amendment right to free exercise.
Whether there are many such regulatory fields or few depends on whether we take
seriously the exceptions to Smith and the requirement of neutrality and general ap
plicability. Members must resist the temptation to bash the Court by exaggerating
the harm it has caused; the unexaggerated harm is quite enough to justify Congres
sional response.

III. WHAT CONGRESS CAN DO NOW

Congress can no longer enact a general solution to the problem of free exercise
law. But it can enact a series of overlapping partial solutions that would collectively
provide substantial protection for religious practice.

1. The Treaty Power. Congress has power to enact legislation to implement
treaties, even if the treaty deals with matters that would otherwise be left to state
regulation. Missouri v. Holland, 252 U.S. 416 (1920), citing cases dating back to the
1790s. Congress could enact a universally applicable law, requiring something like
intermediate scrutiny for burdens on religious practice, to bring the United States
into compliance with the International Covenant on Civil and Political Rights.

It is critical to understand that this proposal does not assume that treaties limit
the sovereignty of the United States, or that treaties are enforceable over U.S. objec
tion, or that treaties change domestic law of their own force. In the case of the
International Covenant on Civil and Political Rights, the Senate's Resolution of
Ratification expressly declares that the Covenant is not self-executing, Sen. Exec.
Rep. 102-23 at 23; the intent of this declaration was "to clarify that that Covenant
will not create a private cause of action in U.S. Courts." Id. at 19 (emphasis added).

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Legislation to implement the Covenant would be wholly consistent with that dec
laration. Implementing legislation assumes that the Covenant has no effect on do
mestic law until and unless Congress passes implementing legislation by the usual
method, with approval by both Houses of Congress and presentment to the Presi
dent. All rights created would come from Congress, not from the Covenant. The Cov
enant merely provides Congress with an additional source of power, to be used only
if and when Congress thinks it appropriate.

To the extent that Congress believes that the United States is in compliance with
the Covenant, it will not pass implementing legislation, and no judicially enforceable
rights will be created. To the extent that Congress, in the independent judgment
of both the House and Senate, believes that the United States is out of compli
ance, and to the extent that Congress chooses to bring the United States into com
pliance, Congress may pass implementing legislation to achieve compliance. Such
legislation would provide for enforcement in American courts by the customary pro
cedures. It would have no effect whatever on any attempt to enforce the Covenant
in foreign or international courts. If anything, it would reinforce the Senate's posi
tion that the Covenant is not self-executing and that the United States may be
trusted to implement the Covenant in its own way, consistent with our traditions
and our political institutions.

Congress has ample basis to find that the United States is not in compliance with
the Covenant's guarantee of religious liberty and that implementing legislation is
necessary. The explanation is set out in full in a recent article by an international
law specialist, which I am not. Gerald L. Neuman, The Global Dimension of RFRA,
14 Const. Comm. 33 (1997). Article 18 of the Covenant expressly protects not only

religious belief, but also the "freedom, either individually or in community with oth ers and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." Art. 18, § 1. This "freedom to manifest one's religion or be liefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Art. 18, § 3. It is necessary but not sufficient that the limi tation on religious practice be "prescribed by law. The requirement of necessity is independent, and must mean something more than necessary to any legitimate pub lic purpose prescribed by law. Congress can properly find that the English text, the original French text, and the negotiating history all indicate that limitations on reli gious practice must be necessary to some state interest sufficiently important to jus tify the limitation. This is something less than the compelling interest test, but it is certainly more than rational basis. Perhaps the best translation into American legal traditions is intermediate scrutiny—substantially related to an important gov ernmental objective. See, e.g., Craig v. Boren, 429 U.S. 190 (1976).

I think it would be a mistake to simply re-enact RFRA and declare it to be an implementation of the Covenant. We would then get into arguments about whether the implementing legislation went further than the Covenant and whether the power to implement treaties includes the power to go further—the same arguments we had over RFRA. It would be better to closely track the standard of the Covenant. Legislation to implement the Covenant would be a partial solution in that it would provide less protection than RFRA provided, but it could have the same uni versal scope as RFRA. That is. Congress can use the treaty power to provide a base of partial protection for all religious practice. It could then use other powers to pro- vide compelling interest protection for those religious practices within the reach of other powers.

2. The **Commerce** Power. Congress could enact RFRA's level of protection for religious practices affecting commerce. The statute would provide that any religious practice affecting commerce is exempt from burdens imposed by state and local leg islation, except where the regulating jurisdiction demonstrates that the application of the burden to the individual serves a compelling government interest by the least restrictive means. The models here are the Privacy Protection Act of 1980, 42 U.S.C. §2000aa (1994), protecting papers and documents in preparation for a publication in or affecting commerce, and the public accommodations title of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994), **forbidding racial and religious discrimination in places of public accommodation affecting commerce, and irrebuttably presuming that commerce is affected by any hotel and by any restaurant that serves interstate travelers.**

The public accommodations law is particularly instructive as to Congressional power. Congress's first public accommodations law was the Civil Rights Act of 1875, enacted to enforce the Thirteenth and Fourteenth Amendments. The Supreme Court struck that law down as beyond the enforcement power. Civil Rights Cases, 109 U.S. 3 (1883). Congress's second public accommodations law was the Civil Rights Act of 1964, enacted with substantially the same scope in practical effect but pursu-
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ant to the commerce power. This Act was upheld in Katzenbach v. McClung, 379 U.S. 294 (1964), and Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

Congress did not enact the public accommodations law to maximize the sale of barbecue sauce. Rather, it enacted the public accommodations law because it was morally right, and it used the Commerce Clause because that was an available means to the end. Similarly here, protecting the religious practices of the American people is morally right, and to the extent that those practices affect commerce, the Commerce Clause is an available means to the end.

After United States v. Lopez, 514 U.S. 549 (1995), **I doubt that the commerce power can reach religious practices that do not affect a commercial transaction. But many religious practices do affect commercial transactions.** When burdensome regu lation prevents a church from building a house of worship, as in Boerne, tens of thousands or even millions of dollars of commerce are prevented from happening. When a Roman Catholic hospital loses its accreditation in obstetrics because it refuses to teach abortion techniques in violation of its religious commitments, all the services and all the instruction its obstetrics program would have provided are prevented or diverted to other sites. If the hospital succumbs to state coercion and agrees to teach abortion techniques, the resulting abortions are themselves a service provided in commerce, and that commerce is diverted to the Catholic hospital from other sites.

It should not matter whether commercial transactions are prevented entirely, di verted from one provider to another, coerced, or changed in some other way: in all these cases, commerce is affected. The Court has long held that production of goods and services affects commerce,3 that individual transactions are within the com merce power if all such transactions cumulatively affect commerce,4 and that Con gress can regulate commerce for moral or other non-economic motives.5 Unless we see dramatic changes in Commerce Clause doctrine, Congress can protect many reli gious practices under the Commerce Clause.

It would simplify litigation of the affecting-commerce issue if Congress enacted definitions or presumptions. For example, **Congress could provide that if burdensome regulation of a religious practice causes or prevents the production, purchase, sale, lease, or employment of goods or services, commerce is affected. Or Congress could provide that the person seeking to justify a burden on religious practice bears the burden of persuasion on the affecting-commerce issue.**

3. The **Spending** Power. Congress could enact RFRA's level of protection for re ligious practices burdened by the rules of any program receiving federal financial assistance. No person could be excluded from participation in, or denied the benefits of, or otherwise subjected to discrimination under any program or activity receiving federal financial assistance, because of a religious practice, unless application of the burden to the person served a compelling interest by the least restrictive means.

The leading models here are Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d (1994), forbidding racial discrimination in federally assisted programs, simi lar civil rights statutes modeled on Title VI and protecting other classes, and the Equal Access Act, 20 U.S.C. 4071 et seq. (1994), protecting student speech in feder ally assisted secondary schools. Congressional power to attach conditions federal spending has been recognized since Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

Conditions on federal grants must be "[]related to the federal interest in particu lar national projects or programs." South Dakota v. Dole, 483 U.S. 203, 207 (1987). Federal aid to one program does not empower Congress to demand compliance with RFRA in other programs. But within a single program, this requirement is easily satisfied. The federal interest is that the intended beneficiaries of federal programs not be excluded because of their religious practice. Congress should include lan guage modeled on 42 U.S.C. §2000d-4a (1994), which defines the scope of aided programs for purposes of the obligation to refrain from burdening religious practices.

3 United States v. Robertson (1995) (mining); Hodel v. Virginia Surface Mining Ass'n, 452 U.S. 264 (1981) (mining); Wickard v. Filburn, 317 U.S. 111 (1942) (agricultural production); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (manufacturing).4 Perez v. United States, 402 U.S. 146 (1971) (local loansharking); Katzenbach v. McClung, 379 U.S. 294 (1964) (restaurant); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (motel); Maryland v. Wirtz, 392 U.S. 183 (1968) (wages of employees of enterprise that affects commerce, whether or not each employee affects commerce); Wickard v. Filburn, 317 U.S. 111 (1942) (agricultural production for consumption by producer).

5 Katzenbach v. McClung, 379 U.S. 294 (1964) (racial discrimination); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (racial discrimination); United States v. Darby, 312 U.S. 100 (1941) (fair labor standards); Hoke v. United States, 227 U.S. 308 (1913) (transportation of women for immoral purposes); Champion v. Ames, 188 U.S. 321 (1903) (lottery tickets).

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Conditions on federal grants must also be clearly stated. They are in the nature of a contract, and state and local entities are entitled to know what obligations they are assuming before they accept the federal money. Suter v. Artist M., 503 U.S. 347, 356 (1992); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981). This requirement can easily be satisfied by careful drafting.

A Spending Clause statute could protect many religious individuals who are sub ject to bureaucratic authority in federally assisted programs. Many of these cases will involve individual devotions or observance that do not lead to any commercial transaction and do not plausibly affect commerce. Thus, a Spending Clause statute and a Commerce Clause statute are complementary. Together they would address a large portion of the problem.

4. The Enforcement Power. City of Boerne v. Flores does not deprive Congress of all power to protect religious exercise under its power to enforce the Fourteenth Amendment. Congress must make a clear record that any statute is directed to de terring or remedying violations that, if all the facts could be readily proved, the Court would recognize as constitutional violations under Employment Division v. Smith. Plainly the Court means to require a more detailed factual record than Con gress compiled for RFRA, and although constitutionality should not depend on what Congress thinks, Congressional rhetoric should put more emphasis on addressing free exercise violations as the Court understands them.

I doubt that the Court would uphold a re-enactment of RFRA under the Enforce ment Clause no matter how good a record Congress compiled. But the Court may well uphold more particularized statutes directed to particular problems, if the Con gress and the religious and civil liberties community do their homework and make their record.

The clearest example is land use regulation, which has enormous disparate im pact on churches, which is administered through highly discretionary and individ ualized processes that leave ample room for deliberate but hidden discrimination, and where there is substantial evidence of widespread hostility to non-mainstream churches and some hostility to all churches. Here are some facts that have already been documented:

a. In the City of New York, churches are landmarked at a rate forty-two times higher than secular properties. N.J. L'Heureux, Jr., Ministry v. Mortar: A Landmark Conflict, in Dean M. Kelley, ed., Government Intervention in Religious Affairs 2 at

164, 168 (1986).
b. In the City of Chicago and some of its suburbs, zoning
regulation is adminis
tered in such a way that it is nearly impossible to start a new church without consent of surrounding owners, and this consent is so often withheld, especially in the case of churches not affiliated with a well-known denomination, that finding a site for a new church is often impossible.6 Many of the resulting lawsuits are not about efforts to build new structures, but simply efforts to rent and occupy a storefront. I believe the same problem exists elsewhere, but it is well documented in and around Chicago. If the Committee will call the attorneys for these churches as wit nesses, it can learn the details. Some of this discrimination can be proved; some of it cannot be. But so many churches would not be investing so much effort in litiga tion if there were no serious difficulties in locating sites.
c. **Denominations that account for only 9% of the population account for about half the reported church zoning cases. That is, the zoning process disproportionately ex cludes small and unfamiliar faiths**. This discrimination is often unprovable in any individual case, but when large numbers of cases are examined, the pattern is clear. **These data are gathered in the Brief of the Church of Jesus Christ of Latter-Day Saints as Amicus Curiae in City of Boerne v. Flores.**
d. Journalists have reported that new suburbs on the fringe of urban growth often exclude churches, even from mainstream denominations. R. Gustav Neibuhr, Here is the Church; As for the People, They're Picketing It, Wall St. J. at A1 (Nov. 20, 1991).
e. The process of administering zoning laws and the process of designating landmarks are highly individualized. Standards tend to be vague and manipulable; zon ing for a parcel is easily changed if those in power desire to change it. Many key

6 See Cathedral of Joy Baptist Church v. Village of Hazel Crest, 22 F.3d 713 (7th Cir. 1994); Love Church v. City of Evanston, 896 F.2d 1082 (7th Cir. 1989); International Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878 (N.D. Ill . 1996); Abierta v. City of Chicago, 949 F. Supp. 637 (N.D Ill. 1996); Living Word Outreach Full Gospel Church and Ministries, Inc. v. City of Chicago Heights, 1996 Westlaw 529376 (N.D. Ill. 1996); Civil Liberties for Urban Believers v. City of Chicago, 1996 Westlaw 89241 (N.D. Ill. 1996); Chicago Miracle Temple Church, Inc. v. Fox, 901 F. Supp. 1333 (N.D. Ill. 1995); Celestial Church of Christ, Inc. v. City of Chicago, 1994 Westlaw 282304 (N.D. Ill. 1994).

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decisions are made at the level of individual parcels in applications for special per mits or variances or in votes on zoning changes or in landmark designations. In Boerne for example, St. Peter Church was added to the historic district by a sepa rate ordinance that applied only to St. Peter and to no other property. These land-use laws are often not neutral and they are almost never generally applicable in any meaningful sense. Thus, the resulting burdens on churches should be subject to strict scrutiny under Employment Division v. Smith. There are Smith violations here that are difficult to prove, and that is an appropriate case for enforcement leg islation even under Boerne. Indeed, to subject the location of churches to the zoning and landmarking procedures in many jurisdictions is to subject the First Amend ment right to gather for worship to a standardless licensing scheme, in violation of settled principles developed under the Free Speech Clause. See, e.g., City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988); Griffin v. City of Lovell, 303 U.S. 444 (1938).
If religious and civil liberties organizations will gather the evidence and bring it to Congress, there are many areas of discretionary decisions where a pattern of widespread but hard-to-prove discrimination against religion can be documented.

The first and easiest to document would be the use of land use regulation to exclude churches. Specific legislation addressing these particular problems would likely be more effective than a general standard such as that in RFRA. **Churches do not need the right to locate just anywhere, without regard to impact on neighbors, but they should have the right to locate somewhere within reach of the members of each wor shiping community. Congressional investigation would reveal that churches do not have that right today.**

5. The Power to Make Federal Law. Congress has undoubted power to determine the scope and reach of federal statutes and regulations. Congress can therefore provide that federal law shall not be interpreted to substantially burden a religious practice unless necessary to serve a compelling state interest. EEOC v. Catholic Univ., 83 F.3d 455, 469-70 (D.C. Cir. 1996). Nothing in Boerne casts any doubt on this proposition. Rather, the opinion reaffirms that "When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution." 65 U.S.L.W. at 4619. There is therefore no reason to doubt that RFRA is valid with respect to federal law, although the challenge will be made and courts will have to decide it again.

It would be prudent for Congress to reaffirm its view that RFRA is still in effect with respect to federal law, either by joint resolution or in a savings clause in any new legislation under the treaty power, the commerce power, the spending power, or the enforcement power. Otherwise, we will have to spend time litigating whether the passage of legislation to replace the invalidated part of RFRA was an implied repeal of the valid part.

There may also be need for more specific federal legislation directed at particular problems. For example, trustees in bankruptcy persist in filing fraudulent transfer claims against churches to recover recover ordinary-course pre-bankruptcy contribu tions, and many lower courts are rejecting RFRA defenses, even though the only ap pellate holding allows the RFRA defense. In re Young, 82 F.3d 1407 (8th Cir. 1996), vacated on other grounds, 65 U.S.L.W. 3850 (1997). The general language of RFRA has not been enough to avoid repeated litigation, even though the burden of refund ing old contributions long since spent should be obvious to anyone.

Indeed, these are cases that could be resolved under the Free Exercise Clause as interpreted in Smith. The generally applicable rule in bankruptcy is that the debtor has control of his funds and may dissipate them prior to bankruptcy, with the result that creditors generally go unpaid. Creditors cannot recover funds gambled away at casinos, because the debtor gets entertainment value and a chance to win money, In re Chamakos, 69 F.3d 769 (6th Cir. 1995), but many lower courts hold that the debtor gets nothing in exchange for his weekly contribution to his church. Congress can solve this problem and largely end this litigation with a specific amendment to the Bankruptcy Code protecting ordinary-course charitable contribu tions made in good faith. Congress could at the same time address the related prob lem of whether debtors who choose to make voluntary partial payments to their creditors under chapter 13 can continue to contribute to their church. I am sure there are other specific issues in federal law, but these bankruptcy issues are ripe for resolution because they have already caused much litigation.

6. Remedies. Any legislation to protect religious liberty should provide explicit remedies. RFRA's provisions for individual rights of action for damages, injunctions, and attorneys' fees are a reasonable model. The Court generally assumes that you did not mean for your laws to be enforced unless you tell it otherwise. It is particu

larly important to provide for private enforcement in Spending Clause legislation;
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it is extremely unlikely that any federal grant will be revoked because of one or a few incidents of suppressing religious practice.

Mr. Chairman, thank you again for holding hearings and for inviting me to testify on "Protecting Religious Freedom After Boerne v. Flores. " Please include this letter in the record of the hearing. As always, I write in my individual capacity; The Uni versity of Texas takes no position on the issues before you.

At the hearing on July 14, numerous witnesses offered the example of land use regulation as one where there is a well-documented pattern of discriminatory en forcement, a pattern of the sort that would seem to justify Congressional action to enforce the Fourteenth Amendment even after Boerne. The Subcommittee asked whether there are other such examples, and I asked for time to reflect and give you a more thoughtful answer.

The land use example was on everyone's mind for two reasons. First, land use reg ulation typically involves vague and changeable standards and highly discretionary decisions. This is the source of the religious liberty problem; it is easy to discrimi nate against unpopular uses, including unpopular churches, and hard to prove the discrimination in any individual case. Second, the stakes are so high that the land use problems of churches have produced much litigation, some empirical studies, and some press attention. This is why so many witnesses were aware of the same example.

The first point—**vague standards and discretionary decisions**—is the source of the religious liberty problem, and these conditions are quite common in governmental organizations. In nearly all the cases in which schools penalize the religious prac tices of students, or government agencies penalize the religious practices of govern ment employees or beneficiaries of the agency's program, the relevant administrator has a large element of discretion in making the rule, interpreting the rule, and choosing when to enforce the rule. The particular disputes in these cases cover a wide range of issues, which makes them hard to generalize about, but they have in common that the administrator's attitude towards the religious practice inevi tably influences his exercise of discretion.

It commonly happens that the administrator's attitude towards the religious practice is negative. At least some Americans are hostile to religion generally; more are hostile to particular religions; many believe that religion should be kept wholly private and are hostile to its public manifestation. Many believers have experienced this hostility, and sympathetic observers have seen it in operation; the hearing proc ess can easily gather anecdotal evidence. Systematic quantitative evidence is scarcer, partly because the studies have not been done, and partly because . Despite these difficul ties, the Gallup Poll has gathered some remarkably revealing information.

In 1993, 45 % of Americans admitted to "mostly unfavorable" or "very unfavor able" opinions of "religious fundamentalists, " and 86% admitted to mostly or very unfavorable opinions of "members of religious cults or sects." George Gallup, Jr., The Gallup Poll: Public Opinion 1993 at 75-76, 78 (1994).

In 1989, 30% of Americans said they would not like to have "religious fundamen talists" as neighbors, and 62% said they would not like to have "members of minor ity religious sects or cults" as neighbors. By contrast, only 12% admitted that they would not like to have "blacks" as neighbors. George Gallup Jr., The Gallup Poll: Public Opinion 1989 at 63, 67 (1990).

It is a reasonable inference that at least a comparable percentage of government administrators hold these hostile views toward religious fundamentalists and mem bers of minority sects. In fact, the proportion of hostile government administrators is probably higher, because it is the experience of many believers that these hostile attitudes are more common among persons in elite positions. If 45% or more of gov ernment administrators hold unfavorable opinions of religious fundamentalists and members of minority sects, and if these administrators have broad discretion to deal with persons under their supervision, then half or more of administrative decisions about the religious practices of these religious minorities are infected by these hos tile attitudes.

If all the facts were known and provable, administrative action so motivated would generally violate the Free Exercise Clause as interpreted by the Supreme Court. A. recent example where the facts could be proved is **Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996), in which the district judge found that the testimony of high ranking university officials (the Chancellor and the Vice Chancellor for Stu dent Affairs) "manifested a degree of antipathy toward members of [Christian Stu dent Fellowship]." Id. at 1554. The issue was a rule requiring all freshmen to live in the residence halls; the administration had allowed secular exceptions but it re-fused to allow freshmen to live in a religious group house under supervision of a**

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pastor. Plaintiff objected to the rampant sex and drugs in the residence halls; the Chancellor testified that religious students who objected to the residence halls should not attend the University.

But proving this hostility in any individual case is difficult, principally because administrators cover their tracks with rationalizations for their decision, but also because judges are reluctant to draw the inference even when the evidence is avail-able. Judges are reluctant to impute bad motive to government officials. **And al though it is indelicate to say so, there is no reason to think that judges as a group are more sympathetic than the population to fundamentalists and members of mi nority sects.** It is a reasonable inference from the Gallup data that 45% or more of judges also hold unfavorable views of these religious minorities. Most of these judges strive to be fair to all litigants who come before them, but they too have dis cretion, and facts are always disputed and uncertain. Their assessment of the facts and of the administrator's motivations is inevitably affected by their views of the religious practice at issue. If the judge were sure of the facts and convinced of the administrator's improper motivation, of course he would find a constitutional viola tion. But it is hard to be sure, and so he gives the administer the benefit of the doubt.

I would add to the record one recent incident in my own experience. I attended a luncheon for representatives of philanthropic organizations in Texas. These people were highly educated, economically successful, well-meaning, genteel, genuinely de-voted to helping a broad range of causes. Their desire to do good and to help people was similar to that of many well-motivated government administrators. The lunch-eon speaker introduced her talk by telling two Baptist jokes, jokes that drew their humor from a cariacatured version of Baptist theological teaching in one case and of Baptist moral teaching in the other. The audience laughed appreciatively both times. I was surely not the only person in the room who thought the jokes objection-able, but no one objected, and more than enough people laughed heartily to make

the jokes successful.
It is inconceivable to me that the speaker would have told ethnic jokes to that audience, or that the audience would have laughed appreciatively if she had. Ethnic jokes would have drawn an embarrassed silence, a few nervous titters, exchanges of shocked or disapproving looks. But it is acceptable in many educated circles to make fun of traditional religious believers.
Attitudes such as those reflected in that lunch and in the Gallup Poll data infect the discretionary decisions of thousands of government administrators throughout the land. So the answer to your question is that widespread violations of the Con stitution as the Court interprets it can be found in the discretionary decisions of government bureaucracies, including schools and social welfare agencies, and that land use regulation is just the most visible and best documented example. Religious liberty groups get many such complaints, and if some of those groups have main tained good files, they could document examples outside the land use context.
Another set of decisionmakers entrusted with effectively unreviewable discretion is juries. Civil juries review religions and religious practices in a wide range of cases, including suits by disaffected members objecting to religious teaching or prac tice, suits for personal injury and other torts, and suits by individuals whose reli gious practice somehow becomes an issue in the case. Of course some of the claims against churches are legitimate and meritorious; others are thinly disguised attacks on religious beliefs and practices. But lawyers who have tried these cases say that whatever the formal rule of law and whatever the nature of the claim, a key issue is what the jury thinks of the religion and the religious practice. I and others can identify lawyers who have tried many of these cases; one of them should be invited to testify at a future hearing.
One other response to your question is a category of cases mentioned in my origi nal written testimony—cases in which the legislature exempts influential secular in terests who complain of the regulatory burden but does not exempt religious prac tices burdened by the same law. I believe that this is discrimination within the meaning of the Supreme Court's free exercise cases. But in any individual case, there will be an argument about whether the secular exemption is sufficiently anal ogous to the religious exemption, and if the court defers to the legislature whenever it is uncertain, many violations will not be identified as such.
Each of these fact patterns produces numerous difficult-to-prove violations of the Free Exercise Clause as interpreted by the courts. Representatives of religious and civil liberties groups are aware of these problems from personal experience. I believe that these groups and the Subcommittee, working together, will be able to document the significance of these problems.
Very truly yours, DOUGLAS LAYCOCK.
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Mr. CANADY. Mr. Sutton.

STATEMENT OF JEFF SUTTON, SOLICITOR, STATE OF OHIO

Mr. SUTTON. Thank you, Mr. Chairman. I'd like to use this op portunity to explain a State employee's perspective on the Boerne decision, Ohio's explanation for getting involved in the case ini tially, and eventually participating in the oral argument at the Su preme Court, and at least our initial instincts about how to re spond to the decision.
Ohio got involved in the RFRA litigation initially for one reason,

and one reason alone, and that was the litigation wave that it spawned in the inmate context soon after RFRA was passed in 1993. As of the date of the decision, Ohio alone had roughly 130 inmate cases, not all of them individual actions, many of them class actions, and an overwhelming percentage of them relying on claims and theories of law that Ohio would easily have won under pre-existing, that is, pre-RFRA law—in fact, even pre-Smith law. So our initial participation in the litigation related really to one problem: Our chaplains, our State attorneys, our corrections offi cials were spending most of their time responding to these lawsuits as opposed to responding to what they thought were other compel-ling problems—indeed, in many cases, the spiritual demands of in-mates.

One of the biggest problems RFRA created in Ohio—and I think this experience was replicated in other States in the country—was that the requirement of diverting chaplains, corrections officials to attend discovery depositions and hearings and trials prevented them from participating in what was in many cases something they wanted to be doing—that is, attending to the spiritual needs of the inmates.

We would all agree with Mr. Colson that one of the best paths to rehabilitation, perhaps the best path to rehabilitation, is a spir itual transformation. There's no doubt about it. That's why Ohio pays for State chaplains, something it obviously does not have to do. But in the wake of RFRA, chaplains were leaving. They didn't feel like they were involved in attending to the spiritual needs of the inmates. They felt they were involved not in tending to the needs of the inmates, but simply in litigation. The States of Okla homa and Colorado actually terminated their State chaplaincy pro-grams in response to RFRA.

So that was Ohio's initial instinct, the initial reason we argued that RFRA exceeded Congress' powers, and that is also why we filed a brief at the certiori stage in the Boerne case to convince the Court to take the case and then why we filed a brief on behalf of 16 States and territories in the U.S. Supreme Court arguing that RFRA did, indeed, exceed congressional power.

The Boerne decision, from our perspective, is not about religion. It is about States' rights, federalism, and preserving structural pro tections that the Constitution provides—protections, incidentally, that are ultimately designed to protect individual liberty. The re quirements, it seems to me, to exercise section 5 power after Boerne are twofold. One, Congress has to establish a pattern and practice of underlying constitutional violations, not just incidental burdens. And two, the remedy has to be proportional to whatever

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those wrongs happen to be. In other words, it has to be designed to remedy those problems, not simply to regulate for the sake of regulating.

In the aftermath of the decision, I think the Court has left ample room for Congress to re-enact RFRA as applied to Federal laws and Federal employees. That strikes me as an opportunity for Congress and an opportunity for this movement. Congress can lead by exam ple, and I don't think there's any doubt that the Court would agree with that. **Justice Ginsberg asked me that very question in oral ar gument, and I agreed that Congress could lead by example in this area.**

Secondly, **I don't think there's any doubt that the States can enact their own RFRA's**. Indeed, in light of the Boerne decision, my boss, Attorney General Betty Montgomery, has drafted a State ver sion of RFRA which she has called "The Ohio Religious Liberty Act." It is attached to my testimony. She, of course, is not a legisla tor and cannot propose it formally to the Ohio general assembly, but what she has done is circulate a copy of the legislation to all 50 State attorneys general. In fact, she discussed this with them the day of the Boerne decision and has sent a copy of the proposed legislation across the street to the general assembly. At the point it's up to the legislative to determine what to do with it.

The State version of RFRA, at least in Ohio, tentatively mirrors the Federal legislation in really all respects except three. One, it only applies to State laws, obviously. Two, it uses intermediate, as opposed to strict, scrutiny. And three, it exempts inmates. Quite obviously, people in Ohio could decide in the legislative process to change it further—either to ratchet up or ratchet down the protec tions—and the same, of course, is true in the other States.

The only other thing I'd like to point out is that I understand the **risk that has been expressed about State RFRAs leading to a patchwork of religious liberty protections. It strikes me that that's a pejorative way of looking at things; the patchwork of protections, can be a plus or a minus. States can go further. States can overpro tect, even relative to RFRA. They can also do less. But having the States experiment through the laboratories of democracy may well be helpful to everyone in finding better ways to protect, and more realistic ways to protect religious liberties.**

Thank you, Mr. Chairman.

[The prepared statement of Mr. Sutton follows:]

PREPARED STATEMENT OF JEFFREY SUTTON, SOLICITOR, STATE OF OHIO

Good morning Mr. Chairman and members of the committee. My name is Jeffrey Sutton and I am the Solicitor for the State of Ohio and am appearing on behalf of Betty D. Montgomery, the Attorney General of Ohio. On behalf of Attorney General Montgomery I want to thank you for the opportunity to express the concerns that prompted Ohio and many of its sister states to challenge the validity of the Reli gious Freedom Restoration Act of 1993 ("RFRA").

My testimony this morning will focus on three major points. First, I would like to explain our view of the holding in City of Boerne v. Flores, 65 U.S.L.W. 4612 (1997). Second, I would like to explain the very significant problems that RFRA posed to state and local governments in the performance of their duties to maintain public safety and welfare and to operate state prisons and locals jails in a safe and secure manner. Finally, I would like to discuss the efforts that Ohio and other states are undertaking to supplement the already substantial body of law guaranteeing re

ligious liberty separate and apart from RFRA.
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I. The Impact Of City Of Boerne
First and foremost, City of Boerne caps the scope of Congress' power under § 5 of the Fourteenth Amendment to legislate in areas traditionally regulated by the states. The decision makes it clear that 5 establishes a power to remedy constitu tional civil rights violations, not to regulate civil rights generally. It authorizes Con gress only to enforce existing constitutional guarantees, as determined by the Su preme Court, not to alter those guarantees. Any power to expand those guarantees for remedial purposes exists only when Congress has established the requisite predi cate for doing so—a pattern and practice of State failure to honor their constitu tional duties. Finally, any such legislation must be proportional to the underlying violation.
Because the Court relied on the Fourteenth Amendment in reaching its decision, we do not think it limits Congress' authority to enact a new RFRA that applies only to Federal laws, regulations and practices. Nor do we think the decision prevents States from providing greater protection for religious liberties than the Free Exer cise Clause already provides.
//. The Problems Caused By RFRA
Ohio wrote an amicus brief on behalf of itself and 15 other states and territories challenging the validity of RFRA in the City of Boerne case. One primary concern motivated our participation: A proliferation of inmate lawsuits under the law. In the three and one-half years that RFRA was on the books, 254 inmate RFRA cases reached the LEXIS legal database. They represented almost 60% of all suits involv ing RFRA in that database. Moreover, those figures probably understate the extent of the prisoner litigation caused by RFRA as most cases were never reported and some involved class actions.
The cases included such bizarre claims as demands for recognition of the right to burn bibles, the right to possess and distribute racist literature, the right to engage in animal sacrifices and the right to group martial arts classes. In addition, RFRA forced the re-litigation of many issues previously settled under pre-RFRA standards. RFRA cases were particularly time consuming due to the law's application whenever prison security regulations "substantially burdened" any and all religious practices. Consequently, corrections officials had to spend an inordinate amount of time on discovery and trial related matters.

Exactly why RFRA + “religious neutrality” needs to be pruned down to RFRA for Bible faiths but the burden on other religions to show benefit.

However visible they were, the lawsuits were only the tip of the iceberg. RFRA's greatest harm was that it greatly disrupted corrections officials' ability to maintain safety and security inside the nation's prisons and jails. The sheer volume of litiga tion greatly exacerbated the existing problems caused by the activity of jailhouse lawyers such as diversion of staff from operational tasks, increased tension between inmates and staff, deterioration of staff morale, and an overall erosion of discipline. In addition, prison officials experienced an exponential growth in both the number and nature of requests for alterations of normal prison routine based upon RFRA, which resulted in the diversion of substantial amounts of staff time to analyze each

of those requests under RFRA's stringent least restrictive means test.
More ominously, inmates exploited the fact that RFRA both shifted and enhanced the burden of proof regarding the validity of prison regulations and practices to in sulate illicit, even dangerous, activities from official scrutiny. Corrections officials across the country noticed that white supremacist inmates suddenly converted to ob scure or eccentric religions, then demanded that officials recognize their religious gatherings and practices under RFRA. Here in the District of Columbia inmates re cruited "religious volunteers" to bring drugs and prostitutes into Lorton prison, in timidating the staff with threats of lawsuits under RFRA. Luciferian inmates in Wy oming invoked RFRA to demand, and receive, the right to unsupervised group serv ices and then burned Christian bibles and hymnals in those serves, creating not only a fire safety threat but also causing significant smoke damage to prison Facili ties. Although most abuses were detected and dealt with eventually, they resulted in tremendous diversions of staff time from other pressing tasks, such as gang sup pression and contraband control. In addition to these specific problems, RFRA also provided an effective mechanism for inmates to challenge the general authority of prison officials, authority which must be maintained both to protect weaker inmates from their stronger, predatory counterparts and to facilitate rehabilitation.
Finally, RFRA actually impeded the delivery of religious services to inmates ad hering to
non-disruptive, mainstream religions. It did so in two ways. Quan titatively, religious services personnel spent so much time dealing with the in- creased volume of increasingly belligerent demands and lawsuits that they had little time to facilitate the delivery of religious services to sincere, non-disruptive inmates of faith. Qualitatively, the need to constantly investigate and frequently turn down requests under RFRA led inmates to view chaplains more as enforcers than pastors,
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and chaplains to become increasingly skeptical of inmates' sincerity, thereby under- mining the relationship of mutual respect that is essential to the effective delivery of religious services.
The foregoing is just a summary of the problems caused by RFRA in the prison setting. Time does not permit a more thorough discussion that those problems de mand. Summaries of the initial and final results of a survey of the impact of RFRA on state prisons conducted by the Florida Attorney General's Office and of a letter from the two chief religious services administrators of the Ohio Department of Re- habilitation and Correction are attached.
///. STATE LAW PROTECTIONS OF RELIGIOUS EXPRESSION
In his opinion for the Court, Justice Kennedy noted-that there is little evidence of a wide-spread violation of religious rights in the United States:
In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. See, e.g., Religious Freedom Res toration Act of 1991, Hearings on H.R. 2797 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 2d Sess., 331-334 (1993) (statement of Douglas Laycock) (House Hearings); The Religious Freedom Restoration Act, Hearing on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess.,

30-31 (1993) (statement of Dallin H. Oaks) (Senate Hearing); Senate Hear ing 68-76 (statement of Douglas Laycock); Religious Freedom Restoration Act of 1990, Hearing on H.R. 5377 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess., 49 (1991) (statement of John H. Buchanan, Jr.) (1990 House Hearing). The absence of more recent episodes sterns from the fact that, as one witness testified, "deliberate persecution is not the usual prob lem in this country." House Hearings 334 (statement of Douglas Laycock). See also House Report 2 ("[L]aws directly targeting religious practices have become increasingly rare"). Rather, **the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion.** Much of the discussion centered upon **anecdotal evidence of autopsies per- formed on Jewish individuals and Hmong immigrants in violation of their religious beliefs,** see e.g., House Hearings 81 (statement of Nadine Strossen); id., at 107-110 (statement of William Yang); id., at 27-28 (state ment of Hmong-Lao Unity Assn., Inc.); id., at 50 (statement of Baptist Joint Committee); see also Senate Report 8; House Report 5-6, and n. 14, and on zoning regulations and historic preservation laws (like the one at issue here), which as an incident of their normal operation, have adverse effects on churches and synagogues. See, e.g., House Hearings 17, 57 (statement of Nadine Strossen); id., at 157 (statement of Edward M. Gaffney, Jr.); id., at 327 (statement of Douglas Laycock); Senate Hearing 143-144 (statement of Robert P. Dugan, Jr.); see also Senate Report 8; House Report 5-6, and n. 14. **It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country.**

(Emphasis added).

One reason for the general tolerance of different religious beliefs is the wide- spread presence of state and local laws protecting against the infringement of reli gious liberty. In the wake of the City of Boerne decision, the states are acting to fill any gap that may have resulted from the invalidation of RFRA. **Ohio Attorney General Betty Montgomery is working with the leaders of the Ohio General Assem bly, and other State Attorneys General, to develop a state counterpart to RFRA. In most respects, the proposed law parallels RFRA, except that it applies only at the State level, invokes intermediate and not strict scrutiny and exempts prisoners. A draft is attached.**

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THE OHIO RELIGIONS LIBERTY ACT

Purposes:

(1) T o advance and secure the protections of religious liberty guaranteed by the Ohio Constitution, which provides as follows:

Religion, morality, and knowledge, . . . being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship. Art. I, section 7;	Free government being dependent on religion, morality, and knowledge that supports fundamentals of freedom such as consent of the governed, freedoms of speech and religion, serving others, and equal rights for all, it shall be the duty of the General Assembly to pass suitable

	laws to protect every freedom-supporting religious body and believer in the peaceable, lawful enjoyment of their own mode of public worship.
(2) To ensure that government does not substantially burden a person's free exercise of religion without a legitimate explanation; and	...without explaining the negative impact on our freedoms and rule of law that is a reasonable concern based on experiences where the religion is dominant.
(3) T o provide a claim or defense to persons whose religious exercise is substantially burdened.	to provide a claim, defense, or accommodation to persons whose exercise of freedom-supporting religion is substantially burdened.

Statute:
(1) State and local government shall not substantially burden a person's exercise of religion, except as provided in subsections (2) and (3) of this section.
(2) State and local government stay substantially burden a person's exercise of religion only if it demonstrates that application of the burden
(a) advances an important governmental interest; and
(b) is no greater than necessary to further the governmental interest.
(3) This statute does not apply to individuals incarcerated in State or local prisons.
Definition:
The term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the State or a subdivision of the State;
Applicability:
(1) This chapter applies to all State and local law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after its effective date; and
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(2) All State and local laws adopted after the effective date of this chapter are subject to these provisions unless such laws explicitly exclude such application by reference to this chapter.
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APPENDIX ITEM B
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
ROBERT A. BUTTERWORTH
Attorney General
State of Florida

MEMORANDUM
TO: Robert A. Butterworth
Attorney General
Harry Singletary
Secretary
Florida Department of Corrections
FROM: Kim Tucker
Deputy General Counsel
DATE: July 19. 1996
RE: Preliminary Results of the RFRA Survey of All States: The Impact of the Religious Freedom Restoration Act on State Correctional Systems

This is to summarize the preliminary results of the national survey on the impaet of the Religious Freedom Restoration Act (RFRA) on state correctional systems.

As you know, RFRA's mandated abandonment of the

constitutional standard for review of free exercise of religion claims in the prison context, enunciated by the U.S. Supreme Court in O'Lone v. Estate of Shabazz. 482 U.S. 342 (1987). has had a tremendously negative impact in Florida. RFRA has resulted in a significant increase in the number of claims for exemptions from security regulations and requests for special privileges. It has also resulted in an increase in the number of cases brought claiming the right to exemptions under this Act, increased the cost in staff and financial resources to evaluate and litigate such claims, and has required Florida as a State to relitigate claims previously won even under the Eleventh Circuit's pre-O'Lone "strict scrutiny" standard. What is most distressing is the nature of the recent prison actions. If anything, the recent RFRA claims are more bogus or bizarre than our previous experience.

At the Spring meeting of the National Association of Attorneys General (NAAG), in Washington. D.C., it became painfully apparent that other states were experiencing similar deleterious consequences from the application of this Act in the prison context. This issue was raised by the Attorney General to both the President and Attorney General Janet Reno. General Reno responded by requesting additional information on the costs and consequences of RFRA in prisons and jails. As a result, we undertook the process of surveying all states, the District of Columbia, and the U.S. Territories and Commonwealths on the impact of RFRA on their correctional systems. Surveys were sent by NAAG to the Attorneys General and Secretary Singletary sent surveys to each of the Directors of correctional systems in the States and Territories, as well as several of the larger jail systems. Pursuant to your direction. I am managing the collection and

assessment of the survey responses.
I am pleased to report that of the 56 States and Territories to
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which the survey was sent, we have received responses from the Attorneys General and Department of Corrections in 33, so far, and we have been provided assurances from the others that their responses are in progress.
As discussed more fully below, RFRA has had a very significant, and very adverse, impact upon corrections systems in three major ways. First, RFRA has been utilized by racial hate groups and other inmate gangs to insulate their activities from the oversight and control of corrections officials. Second, there has been a tremendous increase in the number of lawsuits and internal demands for "religiously motivated" alterations of prison practices, creating significant burdens on the resources of corrections systems, state attorneys general,
and the courts. The enactment of RFRA
has resulted in the proliferation of claims for exemptions from prison security regulations and requests for special privileges, grounded in obscure or previously little-known "religions", including: Wicca, Satanism, Odinism, Asartu, and Luciferianism. Third, the enactment of RFRA has been followed by a reduction in the availability of religious programming in some state correctional systems.
Perhaps the most prevalent and disturbing pattern is the use of RFRA by inmate groups to insulate their activities from regulation by prison officials. Inmate groups and gangs have recognized that RFRA's "least restrictive means" test makes it very difficult for corrections officials to restrict activity allegedly motivated by religion and, consequently, have claimed religious status for their groups and religious motivation for their actions. Where previously prison officials successfully prevented gangs from wearing colors or emblems, these same groups now assert the right to wear special clothing or medallions as expressions of religious freedom. Since the federal courts are loathe to challenge the sincerity of religious claims and because it is difficult to
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overcome the "least restrictive means" test in the assertion of this type of claim, this is providing inmates an avenue for circumventing the legitimate security concerns of correctional institutions and encouraging the proliferation of gangs in prisons. Like Florida, most states responding to the survey have indicated that this pattern is being employed by racial hate groups, such as the Aryan Nation, as well as street gangs.
A second common and disturbing pattern is a tremendous

drain on the resources of state correctional systems. State Attorneys General, and the courts. Most states have reported a significant increase in the number of inmate lawsuits asserting religious claims since the enactment of RFRA. There have been particularly noticeable increases in the States of Arizona and New York. Most lawsuits involve issues settled prior the enactment of RFRA. under the analysis established in O'Lone. This mostly redundant litigation requires correctional systems to divert employees from their normal tasks, requires State Attorneys General to devote significant staff to defend, and ties up court dockets across the country, in both state and federal courts.[1]

1 Not only has there been a significant increase in the free exercise lawsuits since the enactment of RFRA. conversations with Assistant Attorneys General and staffs of Department of Corrections of other States has indicated that the individual cases are more time consuming and costly than prisoner suits under the previous Constitutional standard. During this year's NAAG Corrections Conference, in Albuquerque. NM. and in a recent NAAG conference call on RFRA. attorneys from several States related that courts are reluctant to dispose of such cases on summary judgment or similar grounds because of factual and legal questions about the religious necessity of the requested "accommodations."

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Similarly, most of the responding states have noted significant increases in the number, belligerency, and unusual nature of inmates' internal demands for "religiously motivated" alterations to and exemptions from prison regulations. The large number of those requests, together with RFRA's "least restrictive means" requirement, are resulting in very significant burdens on the already overburdened corrections staffs due to the need to investigate the religious necessity and security impact of each of the growing number of demands.

Finally, and most ironically, the survey indicates that RFRA has actually resulted in a decrease in religious programming for most inmates in some States. The increased demands on staff time, described above, means that prison chaplains have less time to actually deliver religious services. In addition, increased demands for time and space by adherents to such previously obscure "religions" as Satanism. Wicca, Asatru, and Odinism[2] has resulted in less time and space being available for adherents of wide-spread, mainstream religions. Moreover, the increased stridency of inmate demands and doctrinal conflicts between inmates and potential volunteers

2 Prior to enactment of RFRA. these "religions" were rare or unheard of in the prison context. The survey indicates, however, that inmate claims of conversion to these "religions" has

proliferated since enactment of RFRA. Similarly, RFRA has spawned a surfeit of inmate claims for special privileges and exemptions, allegedly grounded in the Native American religion: however, overwhelming these claims are asserted by inmates with no previous or legitimate claim to tribal affiliation, (e.g. claims of Virginia inmates Randall "Lone Wolf" Mullins and William "Two Eagles" Martin to the right to possess feathers from endangered eagles, despite federal law prohibitions against possession of such feathers by individuals who do not have an identification number from the Bureau of Indian Affairs. Ironically, the Justice Department has intervened in this case on the inmates behalf.)
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has resulted in less programming being available from outside groups, who had previously serviced the inmate populations. Finally, some States have become so frustrated with the difficulties resulting from RFRA that they have eliminated all State-funded religious programming in their prisons.3

As the foregoing makes clear, the preliminary results of the RFRA survey are very disturbing. It appears that, as anticipated prior to its enactment. RFRA has had a disruptive effect on the operation and security of the nation's prisons. The actual costs of imposition of this ill-conceived standard on State and local correctional facilities is difficult to calculate, but our survey shows taxpayer money being diverted to serve no public purpose. However, the costs are known to be significant and the risks created to staff and inmate safety are substantially increased. I will advise you further of the progress of the survey as additional results become available.

3 The Departments of Corrections in Oklahoma and Colorado have discontinued State-funded Chaplaincy programs. Not all reductions in services to mainstream religions are intentional. For example, officials in Wyoming felt compelled by RFRA to allow a group of "Luciferians" to have an unsupervised service in the prison chapel. In an apparent burst of religious enthusiasm, the Luciferian inmates burned Christian hymnals and Bibles, making the books unavailable for Christian inmates to use, causing substantial smoke damage to the Chapel (thus, making it unavailable for general use by other inmates until repaired), and, obviously, creating a significant safety hazard to the life and safety of all inmates and staff within the institution.
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APPENDIX ITEM C
July 17, 1996
Ms. Betty D. Montgomery
Attorney General of Ohio
30 East Broad Street, 17th Floor

Columbus, Ohio 43266-0581
Re: The Effect of the Religious
Freedom Restoration Act of
1993 on the Delivery of
Religious Services in Ohio's
Prisons
Dear Attorney General Montgomery,
We are writing as the Directors of Religious Services of the Ohio Department of Rehabilitation and Correction to describe the effect of the Religious Freedom Restoration Act of 1993 ("RFRA") on the delivery of religious services in Ohio's prisons. Ironically, RFRA has adversely affected the delivery of such services by limiting both the quantity and quality of staff time that can be devoted to religious matters.
Quantitatively, RFRA has forced religious services personnel to be diverted from tasks necessary to meet the spiritual needs of Ohio's inmates in order to respond to the significant legal and operational problems that have followed us enactment. Prior to RFRA, the Ohio Department of Rehabilitation and Correction ("ODRC") took a proactive approach to meeting the religious needs of inmates and we spent the vast majority of our time developing programming, recruiting and working with paid and volunteer providers of
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religious services and working with the religious community at large regarding the needs of inmates. We were seldom involved in litigation or problems of statutory compliance.
Unfortunately, that changed dramatically after the enactment of RFRA. We now spend approximately 75 to 90 percent of our time dealing with legal and operational problems directly related to RFRA. More specifically, we spend between 15 to 25 percent of our time working with attorneys from your office on lawsuits arising under RFRA. In addition, we spend between 60 to 70 percent of our time consulting with institutional staff regarding compliance with RFRA. The cumulative result of those developments has been that we are now forced to take a reactive approach to religious matters, as opposed to our traditionally proactive approach.
That dramatic change has two interrelated causes. The first is that RFRA's least restrictive means test requires us to effectively "set up and shoot down" all possible alternatives for dealing with "religiously motivated" requests for alterations of normal prison operations. Considering and evaluating those mostly unworkable alternatives is tremendously time consuming. Time spent on those matters cannot be spent on facilitating the delivery of religious services of a non-disruptive nature.
Secondly, inmates and inmate groups have recognized,

and abused, the fact that RFRA has shifted the burden of proof in religious matters. Since RFRA's enactment we have seen the proliferation of new, inmate created "religions" with such bizarre demands as group martial arts classes. In addition, we have seen a very large increase in requests for accommodations for previously unrecognized "requirements" of existing religions. Even more frighteningly, a number of inmate gangs, including racial hate groups, have claimed

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"religious" status in order to insulate their illicit and disruptive activities from scrutiny by correctional staff. Although most abuses are ultimately detected and dealt with, that only occurs after a tremendous investment of time by religious services staff who must investigate the "religious" nature of the groups or faiths at issue and the "religious" basis for the individual accommodations requested. Once again, time spent on such tasks cannot be spent on the actual delivery of the services to inmates adhering to unquestionably legitimate and sincerely held religious beliefs.

Not only is that division of resources very disruptive, it is also very wasteful. Most of the accommodations sought involve matters that were analyzed and rejected under Pre-RFRA legal standards. However, R.F.R.A. has required that those matters be revisited, effectively requiring that each problem be analyzed twice. Once again, time spent on those largely redundant tasks is time that cannot be spent on the delivery of religious services that are not subject to any dispute.

The effect of RFRA on the quality of staff time devoted to delivery of religious services has been equally, if not more, deleterious. Prior to the enactment of RFRA religious services personnel were usually able to maintain a "pastoral" type of relationship with individual inmates, regardless of the faith of the individual staff member or inmate. However, because of the increased number of increasingly bizarre demands and the increasing militancy of inmates making such demands, religious services staff are becoming more skeptical, thereby straining the relationship from the perspective of the staff members. Similarly, because staff are increasingly required to demand proof of the religious basis for requested accommodations and frequently forced to deny requested accommodations inmates are beginning to view religious services personnel more as "enforcers" of

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staff authority than as pastors. That hardly fosters the type of open, mutually accepting relationship that is vital to the effective delivery of religious services.

As the foregoing makes clear, RFRA has had a very
significant and very adverse effect on the delivery of
religious services in Ohio's prisons.
Sincerely,
Marloe Karlen David Schwarz
Director of Religious Services Director of Religious Service
North Region South Region
Department of Rehabilitation Department of Rehabilitation
and Correction and Correction
1050 Freeway Drive 1050 Freeway Drive
Columbus, Ohio 43229 Columbus, Ohio 43229
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Mr. CANADY. Thank you, Mr. Sutton.
Professor Berg.
STATEMENT OF THOMAS C. BERG, ASSOCIATE PROFESSOR OF
LAW, CUMBERLAND LAW SCHOOL, SAMFORD UNIVERSITY
Mr. BERG. Thank you, Mr. Chairman. I have just a few com
ments to make, all of which are set forth at greater length, obvi
ously, in my written submission.
Obviously, the need for religious freedom legislation is as great
now as it was in 1993. Religious practice is still subject to wide-
spread suppression by general laws under the Smith standard. You
look at the long list of free exercise claims that were denied after
Smith, before RFRA was enacted, and you get worried about what
we might be returning to. As Professor Laycock pointed out, Smith
contains exceptions and limitations that could be used to preserve
and advance free exercise, but their scope is uncertain.
RFRA clearly, in my view, does remain valid as applied to the
Federal Government. I agree with Professor Laycock that we will
ultimately win that argument. The decision in Boerne is based on
section 5 of the 14th Amendment which says, "Congress shall have
the power to enforce the Constitution." The Supreme Court said
that enforcing the Constitution means our understanding of the
Constitution—Marbury v. Madison. Whatever you think of that po
sition, it has nothing to do with the proposition that Congress can
act under other powers that are not powers enforcing the Constitu
tion. So Boerne has nothing to do with that. And I wouldn't make
much of the remand in the Crystal Church case as far as the
Court's view on this, because they do things like that all the time
to clear their docket after they decide a major case. Nevertheless,
it would be, I think, prudent for Congress, in legislating, to make
it clear that RFRA does, indeed, apply to the Federal Government.
Now, as to State and local laws, which are the major issue, we
know that the options of working for State mini-RFRA laws and for
a constitutional amendment have significant problems with them.
So Congress does have a role to play, and I believe that it should
seriously consider and enact a revised version of RFRA that would
be based on several sources of power. Because each of these sources
will not support, or at least most of these sources will not support,
the across-the-board coverage that the original RFRA had, you

should rely on them together as complementary, and provide that
RFRA is triggered whenever the situation fits under any one of
them.
Now, these possible bases include the Spending and Commerce
power, as we've talked about today. The revised RFRA could pro-
vide that the compelling interest test is triggered when the reli
gious activity in question affects interstate commerce or when the
burdensome State program in question is a recipient of Federal
funds. It's not ideal to base protection of a civil right, a fundamen
tal human right, on the Commerce power, but Congress did it in
1964 in the Civil Rights Act and it can do it again.
The use of the Spending and Commerce powers may raise some
legitimate concerns for some Members about federalism and State
autonomy. So let me take a moment to respond to some of those
concerns. First, there are some basic rights that we all agree
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should be protected across the Nation. Whatever our views about
federalism, we agree that there is some set of basic rights that
should be protected nationally, and free exercise of religion, which
is an explicit constitutional right, should be among those.
Second, it's important to realize, I think, that RFRA differs sub
stantially from many other Federal mandates that attempt to im
pose a uniform, national solution to some complex social problem.
The ultimate goals of federalism are to decentralize power and to
allow a variety of approaches to problems. And RFRA doesn't cut
against those goals; it serves them. It allows religious organizations
to follow their tenets and fashion distinctive approaches to social
needs, free from unnecessary regulation. There's much interest now
in relying on religious charities to attack the problems of poverty
and crime. RFRA is an important part of that strategy. In the re-
ported cased alone, it's permitted homeless shelters and soup kitch
ens to operate in the face of exclusionary zoning rules, churches to
expand their buildings to pursue new ministries in the face of
landmarking laws, and prisoners to practice peacefully their reli
gious beliefs which studies have shown can have powerful rehabili
tative effects.
Both the Spending and Commerce powers are probably available,
but they will be limited in their coverage because of the Supreme
Court's recent concern to protect federalism. The model for the
spending power component, as Professor Laycock said, would be
Title VI and the other civil rights laws that prohibit discrimination
in any program or activity receiving Federal funds—the Equal Ac
cess Act, as well. The Court has upheld those conditions. Even if
you believe that the Spending Power should not generally be used
to pressure States into enacting Congress's preferred social policy,
you can still defend the anti-discrimination statutes as means sim
ply to ensure that Federal money is not used to support discrimina
tion. The same reasoning could support RFRA.
And in this regard, I think it's important to note that the latest
case on the Spending Power, South Dakota against Dole, was writ-

ten by the Chief Justice and joined by Justice Scalia. So a major part of the so-called "States' rights wing" of the Court takes a posi tion on that Congress has considerable authority to act under the Spending power.

Under the Commerce power, coverage would be limited mostly to situations where the religious activity itself has some plausible commercial connection, or where in the aggregate it would substan tially affect interstate commerce—those are the limits under the Lopez decision.

At best, I think a Commerce power component of the statute would cover many free exercise claims by religious institutions based on congressional findings that their activities of hiring per sonnel or purchasing materials affect commerce individually or in the aggregate.

But many individual claims, as opposed to institutional claims, would have to be protected some other way. And at least some of those would come in under the Spending power. The only way to get across-the-board coverage now is to rely on the Treaty power and legislate to implement the Covenant on Civil and Political

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Rights, as Professor Laycock mentioned; and I second his com ments on that.

In addition, Congress could and should use section 5 to pass tar geted exemptions in specific areas, making specific findings that facially-neutral laws in those areas are in fact often discriminatory or—and here's a point that hasn't been raised that I think is worth exploring—you might find in particular cases that other rights, such as free expression, are also involved in particular cases. There is a category of exceptions to Smith called "hybrid rights," which those of us who study the area like to make fun of; but it is in the decision that when a claim involves both the religious element and an element of free expression or some other kind of right, the com pelling interest test may still apply. That's how the Court
pre-
served the Yoder decision and the cases about Jehovah's Witnesses speech. You might be able to make those kinds of findings in spe cific cases and that would increase the number of targeted exemp tions you could make.

And, finally, in any legislation you should make clear that RFRA stills applies to Federal laws. Thank you.

[The prepared statement of Mr. Berg follows:]

PREPARED STATEMENT OF THOMAS C. BERG, ASSOCIATE PROFESSOR OF LAW, CUMBERLAND SCHOOL OF LAW, SAMFORD UNIVERSITY

My name is Thomas C. Berg, and I am an associate professor of law at Cum berland Law School, Samford University, in Birmingham, Alabama, where my main scholarly interest is in the law of religious liberty. I also have written briefs in a number of religious liberty cases, often on behalf of the Center for Law and Reli gious Freedom of the Christian Legal Society, but also on behalf of other groups of varying faiths.

We are here today to explore ways of protecting religious freedom in America in the wake of the Supreme Court's decision in City of Boerne v. Flores,1 which struck down the Religious Freedom Restoration Act of 1993 (RFRA) as applied to state and local laws. In striking down RFRA, the Court adhered to its ruling in Employment Division v. Smith2 that the Constitution gives religious practice almost no protection from a law that is formally neutral and generally applicable. Only in the few cases where religious practice is singled out for suppression can we be confident that the federal courts will intervene. Smith set out some exceptions to this rule, and careful litigation may expand their scope. But there is no denying that in our heavily regu lated society, Smith allows religious exercise to be heavily regulated too. Congress recognized this and, through RFRA, tried to restore the requirement that govern ment show a compelling need in order to override the demands of religious con- science. But the Court held in Boerne that when Congress enforces the provisions of the Fourteenth Amendment under section 5 of the Amendment, it cannot adopt an interpretation of rights under the Amendment that is broader than what the Court would recognize.

I understand that there is discussion in Congress about making an official expres sion of anger at the Boerne ruling. I do not have an opinion on the prudence of such a response, but there certainly are reasons to be angry. The Court adhered to its minimal conception of religious freedom even though both houses of Congress had concluded, by overwhelming votes, that the conception was far too narrow. The ma jority of the Court apparently thought that this congressional expression of national consensus did not justify even a second look at Smith. The majority made no at- tempt to defend Smith on its merits (only Justice Scalia did). Instead it admonished us that Smith should be followed simply out of the "respect due" the Court's prece dents, "and contrary expectations must be disappointed." 3 The invalidation of RFRA is a distressing example of the view that the nine justices of the Supreme Court have the exclusive prerogative to interpret the Constitution.

1 117 S. Ct. , 65 U.S.L.W. 4612 (1997).2 494 U.S. 872 (1990).S 117 S. Ct. at .

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It is especially disturbing that Smith's holding should now be insulated from re- consideration by the rule of precedent, since the holding was adopted without full hearing in the first place. The Court adopted the general applicability standard, changing previous law, without ever taking any briefing or arguments on the issue. Now the standard is once again shielded from full debate on its merits, this time by the doctrine of stare decisis.

Plainly, the need for legislation protecting religious conscience is as great as it was in 1993, if not greater. Religious practice is still subject to suppression from facially neutral laws. As those familiar with RFRA know very well, Smith led to a slew of lower court decisions allowing impositions on religious conscience. Coroners could perform unnecessary autopsies in violation of the family members' religious beliefs; cities could zone churches virtually out of the city limits and could apply his toric preservation laws to keep churches from adapting their buildings to new minstries.4 RFRA would assuredly have stopped many of those impositions. Some of them may still be stopped under positive readings of Smith, but the task will be much harder.

Moreover, it now appears less likely than ever that the Court will overrule Smith any time soon. The justices have stuck by Smith's rule as a matter of precedent once. Although they may modify it, it is difficult to imagine them now turning around and overruling it.

Among the obvious possible responses now are to fight for religious freedom in the various states, and to seek a constitutional amendment protecting religious practice from general laws. Those responses involve mostly political and strategic choices. The trickier legal questions concern whether and to what extent Congress can still play a role in protecting religious freedom by statute, using its other enu merated powers. I will concentrate on discussing possible use of the Spending Power and the Commerce Power, and a few concerns that arise from their use.

The first concern is that legislation based on those powers will not have as broad a coverage as the original RFRA. Under those powers, Congress can only protect re ligious exercise when it substantially affects interstate commerce or when the bur densome state program is a recipient of federal funds. Not all meritorious claims will be protected, not even all of the most compelling ones. The only way to preserve across-the-board coverage of claims is to legislate under the Treaty Power, as an im plementation of international human rights agreements. But if Congress does not want to proceed under the Treaty Power, it can at least use both the spending and commerce powers and provide that the compelling interest test will be triggered under either of them.

A second concern is that provisions such as the Commerce Power are not precisely fitted to the protection of civil rights such as religious freedom. In that respect, Con gress faces the same situation now as it did in 1964 when it decided to base the Civil Rights Act on the Commerce Clause rather than on the Fourteenth Amend ment. Now, as in 1964, we have no choice because the Court has interpreted the Fourteenth Amendment narrowly. The revised RFRA will simply have to be the best possible under the Commerce Power combined with other sources of authority.

A third concern is that basing RFRA on the spending and commerce powers, whether or not it is constitutional, raises legitimate questions about federalism and state autonomy. I will address some of those questions in discussing each clause.

But it is important to note two points at the outset. First, there is almost universal agreement that some fundamental rights should be protected at the national level. Free exercise of religion, set forth in the Constitution, certainly fits in that category. Second, RFRA differs great from many federal mandates that attempt to impose a uniform national solution to complex social problems. The ultimate goals of fed eralism are to decentralize power and allow a variety of solutions to problems, and RFRA in fact serves those goals. It allows religious organizations like schools and social service agencies to follow their own tenets and fashion their own distinctive approaches to social needs, free from unnecessary state regulation. There is much interest now in relying on religious charities to attack the problems of poverty and crime. RFRA is an important part of such a stategy.

Before RFRA, Salvation Army shelters were subjected to extensive state regula tion,5 and churches were prevented from pursuing their mission by locating in new

4 See, e.g., Senate Rep. No. 103-111 (July 27, 1993) (detailing these and other consequences of 5Smith).

Salvation Army v. Dept. of Community Affairs, 919 F.2d 183 (3d Cir. 1990) (upholding regu lations under Smith).

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neighborhoods6 or adapting their buildings to new needs.7 Catholic hospitals that play a crucial role in serving the sick were pressured by accreditators to perform abortions and teach their residents how to do so.8 Religious faith can be a dramatic rehabilitative force for men and women in prison,9 but before RFRA wardens could bar prisoners from practicing their faith even in ways that posed no threat to dis cipline or order. Litigation under RFRA was already beginning to correct some of these results, both in the area of social services and in the area of prisons.10 Freeing religious agencies to attack social problems is not the only aspect of religious free dom, but it is an important benefit of it.

I. THE VALIDITY OF RFRA AS APPLIED TO FEDERAL ACTIVITIES

The Boerne decision struck down RFRA as applied to state and local governments. Before discussing how to respond to that ruling, I want to address concerns that some have expressed about whether RFRA remains valid as applied to the activities of the federal government. In my judgment, it clearly remains valid.

Boerne held that RFRA exceeded Congress's power to enforce the Fourteenth Amendment, under section 5 of the Amendment, because RFRA adopted a sub stantive interpretation of the Constitution that was different from the Supreme Court's interpretation in Smith. That reasoning is only relevant to RFRA's applica tion to state and local governments, because the Fourteenth Amendment applies only to states, not to the federal government.

Congress's power to control the activities of federal agencies does not rest on the Fourteenth Amendment. Rather, the power to control a federal agency or program rests on whatever power(s) Congress used to create it in the first place, supple mented by the Necessary and Proper Clause. For example, Congress passed the con scription laws under its Article I power to raise armies.11 Under that power, Con gress has discretion to exempt conscientious objectors, if it concludes that this is the fairest and best way to administer the draft system. Justice White set out this ex- planation in one of the Vietnam draft exemption cases.12

Congress has the power to put an exemption for religious conscience in every stat ute, and it surely can decide that it would be more efficient to deal with the issue universally, as RFRA does. The Necessary and Proper Clause unquestionably gives Congress that discretion. As to future federal statutes, RFRA is really no more than a rule of construction: any future statute is to be construed not to place unnecessary burdens on religious freedom unless the statute explicitly provides that the RFRA standard does not govern.13

Opponents of RFRA have made two arguments that would also render the statute invalid as to federal actions, but neither of those arguments went anywhere in Boerne. The first is the argument that any exemption for religiously motivated con- duct violates the Establishment Clause. That argument got only one vote in Boerne,14 and the Court has repeatedly rejected it in other decisions too.15

The other argument is that RFRA intrudes on the judicial power by directing the courts in future religious freedom cases to apply a legal standard that the Supreme Court has rejected. To state that contention is to refute it. Legislation constantly sets forth standards for courts to apply, and often its whole purpose is to impose a standard the courts have refused to impose under the Constitution. After the

6 Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (upholding exclu sionary zoning ordinance under Smith analysis).7 Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991) (upholding landmark restrictions on church building).8 St. Agnes Hospital v. Riddick, 748 F. Supp. 319 (D. Md. 1990).9 See, e.g., 139 Cong. Rec. S14462 (daily ed. Oct. 27, 1993) (Sen. Lieberman) (summarizing evidence); id. at 14464-65 (Sen. Coats) (same).10 See, e.g., Jesus Center v. Farmington Hills Zoning Bd., 215 Mich. App. 54, 544 N.W.2d 698 (1996) (denial of permit to operate homeless shelter substantially burdened church's religious exercise even though shelter could be located elsewhere); Western Presbyterian Church v. Bd.

of Zoning Adjustment, 849 F. Supp. 77 (D.D.C. 1994) (issuing preliminary injunction against zoning board's exclusion of a soup kitchen that had operated safely for 10 years); Alameen v. Coughlin, 892 F. Supp. 440 (E.D.N.Y. 1995) (granting preliminary injunction against rule forbidding Sufi Muslim prisoners from possessing and displaying beads important to their faith).
11 U.S. Const. art. I, §8, cl. 12, 13.12 Welsh v. United States, 398 U.S. 333, 371 (1970) (White, J., dissenting on other grounds).13 RFRA §6(b), 42 U.S.C. §2000bb-3.14 117 S. Ct. at (Stevens, J., concurring).15 Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987); Zorach v. Clauson, 343 U.S.
306 (1952); Smith, 494 U.S. at 890; Board of Education, Kiryas Joel School Dist. v. Grumet, 114 S. Ct. 2481, 2492 (1994); Texas Monthly v. Bullock, 489 U S . 1, 18 (1989). The last two cases rejected particular accommodations as going too far but affirmed that there is no per se rule against accommodations.
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Court held that discrimination on the basis of pregnancy is not sex discrimination under the Fourteenth Amendment or Title VII,16 Congress used the Commerce Power to prohibit both states and private entities from discriminating because of pregnancy.17 And the 1964 Civil Rights Act itself relied on the Commerce Power to make private businesses follow standards of racial equality when the Court had ear lier held they were not bound to do so by the Fourteenth Amendment.18

RFRA may be more general than some other statutes, but that does not matter constitutionally; Congress can decide whether to legislate generally or specifically. Boerne does make appeals to the separation of powers and to the judicial preroga tive of interpreting the Constitution, but only because the Fourteenth Amendment enforcement power limits Congress to enforcing the Constitution. The Court simply ruled that the meaning of the Constitution is determined by its decisions rather than Congress's interpretation. That ruling carries no implications for situations when Congress acts not under a power to enforce the Constitution, but under the various Article I powers.

It is true that the Court has sent a case involving an application of RFRA to fed eral law back to the court of appeals for reconsideration in light of Boerne.19 We should not make very much of that. The Court regularly does this to clear its docket after it decides a major case. RFRA should be held still to apply to federal laws; the question is how to protect religious freedom from state and local laws.

II. OPTIONS FOR PROTECTING RELIGIOUS FREEDOM

A. State Provisions

One option is to seek the enactment of the compelling interest standard in the various states through so-called "mini-RFRA" statutes like the one that passed Michigan's House last week and is awaiting approval in its Senate. These efforts and successes should be applauded. But we should recognize that such a process is piecemeal, and that particular interest groups may have power at the state level to force an exception to a state RFRA when they would not have such power in Con gress. Federal action is preferable if possible.

B. Constitutional Amendment

Another obvious possibility is to seek to enact a constitutional amendment pro tecting religious exercise from general laws unless the government can satisfy some form of heightened scrutiny. Obviously the process of securing the ratification of 38 states would be very difficult. But some observers point out that the effort alone could help give momentum to state protections of religious exercise, as the Equal Rights Amendment did for state women's rights laws even though it failed to pass.

I understand that the suggestion has been raised that the proposed amendment not enact substantive protection against general laws itself but simply give Con gress the power to do so. This would probably make passage easier, but it would do so precisely because it would leave the question about which claims actually to protect to be decided in the political arena through congressional legislation.

C. Federal Legislation

Because state remedies will be piecemeal and the constitutional amendment proc ess is long and difficult, Congress still has an important role to play. It should con sider enacting a revised version of RFRA based on the sources of power available to it. Because most of these powers will not support the broad coverage that the original RFRA had, Congress should rely on as many of them as possible and provide that the compelling interest test is triggered if the situation fits under any of these powers.

1. TREATY POWER

The only way to achieve the same across-the-board coverage as the original RFRA is to rely on Congress's power to legislate to implement treaties. Others can present the argument more fully; but basically, Congress has the authority to protect reli gious conscience from general laws as an implementation of the International Cov enant on Civil and Political Rights.20 I gather that there are practical political dif ficulties with proceeding on that basis, so I will concentrate on others.

16 Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Co. v. Gilbert, 429 U.S. 125 (1977).17 Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).18 Civil Rights Cases, 109 U.S. 3 (1883). 19 Christians v. Crystal Evangelical Church, 117 S. Ct. , 65 U.S.L.W. 3205 (1997) (vacating and remanding In re Young, 82 F.3d 1407 (8th Cir. 1996)).20 See Gerald L. Neuman, The Global Dimension of RFRA, 14 Const. Comm. 33 (1997).

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2. SPENDING POWER

One trigger for a new version of RFRA would be to rely on the Spending Power21 and make compliance with the compelling interest test a condition on federal fund ing of state or local government programs. There are questions as how far the effect of that condition could reach.

The existing case law gives Congress great leeway in putting conditions on federal funds to state and local governments; it is even more favorable to congressional power than the section 5 law was. The Court has not struck down such a condition since before the New Deal "revolution" of 1937, and even that decision said Con gress can exercise the Spending Power for purposes that are not within the other enumerated powers.22 Ten years ago, South Dakota v. Dole23 held that even if Con gress could not could impose a 21-year minimum drinking age itself, it could require states to do so as a condition of receiving federal highway funds. Dole was written by Chief Justice Rehnquist and joined by Justice Scalia. In other words, even a part of the current state's rights majority on the Court is inclined to allow conditions on funding to state governments, even if Congress could not impose the same rule by direct regulation. The theory, apparently, is that Congress can do what it likes with federal money and states are free to reject the money if they do not like the accom panying conditions.24

The U.S. Code is filled with statutes conditioning the receipt of federal funds on the recipient's acting or not acting in certain ways. The model for a revised RFRA would be the anti-discrimination laws, which together prohibit discrimination based on race, sex, handicap, or age in any "program or activity" receiving federal assistance.25 These conditions have been explicitly upheld as exercises of the Spending Power.26

Some members of the Court, however, may be priming to limit
the Spending
Power, as they have other congressional powers, in ways that would limit a revised version of RFRA. Justice O'Connor (one of RFRA's strongest supporters) dissented in Dole and wants to limit the Spending Power, and she has some academic supporters. Their argument is that conditional funding should not be used to regulate the states in ways that Congress could not do directly under the other enumerated powers. O'Connor's means for limiting the Spending Power is to insist that the con dition be directly related to the expenditure of funds. The majority opinion in Dole did require that the condition be germane to the purpose of the expenditure, but only in the sense that there was some minimal rational connection; that was satis fied because teenage drinking relates to highway safety.27 Justice O'Connor would require more than some rational connection: she would require that the condition actually restrict the use of the funds rather than place some separate constraint on the state's behavior (as the drinking-age minimum did).28

How would all this apply to a revised RFRA? One does not need not to follow the loose approach of Dole in order to premise some version of RFRA on the Spending Power. Actually the Dole majority's approach, looking for some logical connection between the condition and the purpose of the spending, is not the most promising road. Protecting religious freedom is not related to the purposes of most federal grants even to the degree that the drinking age is related to the operation of highways.

Instead, a revised RFRA would have to follow the logic of the anti-discrimination laws. Congress can ensure that "'public funds [will] not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.'"29 In the same way it can ensure that federal funds will not be used to support the impo sition of burdens on religious freedom. The condition is in fact a restriction on the use of funds, as Justice O'Connor demands. Even scholars who want to limit the Spending Power defend the anti-discrimination conditions on the ground that Con-

2 1 U.S. Const, art. I, § 8 , cl. 1.

2 2 United States v. Butler, 297 U.S. 1 (1936).

2 3 483 U.S. 203(1987).

2 4 Dole, 483 U.S. a t 210.

25 Title VI, Civil Rights Act of 1964, 42 U.S.C. §2000d (race); Title DC, Education Amendments of 1972, 20 U.S.C. §1681 (sex); Rehabilitation Act of 1973, §504, 29 U.S.C. §794 (handicap); Age Discrimination in Employment Act of 1975, Title III, 42 U.S.C. § 6102.

26 Lau v. Nichols, 414 U.S. 563, 5 6 8 - 6 9 (1974).

2 7 483 U.S. a t 208-09.

2 8 Id. a t 216 (O'Connor, J., dissenting).

29 Lau, 414 U.S. at 569 (quoting 110 Cong. Rec. 6543 (Sen. Humphrey's statement on Title VI)).

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gress can legitimately decide to purchase only nondiscriminatory education.30 Simi larly, Congress could decide only to purchase state and local services that do not burden religious freedom.

Under this approach, a revised RFRA could be more defensible than the drinking-age condition upheld in Dole. Congress there pressured the states to legislate on an independent question of social policy that, while it had some ties to the federal ex penditure, also had a host of other implications.

Approaching the problem in this way, however, would require drafting a revised

RFRA so as not to extend the conditions far beyond the actual expenditures of funds. Certainly, the bill could not say that any state that receives federal assist ance in any of its programs is subject to RFRA in all of them. At the other extreme, the bill certainly could say "federal funds may not be used to burden religion," but that language would have the most limited coverage. In the middle is the language already in civil rights laws: the condition must be observed in any "program or ac tivity" receiving assistance. That language could be construed literally, to impose the condition only on the particular program receiving funds; or it could be con strued to all programs of a state agency whenever one program receives funds, as Congress provided in the Civil Rights Restoration Act of 1988.31 Of these middle op tions, the narrower one, limiting the condition to the particular program or activity, is safer, but again it provides less coverage.

The model of the anti-discrimination laws is the most promising because most of the justices will not want to call the whole structure of civil rights enforcement into question. Justice O'Connor did suggest in Dole that the anti-discrimination condi tions could be justified anyway under section 5 of the Fourteenth Amendment or the Commerce Power.32 That is not true of all such rules. Some of the implementing regulations prohibit recipients of funds from taking actions that have discriminatory effects,33 even though tile Fourteenth Amendment prohibits only intentional dis-crimination.34 Many recipients of assistance are private schools or other institu tions, which cannot be reached by the Fourteenth Amendment and might not be reached by the Commerce Power if the Court continues to restrict its scope. So if the Court wanted to strike down a revised RFRA, it would have to worry about the ramifications for established civil rights laws.

3. COMMERCE POWER

Another component of a revised RFRA would be reliance on the power to regulate interstate commerce. Here there are also uncertainties as to the extent of Congress's power, and the best result would be only partial coverage. So the connection to interstate commerce should be simply another trigger.

There is a preliminary question whether Congress can use the Commerce Clause at all to impose a rule such as the compelling interest test on state and local govern ments. In two recent decisions the Court has held that because of the Tenth Amend ment, Congress "may not compel the states to enact or administer a federal regu latory program." The latest is United States v. Printz,35 which struck down the Brady Bill s requirement that sheriffs check the background of any gun purchasers in their county. Earlier in New York v. United States,36 the Court struck down a federal law mandating that each state develop a plan for disposing of radioactive waste generated within its borders or else "take title" to the waste. (These holdings do not apply to the Spending Power; the New York decision, for example, upheld the part of the law that made funds available to the state if it developed a waste disposal plan.37)

Some of the broad language in these decisions raises a question whether a revised RFRA could be based on the Commerce Power. In places in Printz, the Court says that Congress may regulate interstate commerce directly but may not regulate the

3 0 Thomas R. McCoy and Barry Friedman, Conditional Federal Spending: Federalism's Trojan Horse, 1988 Sup. C t Rev. 85, 114.8 1 Pub. L. No. 100-259 (1988), amending the statutes cited in note 25.8 2 483 U.S. at 217 (O'Connor, J dissenting) (citing Lau, 414 U.S. 563).3 3 See Guardians Assn. v. Civil Service Comm., 463 U.S. 582 (1983) (upholding such regula

tions under Title VI); Lau, 414 U.S. 563 (upholding regulations requiring schools to correct English language deficiencies of students); Kelley v. Board of Trustees, 35 F.2d 265, 268 (7th

Cir. 1994), cert, denied, 115 S. Ct. 938 (1995) (regulations under Title DC).
84 Washington v. Davis, 426 U.S. 229 (1976) (race); Personnel Administrator v. Feeney, 442 U.S. 256 (1979) (sex).85 117 S. Ct. , 65 U.S.L.W. 4731 (1997).8 6 505 U.S. 144(1992).87 Id. at 173.
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states in their regulation of commerce, and also that a law whose "whole object" is "to direct the functioning of the state executive" is per se unconstitutional.38
However, the enforcement of civil rights such as religious freedom against states is very different from the regulatory programs the Court has struck down. RFRA does not affirmatively compel states to carry out a regulatory program; it negatively prohibits them from interfering with individuals' rights. RFRA ultimately acts upon individuals by protecting their religious exercise; it happens that the force against which such protection is needed is state and local government. RFRA does not single out the states for regulation; the whole federal government is subject to the same rule. Moreover, one of the main concerns of Printz and New York is that state offi cials will be held accountable for unpopular regulations actually attributable to Con gress; 39 this blurring of accountability does not seem likely to happen when state official do not take affirmative steps but merely leave religious practice alone. If RFRA were struck down, then the Tenth Amendment would potentially bar a great many civil rights laws not premised on the Fourteenth Amendment enforcement power. The Court might stretch federalism that far, but it seems less than likely.
However, the scope of RFRA's coverage under the Commerce Power would be lim ited. The reach of the Commerce Power is now defined by United States v. Lopez,40 which struck down the Gun-Free School Zones Act of 1990 because the activity of carrying a gun in a school did not bear a substantial relation to interstate com merce. Lopez sets out three categories of permissible regulation. Since a revised RFRA would not directly regulate or protect the channels or instrumentalities of interstate commerce, it probably would have to rest on the power to regulate activi ties that "substantially affect" interstate commerce.41 Lopez suggests two possible ways to meet the "substantially affecting" test.
The first way is to ensure, through an explicit jurisdictional element in the stat ute, that the activity in any given case affects interstate commerce. The Gun-Free School Zones Act contained no such jurisdictional element.42 More important, the Court indicated that it would not just accept speculation about how a particular ac tivity is connected
to interstate commerce.
The second possible way is to show that the activity would substantially affect interstate commerce through repetition—that is, viewed "in the aggregate"—even if not in every particular instance.43 For example, a farmer growing wheat on his land for his family's consumption would not himself affect interstate commerce, but the class of all such activity nationwide would.44 One of the key steps in Lopez is to limit sharply this "aggregation" argument—perhaps confining it to cases where the regulated activity is economic in nature, and at least viewing that as a very impor tant factor. (Gun possession, the Court concluded, was not economic.) Without some such limit, the Court said, the Commerce Power would become a general police power.
The Court also said that the asserted connection between gun possession in schools and national productivity was too attenuated and required "pil[ing] infer ence upon inference."45 Some lower courts cases have read Lopez as still allowing regulation of intrastate noneconomic activity—for example, domestic violence against women—if, when aggregated nationally, it has a close and substantial effect

on interstate commerce.46
In my judgment, the effect of these rules would be to limit the Commerce Power basis for a revised RFRA mostly to cases of free exercise rights asserted by institu tions: churches, religious schools, religious social service agencies such as homeless shelters or child care centers. Many of these institutions could meet a jurisdictional element of "affecting interstate commerce." Congress would have to make findings that such institutions purchase materials or supplies in interstate commerce or have other connections to it (on the model of the Civil Rights Act provisions upheld as applied to local restaurants in Katzenbach v. McClung47). The aggregation argu ment also could be available for many classes of religious institutions, since they could be said to engage in economic activity: hiring employees, purchasing materials

38 117 S. Ct. a t .
3 9 Printz, 117 S. Ct. at ; New York, 505 U.S. at 168-69.
4 0 514 U.S. 549, 115 S. Ct. 1624 (1995).
4 1 Lopez, 115 S. Ct. at 1629-30.
4 2 Id. at 1632.
4 3 Id.
44 See Wickard v. Filburn, 317 U.S. Ill (1942) (approved in Lopez, 115 S. Ct. at 1630).
45 115 S. Ct. at 1633-34.4 6 See, e.g., Doe v. Hartz, 1997 WL 354832 (N.D. Iowa 1997) (upholding the Violence Against
Women Act); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) (same); United States v. Wilson, 73 F.3d 675, 685 (7th Cir. 1995) (upholding the Freedom of Access to Clinic Entrances Act).
4 7 379 U.S. 294(1966).

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and supplies, and so forth. Congress then could and should make explicit findings, wherever possible, that the effect of burdensome general laws on religious institu tions in the aggregate affects interstate commerce.
But these rationales would not likely extend to most cases of individual free exer cise. Some individual cases could be covered, where the conflict arises out of the in dividual believer's commercial activity: for example, those where landlords have reli gious objections to renting to unmarried couples.48 But most would not be, including some of the most compelling situations for protecting conscience. That is the cost of having to protect human rights under a commercial provision. Many but not all of the individual claims could be reached under the Spending Power rationale.

4. TARGETED EXEMPTIONS

Finally, there is the option of enacting exemptions targeted at particular areas of religious exercise based on specific congressional findings. This is clearly a second-best alternative to a general statute. One of the prime political and philosophical advantages of RFRA to date has been that it has covered all religious freedom claims and has not embroiled Congress in explicitly choosing which forms of reli gious practice deserve protection.
However, exemptions targeted at specific areas could fill in some of the gaps in coverage left by other bases for the statute. Congress could continue to rely on the section 5 power and find that religious practices in certain areas implicate one of the "hybrid rights" preserved in Smith: religion combined with rights of speech, as sociation, parental control over education, and presumably other constitutional in terests such as property rights. One good model here is the historic preservation area, where courts have accepted the argument that restrictions on church architec ture intefere with expressive interests as well as religious ones.49 Congress could explicitly find that speech or other interests are implicated in other areas as well.

Congress could also find that some laws, though formally neutral, are implemented in discriminatory ways. Again, historic preservation laws provide a good example: churches are subjected to such ordinances at a much higher rate than other buildings.50

Mr. CANADY. Thank you, Professor Berg. And I want to, again, thank all the members of this panel for their testimony.

Mr. Sutton, let me ask you this: What has been your experience since the adoption of the Prison Litigation Reform Act by the last Congress? Has that diminished the flood of litigation that you talked about in connection with the inmates?

Mr. SUTTON. Mr. Chairman, it has not. But that's an unfair an swer because there really hasn't been time for its protections to come into play. One of the most significant protections of the PLRA is that it prevents frivolous claimants from being able to get IFP (in forma pouperis), status and make repeat filings. And there real ly hasn't been time to do that. So there is some possibility that that would help the States.

But let me tell you an example of one case that would not be af fected by the PLRA that was filed in Ohio, and I think is represent ative not of the eccentric cases that are being filed, but of I think fairly serious ones, though still very difficult ones for State correc tions officials.

We have a case called Syder v. Voinovich. The most significant claim in the case—it's a class action brought on behalf of all Native Americans who are incarcerated in Ohio—is that we could all ap preciate in many senses; they want to be able to grow their hair longer, because they contend it's part of their religious belief. We don't doubt them with respect to the sincerity of that claim, nor, in most cases, do we doubt they're really Native Americans. The

48 See, e.g., Smith v. Fair Employment and Housing Comm., 12 Cal. 4th 1143, 913 P.2d 909 (1996).4 9 See, e.g., First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 840 P.2d 174 (1992).50 See Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 49 & n.203.

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problem for corrections officials—and I'm not a corrections official, but this is what we've been told—is that long hair presents a seri ous problem, both from their perspective of hiding contraband and weapons.

This is a good example of difficult litigation that RFRA has gen erated for us to deal with. Under RFRA without a prison exemption or under a State law without a prison exemption, the State's going to be hard-pressed to deal with that claim, particularly if there's a least restrictive means test. Under pre-RFRA law, even pre-Smith law, State corrections officials would have been given sub stantial deference in making the determination across-the-board that we're simply going to have to say that long hair is prohibited, even if it is something that's required by an adherence to religious belief. I'm not saying that was an easy choice. I think it's a very difficult choice. But I want to suggest to you that that would prob ably be a problem even after the PLRA because that's not a frivo lous claim at all. That's a very serious claim, but the point I'm

making is it's also a hard one for corrections officials to deal with.
Mr. CANADY. But the bulk of the cases that you've talked about
don't involve circumstances such as that. They would fall into the
frivolous claim category. Right? I mean, when you're talking about
the chaplains having to go and testify and the drain on the re-
sources of the system and everybody's attention being diverted by
the lawsuits, that's not by suits that you consider to have some
merit, even though you may disagree with the relief being sought.
I mean, those are the run-of-the-mill lawsuits that we've heard
about that are recreational.
Mr. SUTTON. I want to be fair about my answer. The truth of it
is we haven't broken it down. I cannot cite in Ohio or a national
study that breaks down the RFRA filings and categorizes some as
fairly serious and others as recreational or eccentric.
The example I've just given you, however, would be one that
would divert a substantial amount of chaplain time, corrections of
ficials' time, and even more time if the resolution of the case is as
I think it should come out. If strict scrutiny means anything, it
means the courts would not resolve the issue once and for all time.
They'd litigate it over and over with each individual.
Mr. CANADY. Let me ask you this: What religious rights do you
think that inmates should have?
Mr. SUTTON. Let me start by explaning the rights that the U.S.
Supreme Court has said they should have. What the U.S. Supreme
Court has said is that just because you have broken State or Fed
eral laws and are incarcerated doesn't me that you check your con
stitutional rights at the prison door. You do have constitutional
rights. By and large, what the Court has said in cases like Turner
v. Safley or Lonnie v. Shabazz is that the State defense to those
allegations merely has to meet a reasonableness test; that the
courts defer substantially to prison officials in these areas, even
when constitutional rights are involved, because of the difficulty
States have in running prison systems and the substantial local in
terest involved in managing a corrections
system.
I would say in Ohio we go beyond that. As I said in my opening
testimony, we have State-paid chaplains; that's not something
that's required. I assume there are even some people that are
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strong proponents of the Establishment Clause who would say that
it's not even allowed. So we go well beyond what's required. In
Ohio we're sensitive to the notion that if we take seriously our duty
to rehabilitate inmates, spiritual issues are a great tool when it
comes to this mission. The problems we have are when those inter
ests confront security concerns or the development of a series of ec
centric religions, each with claims of their own and each with de
mands of their own, on State time.
Mr. CANADY. OK, thank you. Let me—
Mr. LAYCOCK. Mr. Chairman, could I speak briefly to this prison
question?

Mr. CANADY. Sure, go ahead, Professor Laycock.

Mr. LAYCOCK. Everyone knows that prisoners file phony claims. The question is how best to screen them, and the Prison Litigation Reform Act addresses directly the problem of phony and frivolous claims across-the-board. I think that's the way to handle it.

I think it's also important to note for the record that prison au thorities sometimes make frivolous rules. And if the rule is that prisoners simply have no rights, then those frivolous rules will pre vail. Let me tell you two real cases. The one prison case that was won under RFRA is Sasnet v. Sullivan, an opinion by Judge Posner. Wisconsin forbade prisoners to wear a cross on their uni form or a Star of David, or any other kind of insignia, because it was classified as jewelry and all jewelry was forbidden. They said people might steal it, although there's no record of that; it might be turned into a weapon although the rule applied even to very small items. It was applied across-the-board in the maximum-secu rity prison and the minimum-security prison, and in the white col lar prison, and in the women's prison. Judge Posner said, after a fairly elaborate trial, that there was just no reason for that.

There was a case that settled in the District of Colorado where the plaintiff was a 64-year-old forger who was on a work-release program. He was allowed out to go to church every week; he was actually the organist in the Episcopalian Church in Craig, Colo rado. But the prison authorities told him, "If you take communion, you're back in the general prison population, because taking com munion would violate our rules about drugs and alcohol." That's a real case.

So I think the way to deal with frivolous litigation is not by tak ing RFRA away; it is to penalize the plaintiffs who file the frivolous lawsuits. If the prison authorities are right about the dangers of long hair, they're going to win that case; judges aren't going to take chances with security. The prison authorities may be wrong. The Federal prisons, I'm informed, allow Native Americans to wear long hair.

Finally, I don't believe the current standard in prisons is Turner v. Safley and O'Lone v. Shabazz which say that there has to at least be some reasonable basis for the rule. Those are pre-Smith decisions. If they're still good law, prisoners have more free exer cise rights than the rest of us do, because under Smith, generally applicable rules don't have to be reasonably connected to anything. The refusal of an exemption doesn't have to have any reason or basis whatever. Now there's a recent Ninth Circuit opinion that as sumes that prisoners do get that protection even though the rest

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of us don't. That case is Ashelman v. Wawrzassek. But under Smith, the prison rules don't even have to be reasonable. So the al cohol rule in Craig, Colorado would stand and the ban on wearing a cross around your neck in Wisconsin would stand.

Mr. CANADY. Thank you, Professor. Let me, with the indulgence of the other members, ask you and Professor Berg to comment a little more on the areas for targeted laws that you've made ref erence to. In what specific areas do you think would most justify our attention? The zoning context has been mentioned. I think that's something that has been discussed most. Do you have other examples?

Mr. LAYCOCK. It is ironic that the Court assumed, without any record or information before it, that zoning is a clear example of a generally-applicable law that just happens to burden religion, when in fact zoning and land use regulation is probably the most systematic Smith violation out there today. We know that in the City of Chicago it is effectively impossible to start a new church. We know that in the City of New York churches are forty-two times more likely to be landmarked than any secular property. We can build that record pretty quickly, I think.

The others are a crazy quilt of different problems that arise. And off the top of my head there's nothing else where the record and the facts are as clearly developed as in zoning.

There is also some targeted Federal legislation that might be helpful. There's this bankruptcy issue that has been mentioned. Do churches have to pay to their members creditors contributions that were made in good faith in ordinary course in the last year before a church member went bankrupt? There's one appellate decision. In re Young the Eighth Circuit decision under RFRA. It says, no, they don't, but the bankruptcy courts are refusing to follow that. The general standards of RFRA ought to solve that problem. In fact, even Smith ought to solve that problem, but there's lots of liti gation. Congress may well want to solve that one, cut off this litiga tion with a specifically-targeted amendment to the bankruptcy code that just fixes it.

When I get home, I may, if I could, submit a letter for the record. I'm sure there are other examples, but right now they're not pop- ping into my head.

Mr. CANADY. Can we—we will be happy to receive your letter and it will be made a part of the record.

Mr. CANADY. Professor Berg, do you have anything to add?

Mr. BERG. I'd do the same.

Mr. CANADY. OK. We'd appreciate that.

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Let me just ask again, just for the record, just in terms of State RFRA's, there's nothing in the decision that would prohibit States from passing equivalent—legislation equivalent to RFRA?

Mr. LAYCOCK. Absolutely nothing.

Mr. BERG. Justice Stevens has one vote on the Court—he's not convinced anybody else to take his position.

Mr. SCOTT. OK. What kind of record would we need to establish to pass legislation using the Commerce Clause?

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Mr. BERG. Well, you've got to be mindful primarily of the Lopez decision, the Gun-Free Schools Act decision and the kind of rules that it sets down. One element that Lopez focuses on is putting some kind of jurisdictional element in the statute affecting interstate commerce. So that would be important. In addition, the record would have to be of an institution purchasing materials in interstate commerce or hiring people engaging in commerce and then a record that across-the-board, if you add up all those situa tions, and churches are, for example, prevented from opening new buildings, from locating in certain neighborhoods—that has a bur densome effect on commerce across the Nation. That's why I think the Commerce Clause is most likely to reach institutional claims where there is some kind of activity like that that you can point to.There's a few individual cases that you could also reach. For example, the case of the landlord who doesn't want to rent to a couple that's not married, because that is inconsistent with his or her te nets, that's a kind of commercial activity where, again, across-the-board, you could probably make findings—I would think that peo ple are deterred from renting, from going into that business, if they know that the State is going to force them to rent in the kinds of circumstances that violates their faith.

So there are some individual cases where you could probably make that kind of record, but I think in most cases you'd be doing it with institutions.

Mr. LAYCOCK. I agree with that and I would add two points, briefly. There's data fairly readily available about the economic magnitude of religious operations—contributions to religious orga nizations, and so forth. The impact on commerce is real. It is sub stantial. How much of that activity is affected, coerced, or prevented by burdensome regulation is going to be some hard-to-docu ment fraction, but certainly the cumulative impact of religious ac tivity is enough to affect commerce. The statute can be drafted broadly: The religious practices affecting commerce are protected. Then it would be very helpful to enact some definitions or pre sumptions about certain kinds of activity that Congress believes af fects commerce. They did that in Title II, for example, of the Civil Rights Act, the public accommodations title, and I think it would be helpful here, as well.

Mr. SCOTT. Professor Laycock, you suggested one way we could deal with this is to enact legislation implementing the International Covenant of Civil and Political Rights Treaty?

Mr. LAYCOCK. Yes, sir.

Mr. SCOTT. Implementing a treaty would not get us past a con stitutional violation, would it?

Mr. LAYCOCK. It would unless another long line of cases gets overruled. The Covenant provides that religious practice is pro tected except where restrictions are necessary to public health or safety. It's a lesser standard than the compelling interest standard, but certainly a higher standard than Smith.

Mr. SCOTT. Let me ask it another way. The fact is that if it's in a treaty, if we just pass the legislation unrelated to the treaty, would there be any difference—would there be any advantage be-

cause it's a treaty?
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Mr. LAYCOCK. Yes, there is—let me explain briefly, and you may need to get an international law expert in here, but the treaty itself is not self-executing. The Senate stated that in a declaration at ratification, and the reason is precisely so that the treaty does not create judicially-enforceable rights that were not passed by both Houses of Congress. The treaty does not create rights that might be enforced in some foreign or international tribunal. The treaty is simply a commitment of the Government and it's up to the Govern ment to decide when and how to implement it.

Congress can pass implementing legislation if Congress believes that's necessary and appropriate. Missouri v. Holland, which is an opinion by Justice Holmes in the twenties, says congressional power to implement treaties is independent of all the other Article One powers. It's a separate power, and so Congress can do things if it believes the treaty requires it, even though those things might otherwise be left to State regulation. And Missouri v. Holland cites a long line of cases, going all the way back to the 1790's, standing for that proposition.

So the power to implement the treaty enables Congress to legis late here without having to rely on section 5 of the 14th Amend ment or the Spending power or the Commerce power. What the statute would add, then, is a judicially-enforceable right, which the treaty itself does not create. The statute could create remedies, which obviously the treaty does not create.

Mr. SCOTT. And there's a line of cases that supports that analy sis?

Mr. LAYCOCK. There's a long line of cases that supports that analysis. Thank you, Mr. Chairman.

Mr. CANADY. Well, gentlemen, we thank you again. We appre ciate your contribution and we'll look forward to your additional submissions, and we may even call you with questions. Thank you very much.

The subcommittee is adjourned.

[Whereupon, at 12:25 p.m., the subcommittee adjourned.]

S. HRG. 105-405
CONGRESS' CONSTITUTIONAL ROLE IN
PROTECTING RELIGIOUS LIBERTY
H E A R I N G
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS
FIRST SESSION
ON
EXAMINING CONGRESS' ROLE IN PROTECTING RELIGIOUS LIBERTY IN THE WAKE OF THE SUPREME COURT'S DECISION IN THE CASE OF CITY OF BOERNE v. FLORES IN WHICH THE COURT HELD THE RELIGIOUS FREEDOM RESTORATION ACT UNCONSTITUTIONAL UNDER THE 14TH AMENDMENT AS APPLIED TO THE STATES
OCTOBER 1, 1997
Serial No. J-105-55
Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
47-217 CC WASHINGTON : 1998
For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-056351-8
COMMITTEE ON THE JUDICIARY

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CONGRESS' CONSTITUTIONAL ROLE IN
PROTECTING RELIGIOUS LIBERTY

WEDNESDAY, OCTOBER 1, 1997

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Kyl, Ashcroft, Abraham, Kennedy, and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. I am sorry it has taken us 5 minutes late to get this going, but we have a lot of things we have to resolve and it is the end of the session, so it is just kind of a miserable experience around here.

Good morning, and welcome to all of you. We are here this morn ing to begin our discussion of what Congress may do to protect reli gious liberty in the wake of the Supreme Court's decision in the case of City of Boerne v. Flores, in which the Court held the Reli gious Freedom Restoration Act [RFRA] unconstitutional under the 14th amendment as applied to the States.

Now, I think it is fitting to note that we open this new chapter in the constitutional dialog with the Court on the eve of Rosh Ha shana, when Jews will be celebrating the beginning of the new year and embarking upon a period of reflection. I hope that this will also mark a new beginning in the history of religious freedom in our country as we reflect on the recent developments in the law of reli gious liberty.

I hope that we will begin here to make substantial steps toward greater deference to religious belief and practice, and that govern ment at all levels will work to increase the freedom of believers to live their religions unburdened by the heavy hand of government.

At the opening of this conversation today, we should remember how we got here. We start with the fact that the first freedom guaranteed in the Bill of Rights is the freedom to believe and prac tice that belief as we wish without government interference. This promise of the freedom of worship is, for many, the country's found ing and guiding principle, the Pilgrims' reason for braving thou- sands and thousands of miles of dark and dangerous seas and countless privations just to arrive here, and privations when they got here.

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As one scholar has noted, "While only a few important immi grants bear the name Pilgrim in American myth, most of the new arrivals [in America] came as Pilgrims from other lands—and Pil grims they have remained * * *." The constitutional guarantee of the free exercise of religion for all has been a beacon to the world throughout our history.

Of the relationship between religious liberty and civil govern ment, James Madison, the principal architect of the Bill of Rights and their prime mover in the Congress, once wrote,

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society * * *. [E]very man who be- comes a member of any particular Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Re ligion, no man's right is abridged by the institution of Civil Society, and that Reli gion is wholly exempt from its cognizance.

This acknowledgment of the precedence of duty to God over de mands of a civil society or government was the Founders' vision and is the source of this Nation's beacon to Pilgrims throughout the

world. It stands in stark contrast to the recent pronouncements of
the Supreme Court in such cases as Employment Division v. Smith.
The Smith decision effected a change in the law governing free ex
ercise claims, holding that, as a general matter, neutral and gen
erally applicable laws will be upheld against free exercise chal
lenges, no matter how onerous the burden on religious practice, un
less a claimant can show his or her case falls within a number of
exceptions or limitations.

Now, I believe we can do better for religious liberty than this.
The Supreme Court has invited us to enact legislation solicitous of
the constitutional value of religious liberty in the Smith decision it-
self. It said,

Values that are protected against government interference through enshrinement
in the Bill of Rights are not thereby banished from the political process. Just as a
society that believes in the negative protection accorded to the press by the first
amendment is likely to enact laws that affirmatively foster the dissemination of the
printed word, so also a society that believes in the negative protection accorded to
religious belief can be expected to be solicitous of that value in its legislation as
well.

Now, in response to this invitation, the Congress passed the Reli
gious Freedom Restoration Act, popularly known as RFRA, with
only three dissenting votes in the entire Congress. In the recent
City of Boerne case, however, the Court decided that RFRA went
beyond Congress' power under the 14th amendment as applied to
the States.

The City of Boerne decision was, to say the least, a deep dis
appointment to us in Congress and to all Americans who care
about religious liberty and freedom. More disappointing was the
fact that the decision was not a model of clarity, so we have sought
the input of many legal scholars to assist us in divining the appro
priate bounds of our power.

Hence, we are here to discuss what options the Congress has be-
fore it, given the current state of Supreme Court jurisprudence. I
think we in Congress are willing to do all we can to work with the
Supreme Court in fashioning appropriate protections for religious
liberty, but we need to know just what options we have, given the

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Court's current posture. We also need to continue the discussion
with the Court about our respective roles as co-equal branches op
erating under the Constitution. I think it would be best if we could
ultimately work with the Court rather than against it to protect
the religious liberty of our people.

In addition to serious work being done in Congress to protect re
ligious liberty with appropriate Federal legislation, I believe other
parts of government should also work toward real and meaningful
protections for religious liberty within their spheres of action. The
Supreme Court should be given ample opportunity to rethink its
decision in Smith, and I would hope that all levels of government
would do their utmost to see that their actions do not impinge upon
the religious liberties of our people.

Now, because of time constraints, because we are going to have a vote at 11 o'clock and I have to leave then for the White House, we will submit members' statement for the record and we will ask witnesses to limit their statements to 3 minutes. If you do need a little bit more than that, we will certainly be liberal in granting it, but I would sure like to keep it as short as we can so we can have a dialog here, if we can.

Now, we are fortunate today to have a distinguished panel of scholars with us. Our first witness will be Professor Douglas Laycock. Professor Laycock is the Alice McKean Young Regents Chair in Law at the University of Texas. He has taught and written about religious liberty for 20 years, and in recent years has published a number of articles on RFRA, in particular. Professor Laycock was also appellate counsel for Archbishop Flores in the City of Boerne v. Flores case, the case we will be discussing at length today.

After Professor Laycock, we will hear from Professor Michael Paulsen. Professor Paulsen is an associate professor of Law at the University of Minnesota Law School. Prior to joining the University of Minnesota in 1991, Professor Paulsen worked for the Justice Department under President Bush and served as senior staff counsel at the Christian Legal Society Center for Law and Religious Freedom. He has litigated numerous religious liberties cases and written extensively on various issues in constitutional law, including religious freedom and separation of powers.

We will then hear from Professor Erwin Chemerinsky, who is the Sydney M. Irmas Professor of Law and Political Science at the University of Southern California Law Center. He is the author of several books, including a treatise on constitutional law. Professor Chemerinsky has also served as co-counsel in numerous cases before the U.S. Supreme Court and has lectured widely on constitutional issues.

Our final witness will be Professor Daniel Conkle. Professor Conkle is a professor of law at Indiana University at Bloomington, and Nelson Poynter Senior Scholar and Director of the Religious Liberty Project at the Indiana University Poynter Center for the Study of Ethics and American Institutions. Professor Conkle has published numerous articles on a wide range of constitutional issues, including religious freedom, and RFRA in particular.

I have to say we are pleased to have all of you here. We are pleased that you are willing to give your time and to make the trip

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here from your respective places of employment and to give us your insights on the important questions that we have raised here today.

So we will begin with you, Professor Laycock, and go from there.

PANEL CONSISTING OF DOUGLAS LAYCOCK, ALICE McKEAN YOUNG REGENTS CHAIR IN LAW, UNIVERSITY OF TEXAS, AUSTIN, TX; MICHAEL STOKES PAULSEN, ASSOCIATE PRO

FESSOR OF LAW, UNIVERSITY OF MINNESOTA, MINNEAPO LIS, MN; ERWIN CHEMERINSKY, SYDNEY M. IRMAS PROFES SOR OF LAW AND POLITICAL SCIENCE, UNIVERSITY OF SOUTHERN CALIFORNIA, LOS ANGELES, CA; AND DANIEL O. CONKLE, PROFESSOR OF LAW AND NELSON POYNTER SEN IOR SCHOLAR, INDIANA UNIVERSITY-BLOOMINGTON, BLOOMINGTON, IN

STATEMENT OF DOUGLAS LAYCOCK

Mr. LAYCOCK. Thank you, Senator Hatch. I sat here 5 years ago and confidently told you RFRA would be a constitutional thing to do, and obviously the Supreme Court disagrees. I would say in my own defense that four courts of appeals upheld RFRA in opinions by conservative judges appointed by Ronald Reagan, well-respected judges. The law is changing at the Supreme Court. How far it will change, we can't know.

The opinion in Boerne, as you said, Senator, is not a model of clarity. The ultimate standard is congruence and proportionality. What Congress can do must be congruent and proportionate to how the Court defines the problem, not how Congress defines the prob lem. How the Court defines the problem is the Smith opinion, and that in itself is ambiguous. The standard of neutrality and general applicability is still in the process of being defined.

I think it is a mistake to indulge the rhetorical temptation to say the Supreme Court doesn't protect religious liberty at all, that nothing violates the Smith standard. I don't think that is right. I don't think we have to prove religious bigotry or conscious, hostile motive to show a Smith violation. I think there are lots of Smith violations out there, and the difficulty is that they are often hard to prove.

They depend upon factually ambiguous circumstances. Differen tially treating a religious group in a similar secular activity is a Smith violation that requires compelling justification, but there are all sorts of ambiguities about whether the religious activity and the secular activity are really analogous. So I would urge the Congress to focus on the things that Smith may protect and the ways in which Congress can help make that workable by shifting burdens of proof, by enacting presumptions, and so forth.

A striking fact about these many individual conflicts between re ligious believers or churches on the one hand and government on the other—the Court says there is no systematic persecution out there, and I suspect that is right. But there is lots of individual conflict in which motives are suspect. Gallup poll data shows that 45 percent of Americans report negative or very negative attitudes toward religious fundamentalists, and that 86 percent report nega-

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tive or very negative attitude toward, "minority" religious sects or cults.

There is every reason to think that the proportions are similar among government officials, that lots of discretionary decisions are being made about churches and religious believers by government

officials who hold negative or very negative attitude toward that re
ligious body.

Congress can find those facts. Congress can shift burdens of proof to simplify the proof of these violations pursuant to section 5 of the 14th amendment. Congress can also do a great deal under the Commerce Clause. Churches spend lots of money. The Boerne case would have prevented a multi-million-dollar construction project. It seems to me clearly within reach of the commerce power. And Congress can do a great deal under the Spending Clause. No participant in a federally-assisted program should be excluded from that program on the basis of his religious practice.

So there are things Congress can do. I talk about them in more detail in the written statement. I would be happy to answer ques
tions.

The CHAIRMAN. Thank you so much, professor.

[The prepared statement of Mr. Laycock follows:]

PREPARED STATEMENT OF DOUGLAS LAYCOCK

Thank you for the opportunity to testify this morning on possible Congressional responses to City of Boerne v. Flores.

I was appellate counsel for Archbishop Flores in that case. I have taught and written about the law of religious liberty for twenty years, and in recognition of my scholarly work, I have been elected a Fellow of the American Academy of Arts and Sciences. I hold the Alice McKean Young Regents Chair in Law at The University of Texas at Austin, but of course The University of course takes no position on any issue before the Committee. This statement is submitted in my personal capacity as a scholar.

I. THE SHRINKING OF CONGRESSIONAL POWER

City of Boerne v. Flores, 117 S.Ct. 2157 (1997), holds that the Religious Freedom Restoration Act is unconstitutional as applied to state and local governments. The decision is based on newly announced limits to Congressional power to enforce the Fourteenth Amendment. The decision does not affect RFRA's application to federal law, which is based on Article I powers and in no way depends on the Fourteenth Amendment. The Administration shares my view that federal applications of RFRA are unaffected.

When the Supreme Court announces a limit on the powers of Congress or of the states, it is central to our system of government that the Court's decision is entitled to obedience. The Court itself is entitled to respect, and I do not doubt that the Jus
tices believe they have delivered the best possible interpretation of the Constitution. But respect does not mean immunity from criticism, and the Boerne opinion has se
rious problems. I briefly note those problems here, because they complicate the task of assessing what Congressional power remains.

I confidently testified in earlier hearings that Congress had power to enact RFRA. Either I badly misunderstood the law, or the Court has changed the law. I take some comfort from the fact that six appellate courts considered the constitutionality of RFRA prior to the Supreme Court s decision in Boerne, and all six upheld the Act. Five of these decisions upheld RFRA as applied to state or local law. Four of these decisions came from federal courts of appeals, and each of these was written by a well-respected conservative judge appointed by Ronald Reagan—Patrick Higginbotham, Richard Posner, John Noonan, and James Buckley. I think that Boerne has dramatically changed the law, but if not, I am not the only one who was

confused.
Boerne significantly limits Congress's independent power to protect the civil lib erties of the American people. With respect to the states, that power is expressly granted by the Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth
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Amendments. That power is no constitutional anomaly; it is as central to our system of government as the Supreme Court's power to invalidate statutes. Governmental power in our system is separated and divided so that each branch has the power and the duty to protect liberty. The Supreme Court has announced a different vi sion, and Congress must obey, but it need not be persuaded.
The choice between these competing visions of separation of powers will continue to be litigated, because the Boerne opinion announces a vague standard of uncertain scope, and because plausible readings of that standard call in question the validity of many other Acts of Congress. The Court reaffirms that Congressional power to enforce the Fourteenth Amendment includes power to enforce rights incorporated into that Amendment from elsewhere in the Constitution, 117 S.Ct. at 2163-64, and it reaffirms that Congress may "prohibit[] conduct which is not itself unconstitu tional." Id. at 2163. But Congress may prohibit such conduct only as a means to "deter[] or remed[y] constitutional violations" as defined by the Court,
id., and
"there must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end." Id. at 2164. "[T]he line is not easy to discern, and Congress must have wide latitude in determining where it lies." Id. But here, the Court determined that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or de- signed to prevent, unconstitutional behavior." Id. at 2170.
This standard seems to require an empirical judgment: Congressional enforcement legislation is valid if the number of violations of the Constitution as interpreted by the Court is sufficiently large in proportion to the number of violations of the stat ute. The Court plainly believed that this proportion is small in the case of RFRA, and that it was larger in the case of other enforcement legislation previously upheld. But the Court had no data on any of these proportions, and it made its guesses about the number of free exercise violations without addressing a significant dis agreement about what would count as a violation. The facts relevant to this propor tion did not get much attention in the briefing, because no one had reason to antici pate that such facts would be dispositive. In any event, facts about the relative mag nitude of societal problems should be legislative facts, not judicial ones.
The standard of "congruence and proportionality" is inherently vague, and the liti gation process is probably incapable of producing good data on the relevant propor tions. Under this standard, it is little more than guesswork to decide which enforce ment legislation is valid and which invalid. With respect to future legislation, Con gress would be well advised to compile a detailed factual record of constitutional vio lations as the Court defines them. With respect to past enforcement legislation, we may expect constitutional challenges to the Voting Rights Amendments of 1982, to the Civil Rights Acts of 1964 as it applies to state and local employment, to the Pregnancy Discrimination Act as it applies to state and local government, to the Civil Rights Act of 1991, to the Violence Against Women Act, and generally to all other enforcement legislation that has not already been upheld by the Supreme Court. I have no better data than the Court, but reading in the reported cases sug gests that for many of these statutes, the proportion of constitutional violations to

statutory violations is far smaller than for RFRA. The Court avoided this difficulty by simply not discussing these statutes; it focused instead on the Voting Rights Act of 1965, which is unique among modern civil rights legislation in the magnitude of the constitutional problem to which it responded.

Of course Boerne is not the only recent decision restricting Congressional power, and it is not the only recent decision overruling or distinguishing away past prece dent. Constitutional law is changing, and what Congress has power to do based on past precedent it may not have power to do after the Court's next decision. My ear lier testimony that RFRA would be valid demonstrates that I have little power to predict how far the Court will cut back. What I can do is outline Congressional re sponses that are clearly constitutional under existing precedent.

I would also note that the Coalition that came together to support RFRA, both in and out of Congress, would not agree on the appropriate scope of Congressional power in other areas of regulation. Some parts of the Coalition would undoubtedly prefer to see Congress less active in some areas of regulation. But I think that all parts of this Coalition agree that Congress should not lose its power, and Congress should not abandon the effort, to protect basic human liberties that are explicitly guaranteed in the text of the Constitution. That is the wrong place to cut back on Congressional power.

II. THE SHRINKING OF RELIGIOUS LIBERTY

Religious liberty is far less secure today, under the rule of Employment Division v. Smith, 494 U.S. 872 (1990), than it appeared to be last spring under RFRA. But

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it is not obvious just how much protection has been removed. The meaning of Smith is disputed, and under Boerne, that dispute is relevant to the scope of Congressional power.

In 1990, in the immediate wake of Smith, I noted deep ambiguities in the Smith opinion:

Smith announces a general rule that the Free Exercise Clause provides no substantive protection for religious conduct. It also notes enough exceptions and limitations to swallow most of its new rule. Everything seems to depend on judi cial willingness to enforce the exceptions and police the neutrality requirement.

Douglas Laycock, "The Remnants of Free Exercise," 1990 Sup. Ct. Rev. 1, 54.

Hearings on RFRA were held in 1991 and 1992. At that time, the few lower court decisions under Smith were giving it the worst possible interpretation. Neither the exceptions nor the neutrality requirement appeared to have any content. Even laws that expressly applied only to churches or only to religious practices were being held neutral and generally applicable. And RFRA s advocates naturally emphasized this worst case scenario, which maximized the need for legislative remedies.

This legislative record was held against RFRA in Boerne. The Court inferred that Congress did not really believe that there are many violations of Smith in America today. In the Court's view, the hearing record showed that even Congress believed that the proportion of constitutional violations to RFRA violations would be small. And it followed, in the Court's view, that Congress was not interested in facilitating the proof of Smith violations, but in reaching other conduct that even Congress did not believe violated the Constitution as interpreted in Smith.

But in the meantime, the Court decided Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), and gave real content to the requirements of neu trality and general applicability. Lukumi compared the local ordinances regulating religious practices to a broad range of other state and local laws dealing with analo gous secular conduct and with secular conduct that caused analogous harms. It wrote into holding Smith's dictum that if a state permits exceptions for secular conduct, it must have compelling reason for refusing exceptions for analogous religious conduct. 508 U.S. at 537.

Some lower court interpretations of Smith began to change in light of Lukumi. One district court held that a rule requiring all university freshmen to live in the dorm was not neutral and generally applicable, because nearly a third of freshmen were covered by. various exceptions. The Free Exercise Clause—not RFRA—therefore required an exception for a freshman who wanted to live in a religious group house. Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996). Another district court held that a landmarking law was not neutral and generally applicable, because it contained three exceptions for various secular situations. The Free Exercise Clause—not RFRA—therefore required an exception for a church stuck with a useless landmark. Keeler v. City of Cumberland, 940 F. Supp. 879 (D. Md. 1996).

If these decisions are good law, and I think they are, then there are many violations of Smith in the land. Federal, state, and local laws are full of exceptions for influential secular interests. Moreover, the details of federal, state, and local laws are frequently filled in through individualized processes that provide ample opportunity to exempt favored interests and refuse exemptions to less favored interests, often including religious practice. Where a law has secular exceptions or an individualized exemption process, any burden on religion requires compelling justification under reasonable interpretations of Smith.

The problem, of course, is that these violations are difficult to litigate. There is room for endless argument whether the secular exception is really analogous to the claimed religious exception, and whether the lawmaking and exemption process is really individualized. In the very best case, all free exercise litigation will be far more complicated and expensive, and many good claims will be lost. In the more likely case, courts will defer to regulators and only the most egregious discrimination against religion will ever be adjudicated.

There is also continued dispute about the meaning of Smith even in principle. The discrimination against religious practice in Lukumi was so extreme that it can be distinguished from the more widespread discrimination of the sort found in Rader and Keeler. In its discussion of Smith in Boerne, the Court reaffirmed the hybrid rights exception to Smith, and it reaffirmed the rule that exemptions for secular hardship require exemptions for religious hardship. 117 S.Ct. at 2161. But when it considered whether RFRA was a proportionate response to violations of Smith, it used the phrase "religious bigotry" as a shorthand for what Smith required. Id. at 2171. This shorthand made it easier to argue that RFRA was a disproportionate response to a small number of actual violations, but as a summary of Smith, it is either inaccurate or a term of art. The word "bigotry" never appears in either the

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Smith or Lukumi opinions; the Smith-Lukumi test is an objective test of differential treatment, not a subjective test of governmental motive. "Religious bigotry" must be a label for unjustified differential treatment of religion; we should not assume that the new phrase was meant to change the Smith-Lukumi standard without explanation and once again dramatically shrink constitutional protection for religious liberty without briefing or argument. Lower court judges will almost never find a Smith violation if they conclude that doing so requires them to find state or local officials guilty of religious bigotry in a subjective sense.

I explain this ambiguity in detail that may be excessive, because it is critical both to the scope of remaining free exercise protection and to the scope of Congressional power. Loose Congressional rhetoric to the effect that Smith eliminates nearly all protection for free exercise can actually shrink Congressional power, as Boerne illus trates. Congressional factfinding preliminary to enforcement legislation must focus on regulatory fields in which violations of Smith may be widespread but are difficult to prove. The more such regulatory fields there are, the greater the reach of Congress's power to enforce the Fourteenth Amendment right to free exercise. Whether there are many such regulatory fields or few depends on whether we take seriously the exceptions to Smith and the requirement of neutrality and general ap plicability. Senators must resist the temptation to bash the Court by exaggerating the harm it has caused; the unexaggerated harm is quite enough to justify Congres sional response.

III. WHAT CONGRESS CAN DO NOW

Congress can no longer enact a general solution to the problem of free exercise law. But it can enact a series of overlapping partial solutions that would collectively provide substantial protection for religious practice.

1. The commerce power

Congress could enact RFRA's level of protection for religious practices in or affect ing commerce. The statute would provide that any religious practice in or affecting commerce is exempt from burdens imposed by state and local legislation, except where the regulating jurisdiction demonstrates that the application of the burden to the individual serves a compelling government interest by the least restrictive means. The models here are the Privacy Protection Act of 1980, 42 U.S.C. §2000aa(1994), protecting papers and documents in preparation for a publication in or affecting commerce, and the public accommodations title of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994), forbidding racial and religious discrimination in places of public accommodation affecting commerce, and irrebuttably presuming that commerce is affected by any hotel and by any restaurant that serves interstate travelers.

The public accommodations law is particularly instructive as to Congressional power. Congress's first public accommodations law was the Civil Rights Act of 1875, enacted to enforce the Thirteenth and Fourteenth Amendments. The Supreme Court struck that law down as beyond the enforcement power. Civil Rights Cases, 109 U.S. 3 (1883). Congress's second public accommodations law was the Civil Rights Act of 1964, enacted with substantially the same scope in practical effect but pursuant to the commerce power. This Act was upheld in Katzenbach v. McClung, 379 U.S. 294 (1964), and Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

Congress did not enact the public accommodations law to maximize the sale of barbecue sauce. Rather, it enacted the public accommodations law because it was morally right, and it used the Commerce Clause because that was an available means to the end. Similarly here, protecting the religious practices of the American people is morally right, and to the extent that those practices affect commerce, the Commerce Clause is an available means to the end.

After United States v. Lopez, 514 U.S. 549 (1995), I doubt that the commerce power can reach religious practices that do not affect a commercial transaction. But many religious practices do affect commercial transactions. When burdensome regu lation prevents a church from building a house of worship, as in Boerne, tens of thousands or even millions of dollars of commerce are prevented from happening. When a Roman Catholic hospital loses its accreditation in obstetrics because it refuses to teach abortion techniques in violation of its religious commitments, all the services and all the instruction its obstetrics program would have provided are prevented or diverted to other sites. If the hospital succumbs to state coercion and agrees to teach abortion techniques, the resulting abortions are themselves a service provided in commerce, and that commerce is diverted to the Catholic hospital from other sites.

It should not matter whether commercial transactions are prevented entirely, diverted from one provider to another, coerced, or changed in some other way: in all

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these cases, commerce is affected. The Court has long held that production of goods and services affects commerce, that individual transactions are within the commerce power if all such transactions cumulatively affect commerce, and that Congress can regulate commerce for moral or other non-economic motives. Unless we see dramatic changes in Commerce Clause doctrine, Congress can protect many religious practices under the Commerce Clause.

It would simplify litigation of the affecting-commerce issue if Congress enacted definitions or presumptions. For example, Congress could create presumptions that the practices of religious institutions affect commerce, and that religious practices that use goods or services regularly bought and sold in commerce affect commerce. It would be prudent to specify that Congress is exercising the commerce power to the full constitutional limit.

2. The spending power

Congress could enact RFRA's level of protection for religious practices burdened by the rules of any program receiving federal financial assistance. No person could be excluded from participation in, or denied the benefits of, or otherwise subjected to discrimination, or have their religious practice burdened, under any program or activity receiving federal financial assistance, because of a religious practice, unless application of the burden to the person served a compelling interest by the least restrictive means. The leading models here are Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d (1994), forbidding racial discrimination in federally assisted programs, similar civil rights statutes modeled on Title VI and protecting other classes, and the Equal Access Act, 20 U.S.C. §4071 et seq. (1994), protecting student speech in federally assisted secondary schools. It would better serve the bill's purposes to confine the reach of this spending power provision to recipients of federal money who act under color of law; this bill should not become embroiled in debates over regulation of religious entities that deliver federally financed social services.

Congressional power to attach conditions to federal spending has been recognized since Steward Machine Co. v. Davis, 301 U.S. 548 (1937). But conditions on federal grants must be "[]related to the federal interest in particular national projects or programs." South Dakota v. Dole, 483 U.S. 203, 207 (1987). Federal aid to one program does not empower Congress to demand compliance with RFRA in other programs. But within a single program, this requirement is easily satisfied. The federal interest is that the intended beneficiaries of federal programs not be excluded because of their religious practice. Congress should include language modeled on 42 U.S.C. §2000d-4a (1994), which defines the scope of aided programs for purposes of the obligation to refrain from burdening religious practices.

Conditions on federal grants must also be clearly stated. They are in the nature of a contract, and state and local entities are entitled to know what obligations they are assuming before they accept the federal money. Suter v. Artist M., 503 U.S. 347, 356 (1992); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981).

This requirement can easily be satisfied by careful drafting.

A Spending Clause statute could protect many religious individuals who are sub ject to bureaucratic authority in federally assisted programs. Many of these cases will involve individual devotions or observance that do not lead to any commercial transaction and do not plausibly affect commerce. Thus, a Spending Clause statute and a Commerce Clause statute are complementary. Together they would address a large portion of the problem.

3. The enforcement power

City of Boerne v. Flores does not deprive Congress of all power to protect religious exercise under its power to enforce the Fourteenth Amendment. Congress can enact legislation to assist the enforcement of the Free Exercise Clause as the Court inter prets it, providing stronger remedies and facilitating proof of violations in cases where proof is difficult. If the connection between judicial interpretation and Con gressional legislation is not obvious, Congress should make a clear record that its legislation is directed to deterring or remedying violations that, if all the facts could be readily proved, the Court would recognize as constitutional violations under Em ployment Division v. Smith. Plainly the Court means to require a more detailed fac tual record than Congress compiled for RFRA, and although constitutionality should not depend on what Congress thinks, Congressional rhetoric should put more em phasis on addressing free exercise violations as the Court understands them.

I doubt that the Court would uphold a re-enactment of RFRA under the Enforce ment Clause no matter how good a record Congress compiled. But the Court should uphold burden of proof provisions, which simply reallocate the risk of factual error in cases where it is impossible to be certain whether government did or did not vio late the Constitution as the Court interprets it. And the Court may well uphold

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more particularized statutes directed to particular problems, if the Congress and the religious and civil liberties community do their homework and make their record. The clearest example is land use regulation, which has enormous disparate im pact on churches, which is administered through highly discretionary and individ ualized processes that leave ample room for deliberate but hidden discrimination, and where there is substantial evidence of widespread hostility to non-mainstream churches and some hostility to all churches. Here are some facts that have already been documented:

a. In the City of New York, churches are landmarked at a rate forty-two times higher than secular properties. N.J. L'Heureux, Jr., "Ministry v. Mor tar: A Landmark Conflict," in Dean M. Kelley, ed., "Government Interven tion in Religious Affairs" 2 at 164, 168 (1986).

b. In the City of Chicago and some of its suburbs, zoning regulation is ad- ministered in such a way that it is nearly impossible to start a new church without consent of surrounding owners, and this consent is so often with- held that finding a site for a new church is often impossible, especially in the case of churches not affiliated with a well-known denomination. Many of the resulting lawsuits are not about efforts to build new structures, but simply efforts to rent and occupy a storefront. I believe the same problem exists elsewhere, but it is well documented in and around Chicago. If the Committee will call the attorneys for these churches as witnesses, it can learn the details. Some of this discrimination can be proved; some of it can- not be. But so many churches would not be investing so much effort in liti

gation if there were no serious difficulties in locating sites.
c. Denominations that account for only 9 percent of the population account
for about half the reported church zoning cases. That is, the zoning process
disproportionately excludes small and unfamiliar faiths. This discrimination
is often unprovable in any individual case, but when large numbers of cases
are examined, the pattern is clear. These data are gathered in the Brief of
the Church of Jesus Christ of Latter-Day Saints as Amicus Curiae in City
of Boerne v. Flores.
d. Journalists have reported that new suburbs on the fringe of urban
growth often exclude churches, even from mainstream denominations. R.
Gustav Neibuhr, "Here is the Church; As for the People, They're Picketing
It," Wall St. J. at A1 (Nov. 20, 1991).
e. The process of administering zoning laws and the process of designating
landmarks are highly individualized. Standards tend to be vague and ma
nipulable; zoning for a parcel is easily changed if those in power desire to
change it. Many key decisions are made at the level of individual parcels
in applications for special permits or variances or in votes on zoning
changes or in landmark designations. In Boerne for example, St. Peter's
Church was added to the historic district by a separate ordinance that ap
plied only to St. Peter's and to no other property. These land-use laws are
often not neutral and they are almost never generally applicable in any
meaningful sense. Thus, the resulting burdens on churches should be sub
ject to strict scrutiny under Employment Division v. Smith. There are
Smith violations here that are difficult to prove, and that is an appropriate
case for enforcement legislation even under Boerne. Indeed, to subject the
location of churches to the zoning and landmarking procedures in many ju
risdictions is to subject the First Amendment right to gather for worship
to a standardless licensing scheme, in violation of settled principles devel
oped under the Free Speech Clause. Sec, e.g., City of Lakewood v. Plain
Dealer Publishing Co., 486 U.S. 750 (1988); Griffin v. City of Lovell, 303
U.S. 444 (1938).
It is vague standards and discretionary decisions give religious prejudice a chance
to operate not just in the zoning cases, but also in many other cases. Vague stand
ards and discretionary decisions are quite common in governmental organizations.
In nearly all the cases in which schools penalize the religious practices of students,
or government agencies penalize the religious practices of government employees or
beneficiaries of the agency's program, the relevant administrator has a large ele
ment of discretion in making the rule, interpreting the rule, and choosing when to
enforce the rule. The particular disputes in these cases cover a wide range of issues,
which makes them hard to generalize about, but they have in common that the ad
ministrator's attitude towards the religious practice inevitably influences his exer
cise of discretion.
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It commonly happens that the administrator's attitude towards the religious prac
tice is negative. At least some Americans are hostile to religion generally; more are
hostile to particular religions; many believe that religion should be kept wholly pri
vate and are hostile to its public manifestation. Many believers have experienced
this hostility, and sympathetic observers have seen it in operation; the hearing proc
ess can easily gather anecdotal evidence. Systematic quantitative evidence is
scarcer, partly because the studies have not been done, and partly because few peo

ple consciously admit to bigotry even when they are guilty. Despite these difficul ties, the Gallup Poll has gathered some remarkably revealing information.

In 1993, 45 percent of Americans admitted to "mostly unfavorable" or "very unfa vorable" opinions of "religious fundamentalists," and 86 percent admitted to mostly or very unfavorable opinions of "members of religious cults or sects." George Gallup, Jr., "The Gallup Poll: Public Opinion 1993" at 75-76, 78 (1994).

In 1989, 30 percent of Americans said they would not like to have "religious fun damentalists" as neighbors, and 62 percent said they would not like to have "mem bers of minority religious sects or cults" as neighbors. By contrast, only 12 percent admitted that they would not like to have "blacks" as neighbors. George Gallup Jr., "The Gallup Poll: Public Opinion 1989" at 63, 67 (1990).

It is a reasonable inference that at least a comparable percentage of government administrators hold these hostile views toward religious fundamentalists and mem bers of minority sects. In fact, the proportion of hostile government administrators is probably higher, because it is the experience of many believers that these hostile attitudes are more common among persons in elite positions. If 45 percent or more of government administrators hold unfavorable opinions of religious fundamentalists and members of minority sects, and if these administrators have broad discretion to deal with persons under their supervision, then half or more of administrative decisions about the religious practices of these religious minorities are infected by these hostile attitudes.

If all the facts were known and provable, administrative action so motivated would generally violate the Free Exercise Clause as interpreted by the Supreme Court. A recent example where the facts could be proved is Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996), in which the district judge found that the testimony of high ranking university officials (the Chancellor and the Vice Chancellor for Stu dent Affairs) "manifested a degree of antipathy toward members of [Christian Stu dent Fellowship]." Id. at 1554. The issue was a rule requiring all freshmen to live in the residence halls; the administration had allowed secular exceptions but it re-fused to allow freshmen to live in a religious group house under supervision of a pastor. Plaintiff objected to the rampant sex and drugs in the residence halls: the Chancellor testified that religious students who objected to the residence halls should not attend the University.

But proving this hostility in any individual case is difficult, principally because administrators cover their tracks with rationalizations for their decision, but also because judges are reluctant to draw the inference even when the evidence is avail-able. Judges are reluctant to impute bad motive to government officials. And al though it is indelicate to say so, there is no reason to think that judges as a group are more sympathetic than the population to fundamentalists and members of mi nority sects. It is a reasonable inference from the Gallup data that 45 percent or more of judges also hold unfavorable views of these religious minorities. Most of these judges strive to be fair to all litigants who come before them, but they too have discretion, and facts are always disputed and uncertain. Their assessment of the facts and of the administrator's motivations is inevitably affected by their views of the religious practice at issue. If the judge were sure of the facts and convinced of the administrator's improper motivation, of course he would find a constitutional violation. But it is hard to be sure, and so he gives the administrator the benefit of the doubt.

I would add to the record one recent incident in my own experience. I attended a luncheon for representatives of philanthropic organizations in Texas. These people were highly educated, economically successful, well-meaning, genteel, genuinely devoted to helping a broad range of causes. Their desire to do good and to help people was similar to that of many well-motivated government administrators. The luncheon speaker introduced her talk by telling two Baptist jokes, jokes that drew their humor from a caricatured version of Baptist theological teaching in one case and of Baptist moral teaching in the other. The audience laughed appreciatively both times. I was surely not the only person in the room who thought the jokes objectionable, but no one objected, and more than enough people laughed heartily to make the jokes successful.

It is inconceivable to me that the speaker would have told ethnic jokes to that audience, or that the audience would have laughed appreciatively if she had. Ethnic 12 jokes would have drawn an embarrassed silence, a few nervous titters, exchanges of shocked or disapproving looks. But it is acceptable in many educated circles to make fun of traditional religious believers.

Attitudes such as those reflected in that lunch and in the Gallup Poll data infect the discretionary decisions of thousands of government administrators throughout the land. So if all the facts were known in every case, widespread violations of the Constitution as the Court interprets it can be found in the discretionary decisions of government bureaucracies, including schools and social welfare agencies. Land use regulation is just the most visible and best documented example. Religious lib erty groups get many such complaints, and if some of those groups have maintained good files, they could document examples.

Another set of decisionmakers entrusted with effectively unreviewable discretion is juries. Civil juries review religions and religious practices in a wide range of cases, including suits by disaffected members objecting to religious teaching or prac tice, suits for personal injury and other torts, and suits by individuals whose reli gious practice somehow becomes an issue in the case. Of course some of the claims against churches are legitimate and meritorious; others are thinly disguised attacks on religious beliefs and practices. But lawyers who have tried these cases say that whatever the formal rule of law and whatever the nature of the claim, a key issue is what the jury thinks of the religion and the religious practice. I and others can identify lawyers who have tried many of these cases; one of them should be invited to testify at a future hearing.

4. The power to make Federal law

Congress has undoubted power to determine the scope and reach of federal stat utes and regulations. Congress can therefore provide that federal law shall not be interpreted to substantially burden a religious practice unless necessary to serve a compelling state interest. EEOC v. Catholic University, 83 F.3d 455, 469-70 (D.C. Cir. 1996). Nothing in Boerne casts any doubt on this proposition. Rather, the opin ion reaffirms that "When Congress acts within its sphere of power and responsibil ities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution." 117 S.Ct. 2171. There is therefore no reason to doubt that RFRA is valid with respect to federal law, although the chal lenge will be made and courts will have to decide the issue again.

It would be prudent for Congress to reaffirm its view that RFRA is still in effect with respect to federal law, either by joint resolution or in a savings clause in any new legislation, or by an explicit amendment to RFRA as an existing federal statute. Otherwise, we will have to spend time litigating whether the passage of legislation

to replace the invalidated part of RFRA was an implied repeal of the valid part.
There may also be need for more specific federal legislation directed at particular problems. For example, trustees in bankruptcy persist in filing fraudulent transfer claims against churches to recover ordinary-course pre-bankruptcy contributions, and many lower courts are rejecting RFRA defenses, even though the only appellate holding allows the RFRA defense. In re Young, 82 F.3d 1407 (8th Cir. 1996), vacated on other grounds, 117 S.Ct. 2502 (1997). The general language of RFRA has not been enough to avoid repeated litigation, even though the burden of refunding old contributions long since spent should be obvious to anyone.
Indeed, these are cases that could be resolved under the Free Exercise Clause as interpreted in Smith. The generally applicable rule in bankruptcy is that the debtor has control of his funds and may dissipate them prior to bankruptcy, with the result that creditors generally go unpaid. Creditors cannot recover funds gambled away at casinos, because the debtor gets entertainment value and a chance to win money, In re Chamakos, 69 F.3d 769 (6th Cir. 1995), but many lower courts hold that the debtor gets nothing in exchange for his weekly contribution to his church.
Congress can solve this problem and largely end this litigation with a specific amendment to the Bankruptcy Code protecting ordinary-course charitable contribu tions made in good faith. Congress could at the same time address the related prob lem of whether debtors who choose to make voluntary partial payments to their creditors under chapter 13 can continue to contribute to their church. I am sure there are other specific issues in federal law, but these bankruptcy issues are ripe for resolution because they have already caused much litigation.
5. Remedies
Any legislation to protect religious liberty should provide explicit remedies.
RFRA's provisions for individual rights of action for damages, injunctions, and attor neys' fees are a reasonable model. The Court generally assumes that you did not mean for your laws to be enforced unless you tell it otherwise. It is particularly im portant to provide for private enforcement in Spending Clause legislation; it is ex-
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tremely unlikely that any federal grant will be revoked because of one or a few inci dents of suppressing religious practice.
The CHAIRMAN. Professor Paulsen.
STATEMENT OF MICHAEL STOKES PAULSEN
Mr. PAULSEN. Thank you, Mr. Chairman. The question here today is what Congress may yet do to protect religious liberty in the aftermath of City of Boerne. My theme in my testimony, which drones on for some 20-odd pages and I will just briefly summarize, is that there is a great deal that Congress can do consistent with City of Boerne to further religious freedom, furthering what the Su preme Court has already held and not taking action that is in con flict with the direction of the Supreme Court's decisions.
Now, I would preface all this by saying that I think City of Boerne is a very serious impairment of both religious liberty and Congress' constitutional power to enforce civil liberties generally.
One thing that Congress may do and it would be appropriate to do would be to consider a constitutional amendment to correct the Boerne decision. It is within Congress' powers and it is an appro priate exercise of those powers to seek to correct what it believes to be the erroneous constitutional decisions of the Supreme Court.

But short of constitutional amendment, which for a variety of
reasons might not be practical, there are a great deal of things that
Congress could do and I would emphasize two of them. First, Con
gress may enforce the Free Exercise Clause as expounded by the
Supreme Court in Employment Division v. Smith and Boerne, es
tablishing remedies, presumptions, procedures designed to enforce
the core religious liberty interests already identified by the Su
preme Court in that decision.
In other words, Congress may add its voice to the Supreme Court
and paddle in the same direction as the Supreme Court has said
religious liberty interests are already protected. Congress may do
that as long as the remedies and preventive measures it adopts are
not so out of proportion to the object of securing and enforcing
those judicially-identified religious liberty interests as to constitute,
in the view of the Court, an attempt at substantive change.
The second area in which Congress has power is through the
spending power. Taking that spending power even at its constitu
tionally indisputable minimum, Congress has significant authority
to provide conditions to the expenditure of Federal monies to States
in order to require those States to enforce certain core religious lib
erties standards consistent with the standard of RFRA.
These steps would protect religious liberty in substantial meas
ure. They would not do everything that RFRA would do, but I
think it is perhaps unwise, in light of City of Boerne, to simply try
to reenact RFRA through some other statutory means. I think that
it would be ill-advised for Congress to attempt to push the enve
lope, so to speak, of its powers under the Commerce Clause and
under the treaty power because the likely result would simply be
the Supreme Court construing those powers more narrowly and in-
validating this statute the same way it invalidated RFRA.
The Supreme Court does not want to see its decision in City of
Boerne circumvented. Therefore, the advice I would give this com
mittee is you may stay well within the bounds of power that the
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Supreme Court has already set forth and well within the scope of
the Free Exercise Clause that the Supreme Court has interpreted,
adding your voice to that of the Court and still accomplish a signifi
cant measure of protection of religious liberty.
If, subsequent to the second effort, the Supreme Court again
strikes it down, it may then be appropriate for the Congress to con
sider what further measures might be in order, exercising its more
strenuous constitutional powers with respect to appointments, ap
propriations, jurisdiction, and constitutional amendment.
Thank you, Senator.
[The prepared statement of Mr. Paulsen follows:]
PREPARED STATEMENT OF MICHAEL STOKES PAULSEN
SUMMARY
City of Boerne v. Flores, 117 S.Ct. 2157 (1997), is a serious impairment of both
religious liberty and Congress' constitutional power to enforce civil liberties gen
erally. City of Boerne invalidated the Religious Freedom Restoration Act, 42 U.S.C.

§ 2000bb et seq. ("RFRA"), as applied to state governments. A constitutional amend
ment is the only certain way to re-enact the substance of RFRA and to correct the
constitutional errors in City of Boerne.

Short of a constitutional amendment, there is still much that Congress can do to
protect and enforce religious liberty by federal statute, working within the param
eters of the Supreme Court's decisions in City of Boerne and Employment Division
v. Smith, 494 U.S. 872 (1990). First, Congress may enforce the free Exercise Clause
as expounded by the Supreme Court in Smith and Boerne, establishing remedies,
presumptions, and procedures designed to
enforce core religious liberty rights identi
fied by the Court, including rights of religious belief, institutional autonomy, paren
tal freedom in matters of education, and a variety of "hybrid" religious freedom
rights identified in Smith and other decisions. Congress may enact remedies and
preventive measures to guard against infringement of these rights by state and local
governments, so long as those remedies and preventive measures are not so out of
proportion to the object of securing these judicially-defined constitutional rights as
to constitute an attempted substantive change in the content of the constitutional
rights themselves, as those rights have been explicated by the Supreme Court. City
of Boerne, 117 S.Ct. at 2169-2170.

Second, Congress may, in addition, protect religious liberty against state govern-
mental interference, within the context of federally funded programs—taking the
Spending Power at its constitutionally indisputable minimum and not attempting to
leverage that power into a broader charter to regulate state governments.

Such steps would provide a substantial measure of statutory protection for reli
gious liberty. They would not accomplish everything that RFRA had attempted to
accomplish. There is a danger, however, in seeking to push too far with any new
religious liberty statute in the aftermath of City of Boerne. Congress should not at-
tempt to "push the envelope" of its constitutional powers in seeking to enact a new
religious liberty statute. In my judgment, Congress therefore should not rely on the
Commerce or Treaty powers as a basis for re-enacting essentially the substance of
RFRA. Such an approach, even if legally defensible in theory, is likely to meet with
a hostile reception from the Supreme Court, which is more likely simply to narrow
the scope of Congress' powers under such provisions than to uphold a statute that
it perceives as an attempted end run around City of Boerne.

Use of the section five power (explicated in Boerne) to enforce Free Exercise
Clause rights clearly identified by the Court itself (in Smith and other cases); and
use of the spending power in a manner that falls well within the Court's holdings
in South Dakota v. Dole, 483 U.S. 203 (1987) and New York v. United States, 505
U.S. 144 (1992), does not present the same difficulties. In each instance, Congress
would simply be taking the Supreme Court at its word, and legislating in a manner
that seeks to work well within the Court's prior pronouncements, without seeking
to press aggressive or controversial interpretations of congressional power.

To be sure, Congress ought not to have to come begging to the Supreme Court
for permission to enforce constitutional rights under powers Congress legitimately
possesses. There is much to criticize in City of Boerne in this regard. But taking
City of Boerne as a given, Congress must at least be permitted to take the Supreme
Court at its word concerning both the scope of the Free Exercise Clause and Con-

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gress' power to enforce it, and there is much that can be done to protect religious
liberty in the way of constructive furtherance of the Supreme Court's own holdings.

If, after such a second effort on the part of Congress—if, after going the second mile in deferring to the Court—it is discovered that the Court cannot be taken at its word, then further and more aggressive corrective measures might be appro priate, within the constitutional powers of the Congress over matters of appoint ments, appropriations, and jurisdiction, and its power to propose constitutional amendments.

Mr. Chairman and members of the Committee:

My name is Michael Stokes Paulsen. I am a law professor at the University of Minnesota Law School. My teaching areas include constitutional law, civil proce dure, law and religion, and legal ethics. My primary area of research and scholar- ship is constitutional law, including especially religious freedom, freedom of speech, and structural constitutional law issues of separation-of-powers, federalism, and the powers of the respective branches of the federal government. I have published nu merous academic articles in these areas. In addition, I have been involved as coun sel or co-counsel in literally dozens of major religious liberty and free speech cases, in federal and state courts. I am testifying in my personal capacity, not on behalf of the University of Minnesota or any other organization.

I am honored to have been asked by the Committee to testify on the subject of what statutory measures Congress can take, consistent with the Supreme Court's decision in City of Boerne v. Flores, 117 S.Ct. 2157 (1997), to restore some or all of the substance of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., and in general to further the protection of religious freedom under the Con stitution.

In my view, the best way to restore the protections of RFRA is by a constitutional amendment. An amendment would displace the City of Boerne decision and restore the protections of RFRA. It would thereby also restore, in my view, the original un derstanding of religious liberty under the Free Exercise Clause of the First Amend ment. That original understanding has been twice undermined by decisions of the U.S. Supreme Court—first, in 1990, in Employment Division v. Smith, 494 U.S. 872 (1990); and second, last summer, in the City of Boerne case. The case against Smith and Boerne has been well made by others, and I will not repeat it here. My point here is simply that Congress has an important role, as a coequal, coordinate branch of the national government, in interpreting the Constitution and in seeking to as- sure that the states and the other branches of government—including the judicial branch—properly respect and enforce the rights of the people secured under the Constitution.

I regard City of Boerne as a serious impairment of that vital principle of our con stitutional framework. A constitutional amendment correcting the Supreme Court's decision would be an appropriate and important way for Congress to protect individ ual rights and uphold the Constitution. It is, in my view, the only absolutely certain way to re-enact the substance of RFRA.

Nonetheless, I understand that, for a variety of practical reasons, it may not be possible or desirable for Congress to proceed by way of constitutional amendment at this time. That is why this Committee has sought to explore the possibilities for statutory action that seeks to work within the parameters established by the Su preme Court's constitutional decisions—including Smith and Boerne—rather than to pursue a path of confrontation with the Supreme Court.

In short, as I understand it, the question before the Committee today is this:

What can be done in cooperation with, and in furtherance of, the constitutional deci sions of the Supreme Court, to advance the agreed goal of protection of the free ex ercise of religion under the First Amendment?

The theme of my testimony today is that, notwithstanding City of Boerne, the Su preme Court has left Congress with a substantial sphere of action within which to Further religious liberty. There is much that Congress can do, rowing in the same direction as the Supreme Court, rather than against the current of the Court's deci sions. Congress perhaps may not (under such an approach) be able to enact all that RFRA sought to accomplish. And, I would add, it is probably unwise to attempt to do so. But Congress should at least be able to take the Supreme Court at its word concerning the powers Congress does have, under Supreme Court precedents. See City of Boerne, 117 S.Ct. at 2172 ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including

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stare decisis, and contrary expectations must be disappointed. "). And those powers remain substantial.

In my view, Congress may, without challenging Smith or Boerne, enact measures to enforce those areas in which the Supreme Court has clearly and expressly af firmed (in Smith, Boerne, and other cases) the constitutional right of religious lib erty. This may be done pursuant to Congress's power under section five of the four teenth amendment, as interpreted by the Court in Boerne. Moreover, Congress should be able to accomplish, at least in part, some of the additional protection it sought to achieved with RFRA, pursuant to Congress's other constitutional powers, all the time staying well within Supreme Court case law concerning the scope of these powers.

In this latter regard, my judgment is that Congress should not attempt to "push the envelope" of the Commerce Power, the Treaty Power, or even the Spending Power. In my view, pushing too far, too fast, is likely to prompt the Court to regard any new statute with hostility—much as the Court in Boerne regarded RFRA with evident hostility, and treated RFRA as a case of congressional overreaching. If the goal of Congress is (at least for now) to work with the Court and within the Court's precedents, it is important that any new statute not seek simply to re-enact RFRA via another power. The present membership of the U.S. Supreme Court is likely to regard any such statute as a pretext or subterfuge to evade City of Boerne, and is far more likely to strike down such a statute than one that seeks respectfully to work, in good faith, well within the boundaries set by the Court's own pronounce ments. See, e.g., City of Boerne, 117 S.Ct. at 2169 (considering the "object and "pur pose" of RFRA in seeking to determine whether there existed a "congruence' be- tween RFRA's prohibitions and a legitimate constitutional goal); id. at 2170 (finding RFRA "so out
of proportion to a supposed remedial or preventive object that it can- not be understood as responsive to, or designed to prevent, unconstitutional behav ior. It appears, instead, to attempt a substantive change in constitutional protec tions.").

In my opinion, it is therefore important for Congress to be clear in any new stat ute that it is, first, attempting to be respectful of and work within Supreme Court precedent, and second, not seeking to push its constitutional powers to anywhere near the outer limit. City of Boerne is a staunchly judicial supremacist opinion by a staunchly judicial supremacist Court. I do not agree with this posture on the part of the Court, as I am sure many others in and out of Congress do not. However, Congress may need to bow in the direction of the Court's claimed supremacy if Con gress wishes to see a new religious liberty statute upheld.

Doubtless some in Congress may regard this as an indignity: Congress should not have to come begging to the Supreme Court for permission to enforce constitutional rights under powers Congress legitimately possesses. However, there is an alter- native, more constructive way of thinking of this: Congress is showing its willing ness to "go the second mile" in accommodating itself to the Supreme Court's prece dents. Surely Congress must at least be permitted to take the Supreme Court at its word. That is what proposals like the ones I shall discuss would do: take the Supreme Court at its word. If, after this second effort on the part of the Congress—if, after going the second mile in deferring to the Court—it is discovered that the justices' pronouncements cannot in fact be taken at face value, then further and more aggressive corrective measures might be appropriate, within the constitutional powers of the Congress over matters of appointments, appropriations, and jurisdic tion, and its power to propose constitutional amendments. But it will be time enough to consider such measures after Congress has made a good faith attempt to work within Supreme Court doctrine and precedent.

It may therefore be appropriate for Congress deliberately to refrain from relying on powers that it may well have, but which are likely to give the Court doubts (de- served or not) about Congress's good faith. Thus, as I will argue below, I think Con gress should not rely on the Treaty Power or the Commerce Power in seeking to pass a religious liberty statute that moves beyond what the Court has held to be required by the Free Exercise Clause—even if Congress believes it has power under these constitutional provisions; even if (some) prior Supreme Court case law would tend to support such power; and even if this means some degree of reduction of cov erage of any religious freedom statute. A statute that, in the Court's perception, pushes these constitutional powers too far, is likely to result in an opinion constru ing the Commerce Power and Treaty Power more narrowly than before, or distin guishing (persuasively or not) this attempted use of these powers from those that the Court has previously sanctioned—much as the Court in Boerne construed Congress's power under section five of the fourteenth amendment more narrowly than one would have been led to believe was appropriate under the Court's prior decisions and unpersuasively distinguished RFRA from other situations in which

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Congress's exercise of this power had been upheld. Nobody, I trust, wants that. No- body wants another Boerne-style decision narrowing Congress's power to enact con stitutional protections of religious or civil rights. Nobody wants this to be an exer cise in futility.

It is therefore my recommendation that Congress consider a statute the goal of which would be to stay well within constitutional bounds established by the Su preme Court. Congress may express its respectful disagreement with the Court's de cisions, but it should emphasize that its present effort seeks to put such disagree ment aside and to work within the Court's framework, taking the Court at its word as to what falls within the recognized scope of the Free Exercise Clause and other congressional powers, and steering far clear of questionable or expansive exercises of powers that may provoke controversy.

In what follows, 1 will outline two areas of congressional action that work well within Supreme Court case law: First, Congress may enforce the Free Exercise Clause as expounded by the Supreme Court in Smith and Boerne, establishing rem edies, presumptions, and procedures designed to enforce core religious freedom rights identified by the Court. Second, Congress may in addition protect religious liberty against state governmental interference, within federally funded programs— taking the spending power at its constitutionally indisputable minimum and not attempting to leverage that power into a broader charter to regulate state govern ments.

Congress should in my opinion eschew reliance on the Commerce and Treaty pow ers as justification for a new religious liberty statute, not because such reliance is necessarily unsound, but because it may tend to provoke needless confrontation with the Court, and increase the risk that any statute enacted will be struck down by the Court as "going too far." However, Congress may and should include in any such statute a "fallback" provision that directs the Court (again, in accordance with the Court's own proclamations) to consider any alternative power under which applica tion of the statute might be sustained, in the event a given application is found to exceed Congress's powers under section five and the spending power.

I. THE SECTION FIVE POWER

City of Boerne unequivocally affirms the power of Congress to enforce, through remedies and preventive rules, the Free Exercise Clause as interpreted by the Su preme Court in Employment Division v. Smith and other cases. Smith is often dis cussed in terms of the religious liberty it denied. In considering Congress's enforce ment power after City of Boerne, however, it is important to emphasize and take seriously the religious liberty that Smith (and Boerne) expressly affirm:

First, Smith and Boerne expressly affirm an absolute right to "believe and profess whatever religious doctrine one desires." Smith, 494 U.S. at 877. Thus, government has absolutely no power to regulate "'religious beliefs as such.'" Id. (quoting Sherbert v. Werner, 374 U.S. 398, 402 (1963)).

Second, Smith expressly states that government has no power to "compel affirmation of religious belief," id. at 877, or to compel someone to speak or affirm government-prescribed messages in opposition to their religious beliefs or principles. Id. at 881-882 (discussing rights of religious liberty that are reinforced by free speech clause).

Third, Smith expressly recognizes that the Free Exercise Clause forbids government from "imposing special disabilities on the basis of religious views or religious status," including exclusion from otherwise available ben efits, privileges, or rights based upon one's religious perspective, affiliation, speech, or exercise. Id. at 877 (citing McDaniel v. Paty, 435 U.S. 618 (1978), Fowler v. Rhode Island, 345 U.S. 67, 69 (1953), and Larson v. Valente 456 U.S. 228, 245 (1982)). In short, government may not discriminate against religious persons, religious speech, religious motivation, or religious conduct. Accord Rosenberger v. Rector & Visitors of University of Virginia, 115 S.Ct. 2510, 2517 (1995); Lamb's Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 (1993); Church of Lukumi Babalu Aye v. City of Hialeah, 113 S.Ct. 2217 (1993).

Fourth, Smith expressly embraced and reaffirmed those prior decisions of the Court that had recognized the right of autonomy of religious institu tions from government interference in matters of internal governance, doctrine, discipline, polity, leadership and employment policies. See Smith, 494 U.S. at 877 (citing Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445-452 (1969), Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95-119 (1952), and Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-725 (1976)). See also Cor poration of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (recognizing free exercise clause interest in autonomy of church hiring decisions as part of justification for congressional exemption from religious anti-discrimination laws); Watson v. Jones, 80 U.S. 679, 728-733 (1872) (reaffirmed in Milivojevich) (recognizing right of religious autonomy in matters of religious governance, doctrine, discipline, and standards of conduct required of mem bership in religious organization).

Fifth, both Smith and City of Boerne expressly affirm the right to free exer cise of religion, free from government interference (absent a compelling in terest), when the claimed right of religious liberty is allied with other con stitutional liberty interests. In this regard, the Court has expressly af firmed "hybrid" free exercise rights to freedom of religious expression (Smith, 494 U.S. at 881) and religious association (id. at 882), subject to override only on a showing of a compelling state interest and no less re strictive means. The Court in both Smith and City of Boerne likewise af firmed a hybrid religious liberty right of parents to direct and control the education of their children, free from government prohibition or substantial burden absent similar compelling justification. City of Boerne, 117 S.Ct. at 2161 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972) with approval); Smith, 494 U.S. at 881 & n.1 (citing Yoder, 406 U.S. 205, 233 and Pierce v. Society of Sisters, 268 U.S. 510 (1925) with approval).

Sixth, both Smith and City of Boerne expressly affirm the application of the compelling interest test in religious liberty cases "'where the State has in place a system of individual exemptions.'" In such cases the State "'may not refuse to extend that system to cases of religious hardship without compel- ling reason.'" City of Boerne, 117 S.Ct. at 2161 (quoting Smith, 494 U.S. at 884 (collecting and discussing cases, including Sherbert v. Verner, 374 U.S. 398 (1963) and Thomas v. Review Board, 450 U.S. 707 (1981)).

Taken seriously, this compendium of judicially-recognized religious freedom rights constitutes an impressive (if incomplete) sphere of religious liberty. My point here is a simple but important one: Congress may enforce all of these core, judicially-rec ognized rights under the Free Exercise Clause by enacting remedies and preventive measures to guard against their infringement by state and local governments, so long as those remedies and preventive measures are not so out of proportion to the object of securing these judicially-defined constitutional rights as to constitute an at- tempted substantive change in the content of the constitutional rights themselves, as those rights have been explicated by the Supreme Court. City of Boerne, 117 S.Ct. at 2169-2170. In my opinion, that means Congress may give real teeth to these constitutional liberties by enacting any of a variety of procedural, evidentiary, administrative, and remedial policies, all pursuant to section five of the fourteenth amendment and thoroughly consistent with the scope of Congress's powers under section five as interpreted by the Supreme Court in City of Boerne.

For example, Congress may embrace and build upon the Court's holdings concern ing the areas in which religious liberty has received judicial recognition and protec tion, as set forth in Smith and other opinions. In this way, Congress may add its voice to that of the Court, reinforcing those areas of constitutional liberty on which there is common ground. This would also help guard against the tendency of lower federal courts and state courts to give Smith and Boerne the reading least protective of religious liberty, rather than a reading that takes seriously those areas of protection that the Court has consistently reaffirmed.

Congress should therefore identify and restate those areas where the Court has reaffirmed Free Exercise Clause and hybrid rights, setting forth unequivocally Congress's sense that the Constitution protects these areas of religious liberty from interference by federal, state, or local government and Congress's intention to see that those rights are fully enforced: Government may not proscribe religious belief; government may not proscribe religious expression; government may not target or discriminate against religious conduct; government may not interfere with religious free exercise that is also religious expression; nor may government compel expression or affirmations contrary to religious conscience; nor may government interfere with religious association, or with religious institutions' internal autonomy in matters of faith, doctrine, discipline, governance, or membership; nor may government substantially burden or penalize (including through financial burdens, penalties, or other discrimination), without compelling justification, parents' rights to direct the upbringing and education of their children in a manner consistent with their religious beliefs and principles; nor may government substantially burden religious conduct by failing to accommodate religious practice within a program or activity that

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permits individualized exemption or application in other respects, without compelling justification.[1]

Next, Congress should seek to enforce and protect these principles, with appropriate procedures, remedies, and preventive measures, reasonably tailored to the goal of safeguarding these judicially-identified areas of religious liberty under the Constitution. Where state action on its face violates one of these principles, Congress plainly may proscribe and punish it. In this regard, RFRA's procedures and remedies seem an appropriate starting point: A violation of one of these core principles should trigger a private right of action for appropriate equitable relief and damages, as well as attorneys' fees. In those areas where the Supreme Court has stated that a "compelling interest" may justify the government's interference with religious liberty, the government—not the individual or religious organization—should bear the burden of showing that imposition of the burden in the particular instance is the least restrictive means of satisfying that interest, and that that interest is truly a "compelling" one. 42 U.S.C. §2000bb et seq.

There are additional procedures that are legitimately open to Congress to protect the rights of private individuals against government in this regard. First, tine government could be required to carry its burden of proof by "clear and convincing evidence" on these points. Such standards have been embraced by the Supreme Court in related First Amendment contexts, as a means of assuring breathing room for constitutional freedoms. Cf. New York Times v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, 418 U.S. 323 (1974).

Second, Congress could make explicit legislative findings specifying that certain categories of asserted governmental interests do not suffice to state a "compelling" interest: a governmental interest is not compelling if the government does not consistently pursue that interest in analogous situations; a governmental interest is not

1 If Congress pursues this approach, Congress emphatically should not declare and enforce only a partial list of these judicially-identified religious liberty interests. The effect of doing so would be to send a message to courts, state officials, local administrators, and the public, intended or not, that the not listed freedoms were less important, or even disfavored. It is even possible that such selective congressional enforcement could lead a court to be suspicious of Con

gress' motives and treat the statute as possibly involving an attempt to "gerrymander" out of equivalent protection certain Free Exercise Clause rights that Congress dislikes. A court might even find reason to question the constitutionality of the statute on this ground. (That is not to say that such a conclusion would be analytically rigorous. But the Supreme Court has probed with an exceedingly sensitive eye for defects in statutes that it has perceived as motivated by a desire to disfavor a certain group of persons, or a certain category of rights, cf. Romer v. Evans, 116 S.Ct. 1620 (1996), and it is not unreasonable to take steps to guard against the pos sibility of perceived analogous problems here.)

The converse is not true, however. Congress may wish to consider identifying other types of "hybrid" constitutional freedoms that involve a clear religious freedom component in combina tion with another constitutional liberty interest, and it may do so without thereby implying that there are no others. The Court's opinion in Smith used the examples of freedom of speech, free dom of association, and parental freedom to control their children's education as firmly estab lished examples, but apparently not as an exhaustive listing. 494 U.S. at 881-882. There seems little danger in Congress not seeking to be exhaustive either, but in seeking to protect at least some other hybrid-type situations where it believes there is a clear case for doing so, consistent with the Court's approach in Smith..

Two important examples of potential hybrid Free Exercise claims would involve religious exer cise in combination with property rights (protected by the Fifth Amendment), see, e.g., Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Coun cil, 505 U.S. 1003 (1992), and religious freedom in combination with claims to bodily integrity (protected by the Fifth and Fourteenth amendments and, in some cases, the Fourth amend ment), cf. Cruzan v. Director, Missouri Department of Health, 457 U.S. 261 (1990). The former hybrid situation might cover cases involving a church's right to use its own property without substantial regulatory burdening by zoning authorities or landmarking or historical preservation acts (the situation in City of Boerne itself) as well as cases involving an individual's right not to be forced to rent or lease property in a manner that would implicate her in conduct violative of her religious principles, see Smith v. Fair Employment and Housing Comm., 12 Cal. 4th 1143, 913 P.2d 909 (1996), cert. denied, 117 S.Ct. 2531 (1997). The latter situation might cover cases involving the right of competent adults to refuse medical treatment on religious grounds, see, e.g., Baumgartner v. First Church of Christ, Scientist, 141 Ill. App. 3d 898 (1986); Munn v. Algee, 924 F. 2d 568 (5th Cir.), cert. denied 502 U.S. 900 (1991), or even the right of family members to object to subjecting a deceased individual's body to an autopsy in violation of the deceased's and the family's religious beliefs. See, e.g., Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990).

It is sufficient that such additional constitutional freedoms be implicated by the government action, not that they necessarily constitute independent rights sufficient standing on their own to invalidate the government's action. (If that were the case, there would be no need to invoke the Free Exercise Clause as well, and thus Smith's description of such hybrid situations would make little if any sense.) Congress may wish to consider any of a variety of situations in which specific additional "hybrid" rights could be identified and specifically enforced.

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compelling simply because it entails a policy within the ordinary constitutional pow ers of government; and a governmental interest in administrative convenience is not compelling absent a demonstration of specific, concrete harms resulting from failure to impose a flat administrative rule.2

Third, Congress could explicitly abrogate state sovereign immunity from damages actions and could further provide for statutory presumed or alternative minimum damages for violations (in addition to whatever declaratory and injunctive relief may be appropriate). Congress might specify that such damages are triggered only where government has failed to "retract" (and rectify) its assertedly unconstitutional actions, upon demand by the affected individual or group.

Fourth, Congress could specify that attorneys fees shall be awarded to parties who prevail in such actions, including those whose suits were in part responsible for prompting the government to "voluntarily" grant the requested relief or change its policies.

All of these measures respond to situations in which some level of government has taken action that, on its face, violates one of the core principles of the Free Exercise Clause as identified by the Supreme Court. An additional and very serious problem is that of "smoking out" government action that, while appearing neutral on its face—that is, not targeted or directed at, or facially discriminating against reli gion—may well reflect an improper purpose of attempting to target a specific reli gious practice, religious group, or religion in general, for adverse treatment. The Su preme Court in City of Boerne was concerned that RFRA was too far-reaching to be defended as a device for ferreting out such illicit motive and punishing such con stitutional violations.

Nonetheless, there clearly are measures that Congress may take that are much more clearly aimed at the pervasive problem of hidden motives, suspicious govern ment conduct, shifting official explanations for official actions, and the like. Reli gious persons and groups frequently have great difficulty in proving such matters—or even in obtaining the hard evidence necessary to prove such violations—but that does not mean that they do not exist. More probably, it means that a good deal of hostile or deliberately indifferent government conduct cannot be proven, and con sequently that religious liberty under the Free Exercise Clause is severely under-enforced as a practical matter in litigation.

The conclusion that Free Exercise Clause rights are undervindicated in litigation is an appropriate subject for legislative fact-finding, and one which the Court likely would treat with substantial deference. See City of Boerne, 117 S.Ct. at 2169-2171. The evidence from which such a legislative finding could be drawn may be largely anecdotal, but that is in the nature of the beast. Evidence of hidden or mixed moti vations is often hidden and mixed. Nonetheless, Congress is entitled to consider the weight of accumulated examples as evidence that the problem very well may be far more extensive than the reported or admitted cases, and legislate accordingly with preventive measures.

Let me offer just one such example, drawn from a case in which I was involved, Settle v. Dickson County School Board, 53 F.3d 152 (6th Cir.), cert. denied, 116 S.Ct. 518 (1995). Brittney Settle was, at the time, a ninth grade student in public school in Dickson, Tennessee. Her English teacher assigned the class a term paper project. The students were permitted to select any topic of their choice, so long as it was interesting to the student, "researchable" (in the sense that a student would be able to find four sources about the topic, including books, encyclopedias, or magazine ar ticles), and "decent." Brittney Settle had difficulty deciding on a topic, and eventu ally proposed to write about "The Life of Jesus Christ." Her teacher rejected the pro posal, on the ground that religious topics were "not an appropriate thing to do in a public school. The teacher told Brittney and her parents that the topic was "inap propriate because * * * it was dealing with [Brittney's] personal religion, her per sonal Savior." Strangely, however, the teacher allowed papers on reincarnation, spiritualism and the occult. Brittney's parents challenged the teacher's action, but the principal, the superintendent, and the school board backed the teacher.

On its face, this is a clear case of discrimination on the basis of religious expres sion. The teacher had given the students essentially free rein in deciding what top ics they wished to choose. The exclusion of Brittney Settle's religious topic was because of its religious nature and viewpoint. My own personal opinion is that the teacher at first made a simple mistake, based upon her erroneous belief that it was

2 I have developed these points about "compelling interest" at length, including discussion of relevant judicial authority, in a law review article addressing the question of what constitutes a "compelling" government interest under RFRA, as applied to action taken by the federal gov ernment. Michael Stokes Paulsen, "A RFRA Runs Through It: Religious Freedom and the U.S. Code," 56 Montana L. Rev. 249, 263-283 (1995).

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constitutionally impermissible to allow a student to write on a topic concerning tra ditional religion. Then, being human, the teacher sought to justify her mistake and began to offer further explanations that seem disingenuous. (In my experience, based on dozens of religious liberty cases, it sometimes seems that the lawyers for governmental bodies are responsible for suggesting disingenuous explanations that they believe provide better grounds for defending the challenged governmental ac tion.) By the time the case reached litigation, Brittney Settle's teacher had six—six!—new-and-improved explanations for what she had done. First, the teacher stat ed that Brittney had failed to receive permission to write on the topic before hand ing in her first outline. (However, the teacher told the school board that she would have rejected the topic anyway.) Second, the teacher said that it would be difficult for her to evaluate a research paper on a topic related to Jesus Christ, and that this would have constituted an objective, non-discriminatory basis for her action. (The teacher had no difficulty with any other topic, including those on reincarnation and spiritualism.) Third, the teacher said that she regarded other topics—such as reincarnation and the occult—not to be religious, but that Brittney's "Life of Jesus" paper could not be discussed in a public school classroom. And on and on it went.

The explanation that is my personal favorite is that Brittney's topic could not fit the assignment because it would not be possible for her to find four sources on the life of Jesus Christ, since "all of the sources that you tare] going to find documenting the life of Jesus Christ derive from one source, the Bible. This was truly grasping at straws, since the teacher permitted a wide array of secondary sources. (The Bible also contains more than one source document on the life of Jesus Christ.)

The fact that many of these explanations were not remotely credible or plausible, and that some were downright silly, did not change the fact that they posed real obstacles to proving that the Dickson County school district, through its teachers and officials, had deliberately discriminated against Brittney Settle on the basis of the religious content of her proposed speech, and not for some other reason. As indi viduals who have had to prove other types of discrimination well know, it is difficult to find "smoking gun" evidence of illicit intent. It can also be difficult to prove that a proffered nondiscriminatory justification is pretextual.

In my experience, this type of problem is common. Sometimes government officials shade the truth. Sometimes they offer after the fact rationalizations for their actions that were not the explanations they gave at the time.

It is appropriate for Congress, in the course of enforcing Free Exercise Clause rights identified by the Supreme Court in Smith and other decisions, to take these practical litigation problems into account. Congress properly may respond to the re ality of such situations by establishing administrative rules, evidentiary presump tions, and burden shifting requirements that are designed to effectuate and protect these constitutional rights. Some that I would suggest as possibilities are the follow ing:

1. Congress could provide that, upon demonstration of a "substantial burden" on religious liberty, the burden of proof shifts to the government to justify its actions as not being discriminatory—not targeted or directed at religious conduct in particular. The government would also bear the burden of proving that its action did not fall within one of the other categories of identified Free Exercise Clause protection for private individuals and groups. It is eminently reasonable to shift the burden of proof in such situa tions. Where a substantial burden on religious exercise has been estab lished, it is entirely appropriate that the ordinary presumption in favor of the propriety of government policy be forfeited. (This is similar to "dispar ate impact" racial discrimination cases.) Indeed, as suggested above, since vital First Amendment rights are at stake, it would be appropriate further to require the government to bear its burden of proof by a "clear and con vincing" evidentiary standard. This would assist in vindicating meritorious religious freedom claims, while at the same time enabling government rea sonable latitude to defend against unmeritorious claims.[3]

2. Backing up a step, Congress could impose an administrative requirement that government officials taking action that burdens religious liberty must, upon request by the affected party, provide a good faith explanation, in writing, of the reason for their action. This requirement need not be oner ous or involve any particular form. A reasonable time period (say, 30 days)

3 Concerns about unmeritorious claims could be addressed by a provision stating that any person found to have abused the protections of the religious liberty statute by filing a frivolous or disingenuous claim could be assessed with the government's court costs, or, in egregious cases, precluded from filing further or subsequent claims under the statute.

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could be allowed for a response. Such an administrative requirement would serve an extremely important purpose: It would prevent shifting expla nations for the government's actions. Congress could further direct that, in subsequent litigation challenging the government's action, the government would be foreclosed from asserting reasons for its action not stated in the Written Explanation (perhaps subject to an exception if the government can show good cause for its failure to include such an explanation). In addition, the failure to have offered an explanation fairly meeting the substance of the plaintiffs request could be treated as evidence of improper motivation on the part of the government official or agency involved, and thus as pre sumptive evidence of a Free Exercise Clause violation.

In the Settle case, for example, it would have proven extremely valuable to require the school district, at a very early stage, to state in writing exactly why Brittney Settle could not write her proposed term paper on the life of Jesus Christ. This would at least have pinned the school district down, before litigation, to the explanations that they gave in writing. In my experi ence as a lawyer, the first uncoached account offered by a party or witness is likely to be the most truthful and accurate one. In Settle, I believe the school officials involved likely would have said that Brittney Settle could not write this paper because the teacher felt that it was inappropriate to write on a religious topic. That would then have been an easy case, in my

view. Indeed, it would have been so easy that I believe the school district
would have been forced to admit the error of its teacher, without years of
expensive and, for Brittney, unsuccessful litigation. The school district al
most certainly could not have obtained summary judgment in its favor, and
had that judgment survive appellate review.
3. Congress could prescribe that where a governmental entity has offered
mixed or conflicting explanations for its conduct, the presence of an expla
nation that, standing alone, would constitute a violation of the Free Exer
cise Clause is sufficient to establish the constitutional violation, irrespective
of the presence of other alternative explanations. This would constitute a
modification of the "mixed motives" analysis that the Supreme Court has
employed in First Amendment cases. See Mt. Healthy City School District
v. Doyle, 429 U.S. 274 (1977). Nonetheless, under Boerne, the Supreme
Court is likely to uphold a congressional finding that the presence of uncon
stitutional action or motivation, where admitted, is not cured by the pos
sible presence of an additional ground for the government action that would
have been proper. This again is an eminently reasonable approach for Con
gress to prescribe as a matter of evidence and proof: If evidence or admis
sion establishes the presence of an impermissible motive of discrimination
against religion, and the claimant has shown that the government's action
substantially burdens his or her freedom of religious exercise, it should be
no defense that the government might have taken the same action even ab
sent the unconstitutional motivation. In such situations of hypothetical
might-have-beens and what-ifs, Congress legitimately may prescribe that no
proof shall be permitted that would defeat liability.
4. Though the question is not free from doubt, Congress also might be able
to prescribe that proof of "deliberate indifference" to or "reckless disregard"
of a substantial burden on religious liberty, after a request for a written
justification specifically identifying such a burden on religious liberty had
been presented to the government agency or official taking such action,
would constitute proof, or at least evidence, of an impermissible intent to
target or discriminate against religion or religious conduct. Smith estab
lishes that incidental burdens on religion, resulting from genuinely neutral
rules of general applicability, do not violate the Free Exercise Clause if
such rules are rationally related to a legitimate government purpose. But
where "deliberate indifference" or "reckless disregard" can be shown, the
government action falls far closer to the "intentional" end of the continuum
than it does to the "incidental" end. Congress should be able, consistent
with City of Boerne, to prescribe that such cases be governed by the strict
scrutiny standard, rather than the deferential standard of Smith.
5. Finally, as noted above, Congress could and should create private causes
of action for violations of these principles, abrogate state sovereign immu
nity for damages, and perhaps provide for statutory or presumed damages
(in addition to whatever declaratory and injunctive relief may be appro
priate) for violations of a Free Exercise Clause enforcement statute. As dis-
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cussed above, Congress should also prescribe that prevailing parties shall
be entitled to reasonable attorneys fees.

Such measures would have real force and accomplish real good in the enforcement
of the Free Exercise Clause. All of these measures would be enforcing Free Exercise

Clause rights as understood and declared by the U.S. Supreme Court. All of these measures would lie within the scope of the section five power as interpreted by the U.S. Supreme Court in City of Boerne. This menu of options affords the Congress the opportunity to work together with the Court to achieve some positive protection for religious liberty. It does not accomplish all that RFRA sought to accomplish. But it does accomplish something real and important.

II. THE SPENDING POWER

In addition to the forgoing (and in certain ways overlapping with it), Congress may, under current Supreme Court precedent, mandate religious accommodation within programs or activities of state and local governments that are funded in whole or in part by the federal government. The principle is simple: No person or group should be effectively excluded from participation in, or denied the benefits of, or otherwise discriminated against in, any government program that receives fed eral financial assistance, on account of the fact that some rule or requirement of the program imposes, without compelling justification, a substantial burden on that person's or group's freedom of religious exercise. Put more simply yet, Congress can direct that in a state or local governmental program funded by Congress, RFRA (or something very much like it) applies.

The constitutional law concerning Congress's power to impose such a condition pursuant to its exercise of the Spending Power is well settled. So long as the fund ing condition is in pursuit of "the general welfare"; is unambiguously expressed (so as to enable the States to exercise a knowing choice); and is related to "the federal interest in particular national projects or programs," the condition is constitu tionally valid. South Dakota v. Dole, 483 U.S. 203, 207-208 (1987). Here, the re quirement of religious accommodation within federally funded programs is intended to promote the general welfare by avoiding burdens that might deter or prevent reli gious persons and groups from benefiting from or participating in such programs. Congress is capable of expressing its desired condition unambiguously and should take care to do so. Finally, the relevant federal interest is in assuring that national projects or programs—that is, programs funded in whole or in part by federal tax dollars—not be operated in such a way as to impose substantial burdens on reli gious exercise by participants or beneficiaries. Under the standards of South Dakota v. Dole, RFRA-like mandates can be imposed on state and local government programs funded by the federal government.

The exact outer limits of the Spending Power remain subject to debate, and the Supreme Court in South Dakota v. Dole deliberately refrained from exploring "the outer bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power." 483 U.S. at 208 n.3. There is ongoing and legitimate dispute about the power of the federal government to "leverage" small amounts of federal funding into sweeping power to regulate or control the actions of state governments. The law is not settled in this area. The traditional legislative compromise has been to limit a condition attached to federal funds to the "program or activity" receiving federal funds—with the term "program or activity" receiving a more or less expansive construction. See 42 U.S.C. §2000d-4a (1994). Construed narrowly, a funding condition attached to a particular federal "program or activity" would impose the condition only on the particular program receiving funds. Defined more broadly (as the present statute now directs, 42 U.S.C. §2000d-4a), this lan guage essentially imposes the condition on all of the programs of an entire agency or entity that receives federal funds for one of its programs.

In many cases, the broader approach is unlikely to pose any serious constitutional

issue, because there will be no problem of the germaneness of the federal interest
in conditioning funding on an entity-wide basis. See South Dakota v. Dole, 483 U.S.
at 207-208. For example, a local school district that receives federal financial assist
ance in any of its educational programs can be forbidden from discriminating
against student religious expression in a limited open forum created by a school
dis
trict for student expression, because all of a school district's programs or activities
are presumably related to the education process and ultimately directed at serving
the good of students as ultimate beneficiaries. The federal government may attach
a condition seeking to protect the rights or interests of a category of persons (such
as students) for whose ultimate benefit federal funds have been provided to a school
district. That is, as I understand it, the approach of the Equal Access Act, 20 U.S.C.
§§4071-4074. See Westside Board of Education v. Mergens, 496 U.S. 226 (1990).
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Similarly, South Dakota v. Dole upheld a requirement that a state enact a 21-
year-old drinking age as a condition of federal highway construction funds, on the
ground that the condition was reasonably related to one of the purposes of providing
the funds—safe interstate travel. Federal funds for a state's highway construction
give rise to power to impose conditions reasonably related to highway travel, includ
ing the state's drinking age, irrespective of the fact even that construction projects
and drinking ages might be governed by two different state agencies.

The Supreme Court's understanding of the spending power is expansive enough
to permit Congress to fashion a statute that, at the very least, would protect persons
and groups who are the intended beneficiaries of programs operated by particular
state agencies that receive federally funds for related programs—that is, programs
with a reasonable subject-matter nexus to the condition. The extent to which a par
ticular formulation can be considered "safe" will depend on the exact language em
ployed. I do not have a proposal for specific language, however. Nor can I state un
equivocally that the model of the Civil Rights Restoration Act, which embodies the
broader approach, see 42 U.S.C. §2000d-4a, is constitutional in all of its applica
tions, under South Dakota v. Dole.

I do offer the following boundary principle, however: The Supreme Court likely
will not sustain state-wide, cross-agency application of a federally-mandated reli
gious freedom rule imposed as a condition of federal funding of one state program.
This is not because South Dakota v. Dole clearly forbids such arrangements, but be-
cause one can reasonably infer from Dole, and from the tenor of Boerne, that the
Court would regard such a broad cross-agency application as not enabling states to
make an intelligent decision whether to accept or decline federal grant funds, and
as a subterfuge to evade the limits on Congress's power identified in Boerne. Once
again, if the goal is to stay clearly within the boundaries of what the Supreme Court
has already upheld and is likely to continue to uphold, such a broad use of the
spending power would be extremely unwise.

One possible alternative to the use of "program or activity" language (defined
broadly or narrowly) would be for Congress simply to define the spending condition
as extending to the maximum extent constitutionally permissible under the spend
ing power. Such an approach would seem to be constitutional, literally by definition.
It would effectively collapse the question of statutory coverage into the question of
constitutional power: Congress has applied to states (and localities) receiving federal
funds a condition that applies to all the activities of the state (or locality) that it
is constitutional for Congress to reach pursuant to the spending power.

The only possible constitutional difficulty with this approach is South Dakota v. Dole's requirement that, whenever Congress imposes a spending condition, it "'must do so unambiguously * * *, enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" Dole, 483 U.S. at 207 (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)). Dole and Pennhurst may be read in either of two ways on this point. First, they could be read as saying that the substance of the condition that comes attached to federal money must be unambiguous, so that a state knows that acceptance of federal funds will create a clear substantive obligation. In other words, the state must be able to know what substantive conditions it is "buying into." (The supposed condition in Pennhurst was an example of this sort. The Court held that the state could not rea sonably have been expected to know that general language establishing Congress's preferences, goals, and findings, would create determinate substantive legal obliga tions as a result of receiving the grant.) Second, these cases could be read as saying that the scope of the condition must be unambiguous. In other words, the state must be able to know which of its programs or activities will be covered by the spending condition, even if the substance of the condition itself is reasonably clear. (To my knowledge, no funding condition to date has been held inapplicable or unconstitu tional by the Supreme Court on this ground.) Ironically (and a bit strangely), if the second interpretation were to prove correct, a spending condition that purports to go the limit of constitutional power (in terms of its coverage of state programs or activities) might be thought ambiguous, and thus "unconstitutional," because the Supreme Court itself has not made clear how far the spending power may be extended. In my opinion, it would be truly perverse if Congress were prevented from enacting a statute going to the full extent of the spending power on the ground that the full extent of the spending power is not clear—but I would not be astonished if a court were to so hold.

Which approach Congress should employ ultimately depends on what Congress considers to be the more important objective. If the objective is to provide maximum coverage of any religious liberty statutory condition imposed on the states via the spending power, even if this means greater risk of invalidation, Congress should go with the "program or activity" language and agency-wide definition embodied in

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present civil rights law, 42 U.S.C. § 2000d-4a, or with the "maximum extent of the spending power" formulation I have hypothesized. If the objective is to provide cov erage that will surely and undoubtedly fall well within the scope of the spending power as already upheld by the Supreme Court, even at the expense of some dimi nution of coverage, then Congress should attempt only to cover specific programs or activities receiving federal funds.

III. THE COMMERCE POWER AND THE TREATY POWER

Two other possible sources of power for enactment of a religious liberty statute are Congress's powers to regulate interstate commerce and to implement treaties of the United States. Certain decisions of the Supreme Court could be taken to support congressional power to enact, at least within a limited sphere, a RFRA-like religious liberty statute pursuant to either or both of these sources of power. In my opinion, however, it is unwise for Congress to rely on these powers to simply re-enact the substance of RFRA (or something close to it), for several reasons.

First, under the Supreme Court's most recent major commerce power decision, United States v. Lopez, 514 U.S. 549 (1995), it is unlikely that Congress may use the commerce power to protect religious liberty other than in those contexts where a religious practice has a substantial affect on interstate commercial activity. It is theoretically possible for Congress to make the detailed factual findings that might sustain the conclusion that certain categories of religious activity or certain contexts have a sufficient commercial nexus to justify congressional regulation. The most notable of these would involve questions of church and church/school employment practices, and land use situations. These are not insignificant areas, but they provide only patchwork protection for religious liberty. In any event, protection in these areas would in my judgment substantially duplicate the protection that Congress could in any event provide through vigorous enforcement of the Free Exercise Clause under section five, as each of these areas implicates an area of core Free Exercise Clause freedom embraced by the Court in Smith (religious institutional au tonomy, and hybrid religious liberty claims).

Second, even where a religious liberty statute might otherwise validly be enacted pursuant to the commerce power, thorny questions arise under the Supreme Court's decisions in New York v. United States, 505 U.S. 144 (1992) and Printz v. United States, 117 S.Ct. 2365 (1997) concerning state autonomy limitations on the com merce power. I do not wish to be misunderstood on this point: I do not believe that New York and Printz by their terms would preclude enactment of such a statute under the Commerce Clause. Those decisions struck down statutes that affirma tively compelled states to enact or to carry out a regulatory program; a religious lib erty statute would simply pre-empt certain state regulatory authority in matters af fecting interstate commerce, where the state regulatory program imposed substan tial burdens on religious liberty without compelling justification. But New York and Printz, combined with Lopez, are strongly indicative of an attitude of judicial hos tility toward expansive applications of the commerce power in ways that tread on traditional state prerogatives and state autonomy, suggesting that the Court is mov ing toward a general "federalism" limitation on congressional power of uncertain and evolving scope, that would hang as an ominous cloud over any religious liberty statute enacted substantially in reliance on the commerce power.

Third, and relatedly, protection of religious liberty simply does not "feel" like a matter of interstate commerce. To be sure, the commerce power has been used in the past to legislate national social policy with only a tenuous connection to com merce. Indeed, the civil rights statutes are important examples of where Congress has done exactly this. In those cases, however, the legislation regulated private businesses engaged in quintessentially commercial activity—public accommodations, such as hotels and restaurants. Here, a religious liberty statute would, quite prop erly, operate only as a restriction on the power of state and local governments. Es sentially, such a law would regulate state regulations affecting commercial activity, where such state regulations have an adverse impact on religious liberty. This "feels" a good deal less commercial (and a good deal more like regulating the states) than do laws restricting discrimination in public accommodations operated as com mercial enterprises by private (and even public) entities. Again, I do not wish to overstate my concerns. A religious liberty statute could squeeze between the gaps of the Supreme Court's cases restricting the scope of the Commerce Power. But with a moving target, and an increasingly smaller one, my hesitation tends to increase—and so should Congress's.

Fourth, with respect to the treaty power, my remarks are again in the nature of an intuitive judgment rather than hard legal analysis. I understand the argument that Missouri v. Holland, 252 U.S. 416 (1920), establishes that Congress has power to enact legislation implementing treaties, even if the treaty deals with matters that would otherwise be outside the scope of Congress's enumerated powers in Article I and Article IV, and that the International Covenant on Civil and Political Rights may fairly be understood as justifying implementing legislation protecting religious liberty in the United States.

I am not at all certain that I disagree with the argument, on its own terms. But I have great difficulty believing—especially in light of City of Boerne—that the Su preme Court would accept the argument. City of Boerne sends a clear and strong signal: the Court is highly reluctant to accept aggressive, expansive, or new applica tions of congressional powers even in areas where aggressive or innovative applica tions of such powers have been sustained in the past; and the Court will feel no strong compulsion to reconcile its rejection of new applications with its continued acceptance of old ones. I and many others made the mistake of not recognizing this fact with respect to RFRA and the section five power. The lesson I take away from City of Boerne, as applied to the proposed use or the treaty power to re-enact RFRA, is that the Court simply will not let it happen. The Court will distinguish or limit Missouri v. Holland, on grounds persuasive or unpersuasive. The Court will not today sanction a new use of the treaty power to justify a sweeping religious liberty statute that the Court has already held is beyond Congress's powers under section five of the Fourteenth Amendment.

None of this is to say that Congress may not list the commerce and treaty powers among those on which it seeks to rely in enacting a new religious liberty statute to supplement RFRA.4 Congress may wish to include a "fallback or "catchall" provi sion noting that the statute is enacted pursuant to all of its constitutional powers, and that it intends the statute to operate in any of its applications unless it can be sustained in that application under none of the constitutional powers possessed by Congress. My narrow point is that the Congress ought not to rely on the com merce power or the treaty power as the sole basis upon which all or part of any religious freedom statute is justified. My impression is that the Supreme Court, faced with such a statute, would simply respond by narrowing the scope of the com merce and treaty powers—at least as applied to such a statute—and thus frustrate Congress's efforts.

IV. CONCLUSION

A final danger in this regard is that reliance on the commerce and treaty powers could "taint" Congress's efforts under those powers which Congress clearly does pos sess, under settled Supreme Court case law concerning section five of the fourteenth amendment and the spending power, to enact at least a somewhat more limited reli gious freedom statute. There is a very real danger in trying to do too much, and in moving beyond what the Supreme Court has already identified as clearly accept- able enforcement of the Free Exercise Clause and use of the spending power.

The City of Boerne opinion can be read, with only slight reductionism, as simply a judicial gestalt judgment that RFRA "went too far." The opinion is cast in terms of a careful analysis of the historical and precedential scope of the section five en forcement power. At bottom, however, the holding of City of Boerne is that RFRA went too far for the Court's sensibilities; that it gave insufficient deference to the Court's holding in Smith; and that it sought de facto to overrule that holding in all circumstances and in all respects.

My advice to this committee and to Congress is that if you want a new federal religious liberty statute to be upheld by the Supreme Court, don't push too far.

There is plenty that Congress can do to protect and enforce religious liberty, within the sphere of its unquestioned constitutional powers and working well within Su preme Court precedent. Such a statute could accomplish a great deal. Granted, such a statute could not accomplish all that RFRA sought to accomplish. But the perfect is the enemy of the good. And the Supreme Court is, at least for now, the enemy of the perfect.

The CHAIRMAN. Professor Chemerinsky.

4 I use the word "supplement" rather than "replace" because RFRA plainly retains its force as a limitation on federal governmental power. As applied to actions of the federal government, Congress has the same power to enact RFRA as it had to enact any of the federal statutes RFRA operates to limit or modify. RFRA may seem as simply a "necessary and proper" statute carry ing into execution federal powers. See generally Michael Stokes Paulsen, "A RFRA Runs Through It: Religious Freedom and the U.S. Code," 56 Montana L. Rev. 249, 253 (1995) ("Con gress possesses the same power to pass RFRA, as RFRA concerns federal statutes, as it had to pass those other federal statutes in the first place."). There is no need to re-enact or replace RFRA as it applies to federal law.

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STATEMENT OF ERWIN CHEMERINSKY

Mr. CHEMERINSKY. Thank you so much for inviting me to be here today. I am truly honored.

I believe that Congress can reenact the Religious Freedom Res toration Act in a manner that is likely to withstand Supreme Court scrutiny. The reality is that Americans have less religious freedom after the Boerne decision than they did before. Many challenges to neutral laws of general applicability that burden religion which would have been struck down on the Religious Freedom Restora tion Act now will be upheld.

I think there are two separate ways, either sufficient, that this Congress could reenact the Religious Freedom Restoration Act.

First, Congress could use its authority under powers besides sec tion 5 of the 14th amendment to expand the scope of individual rights and thus pass an RFRA.

It is clearly established that Congress can provide more rights than the Supreme Court recognizes in the Constitution, just not less. The ninth amendment, for example, says the enumeration of some rights in the Constitution doesn't deny or disparage the exist ence of other rights. Where are these other rights to come from? Through congressional action. A simple example: There is no con stitutional right protecting individuals from private race or gender discrimination, but the 1964 Civil Rights Act is a Federal statute doing just that.

The Supreme Court in Smith said that individuals have no con stitutional right to be protected from neutral laws of general appli cability. But Congress could create a statutory right protecting in dividuals, saying that neutral laws of general applicability violate Federal statutes except when they meet strict scrutiny.

One logical source of authority besides section 5 of the 14th amendment is Congress' Commerce Clause authority. The 1964 Civil Rights Act was adopted under this authority. What Congress would be saying, then, is that laws that are neutral and of general

applicability put a substantial burden on interstate commerce, and
thus Congress would be using this authority to create the right.
In light of the Supreme Court's decision in United States v.
Lopez, Congress would need to show a record demonstrating such
a burden, but the Boerne case itself shows that millions, maybe
across the country tens of hundreds of millions of dollars, may be
affected by neutral laws of general applicability.
There is a second alternative available to the Congress, and that
would be to reenact the Religious Freedom Restoration Act under
section 5 as a remedial measure. Justice Kennedy's opinion in
Boerne said that Congress can only act under section 5 in a reme
dial manner. Kennedy said there was not a record for RFRA to
show that it was remedial, and he said it had to be shown to be
proportionate to the nature of violations.
Congress could produce such a record. Congress could dem
onstrate that neutral laws of general applicability across the coun
try do burden free exercise of religion and that remedying this
would require the enactment of a statute like RFRA.
It is important to remember that the Supreme Court in Smith
said there is no right of individuals to be protected from neutral
laws of general applicability. The Boerne case just said RFRA as
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then enacted was unconstitutional. However, Congress could create
another statute to provide the rights. Congress always can create
statutory rights even where there are none in the Constitution. The
Court's decision in Smith that there is not a constitutional
right
doesn't preclude a statutory right through either of these mecha
nisms.
The CHAIRMAN. Thank you, professor.
[The prepared statement of Mr. Chemerinsky follows:]
PREPARED STATEMENT OF ERWIN CHEMERINSKY
I thank the Committee for the invitation to testify today. I am truly honored to
be here. I applaud the Committee for holding these hearings and considering wheth
er Congress may reenact a Religious Freedom Restoration Act that is likely to with-
stand Supreme Court scrutiny. My conclusion is that such a law is an essential pro
tection of religious freedom and that the recent decision in City of Boerne v. Flores
leaves open the possibility for Congress to recreate the law in a way that Supreme
Court will uphold.
My analysis rests on the premise that a federal statute protecting the free exer
cise of religion is necessary and desirable. The Supreme Court's decision in Employ
ment Division v. Smith, 494 U.S. 872 (1990), dramatically lessened the protections
for religious freedom in the United States. Prior to Smith, government actions sig
nificantly burdening religion had to meet strict scrutiny and hence would be upheld
only if proven necessary to achieve a compelling purpose. Smith held that the free
exercise clause is not violated by neutral laws of general applicability, no matter
how much they burden religion. The vast majority of free exercise clause claims al
ways have been to such laws.
The Religious Freedom Restoration Act of 1993 sought to restore the use of strict
scrutiny for free exercise clause claims. The Supreme Court's invalidation of this

law in City of Boerne v. Flores, 117 S.Ct. 2157 (1997), means that people in the United States will have far less protection for their religious practices. Laws of gen eral applicability—whether zoning ordinances or historical landmark laws or prison regulations—that seriously burden religion might have been successfully challenged under RFRA, but not any longer. Put most simply, Boerne means that many claims of free exercise of religion that would have prevailed, now certainly will lose. People in the United States have less protection of their rights after Boerne than they did before it.

My key point this morning is that the Supreme Court's decision in Boerne leaves open ways that Congress can reenact the Religious Freedom Restoration Act in forms that the Court is likely to find constitutional.

The Court in Boerne held that Congress, acting under section five of the Fourteenth Amendment, may not change the substantive content of rights, but rather, only may act to provide remedies for violations of rights.

Two options remain open to Congress. First, Congress can create additional rights by statute under constitutional authority other than section five of the Fourteenth Amendment. The Constitution's protection of rights long has been understood as the floor, the minimum liberties possessed by all individuals. The Ninth Amendment provides clear textual support for this view in its declaration: T h e enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage oth ers retained by the people." The Ninth Amendment is a clear and open invitation for government to provide more rights than the Constitution accords.

There is no doubt that Congress, by statute, can provide rights greater than the Court recognizes in the Constitution. For example, private race discrimination does not violate the Constitution because of the absence of government action. Federal civil rights laws that prohibit discrimination by private places of accommodation and private employers create statutory rights where the Court has found no con stitutional protections. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding Title II of the Civil Rights Act of 1964 which prohibits racial discrimination by places of public accommodation).

This seemingly obvious premise, based on the Ninth Amendment, that Congress can expand the scope of rights, means that Congress may do so even when it dis agrees with a Supreme Court decision that refused to find a right in the Constitu tion. Some critics of the Religious Freedom Restoration Act emphasized that Con gress should not be able to overrule the Supreme Court's "reading" of the Constitu tion. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, "Why the Religious

Freedom Restoration Act is Unconstitutional," 69 N.Y.U. L. Rev. 437, 443 (1994). But if the Court reads the Constitution to not include a right, Congress or the states may act to create and protect that right. In other words, the Court's interpretive judgment that a particular right is not constitutionally protected is in no way in- compatible with a legislature's statutory recognition and safeguarding of the liberty.

In the context of a Religious Freedom Restoration Act, the Supreme Court in Smith made the judgment that individuals do not have a First Amendment right to be protected from neutral laws of general applicability that burden religion. Con gress, acting under authority other than section five of the Fourteenth Amendment, could create a statutory right for individuals to be protected from such laws except in cases where the government meets strict scrutiny.

One possible source of Congressional authority is the commerce clause, which

Congress used to prohibit private discrimination in the Civil Rights Act of 1964. In light of United States v. Lopez, 115 S.Ct. 1624 (1995) (declaring unconstitutional the Gun-Free School Zone Act as exceeding the scope of Congress' commerce power), Congress would need to make findings that neutral laws of general applicability im pose a substantial burden on interstate commerce. Congress might point, for exam ple, to the burden that zoning laws place on religious practices and the economic consequences of these laws. The use of the commerce clause as the authority for the Civil Rights Act of 1964 provides ample precedent for using this constitutional provision to increase the protection of rights. However, the relationship between tree exercise of religion and commerce is not an obvious one and the greater the docu mentation of a substantial effect on commerce the higher the likelihood that the Su preme Court ultimately would uphold the law.

A second approach available to Congress would be to reenact the Religious Free dom Restoration Act as an exercise of its remedial power under section five of the Fourteenth Amendment. Congress would need to do fact-finding showing that there is a serious problem of religious freedom being burdened by neutral laws of general applicability. Congress then could enact a law to remedy the problem. The statute could declare the need to offer protection from such burdens on religious freedom and could do this by instructing courts to apply strict scrutiny when such laws are challenged. This seems entirely consistent with the conclusion of Justice Kennedy's majority opinion that Congress' power under section five is "remedial." 117 S.Ct. at 2164.

The Court in Boerne stressed the absence of a "record" documenting the need for a Religious Freedom Restoration Act and contrasted this "with the record which confronted Congress and the judiciary in the voting rights cases." 117 S.Ct. at 2169. The Court also objected that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Id. at 2170. Therefore, if Congress were to reen act a Religious Freedom Restoration Act under its section five powers there would need to be detailed fact finding of how neutral laws of general applicability burden free exercise of religion and why a statutory solution of that scope is needed.

There is no doubt that people have less protection for their religions after Boerne than they did before. But hopefully this will be only temporary as legislatures, both Congress and at the state level, find other ways to create a right of individuals to be protected from neutral laws of general applicability that burden religion. Hopefully, too, the Supreme Court will uphold these laws and once more reaffirm that Congress may protect rights greater than those found in the Constitution by the Su preme Court.

The CHAIRMAN. Professor Conkle.

STATEMENT OF DANIEL O. CONKLE

Mr. CONKLE. Thank you, Mr. Chairman, members of the committee. I truly am grateful to have the opportunity to testify on mat ters of enormous constitutional significance relating not merely to religious liberty, but also to the proper role of Congress, the Su preme Court, and the States in protecting that liberty.

I discuss a variety of matters in my written statement. Here, I wish to simply highlight a few points with respect to what I regard as to the most viable potential statutory responses to the Boerne decision.

First, remedial legislation under section 5. The other witnesses have testified on this matter in some detail and I won't belabor the

matter except to say two things. First, I would exercise considerably more caution than Professor Chemerinsky has just suggested in terms of the breadth with which Congress can enact remedial legislation under section 5.

Remedial legislation, according to the Boerne decision, is legislation that reasonably or plausibly can be regarded as legislation that is designed to enforce the Supreme Court's understanding of the first amendment, and that is the Smith case. Smith, with ambiguities in the decision to be conceded, essentially says that in most circumstances there is no constitutional right to religious practice exemptions from laws of general application. And, indeed, in general, the constitutional right to free exercise is not violated except by laws that discriminate against religion.

Although there is ambiguity, I believe that this generally contemplates purposeful or deliberate discrimination against religion and, as a result, remedial legislation to be upheld by the Supreme Court probably must proceed in that understanding that it is purposeful discrimination against religion that violates the Constitution under Smith and that remedial legislation therefore properly might address.

I think that clearly has implications for the nature and extent to which Congress can shift burdens of proof. I think Congress can attempt, through appropriate findings and with an appropriate record, to identify particular circumstances in which, in the language of Boerne, there is a significant likelihood of a violation of the Free Exercise Clause, as interpreted in the Smith case. I think that might mean targeting particular areas of State and local regulation. It might permit other sorts of legislation.

The main weakness in remedial legislation, in my view, is that it would not permit Congress to further the basic objective of RFRA, which is to protect religious believers even from general non-discriminatory laws that have the incidental, but nonetheless painful effect of burdening their religious practice.

That takes me to the spending power. I do agree that the spending power probably would permit Congress to impose program-by-program spending conditions tracking the language of RFRA or perhaps developing some other standard. I discuss some of these options in my written statement. There may be limitations on the spending power that the Supreme Court currently might be prepared to adopt, given its recent trend of protecting constitutional federalism. Again, I discuss those in my written statement. Notwithstanding those limitations, I do think the spending power is the most viable option for Congress to consider and it might be fruitful for Congress to move in that direction.

In conclusion, let me suggest that Congress could decide to do nothing in response to Boerne. It could decide to accept, at least for

now, the judgment of the Supreme Court and allow the issue of re
ligious practice exemptions to play itself out in the States and in
the Supreme Court. I do not think that is the best course of action.
I think Congress has a role to play in protecting religious liberty.
At the same time, I think it is imperative that Congress chart a
careful course between constitutional confrontation on the one
hand and congressional capitulation on the other. To me, that sug
gests that Congress should respect the roles of other constitutional
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actors, including the Supreme Court of the United States and in
cluding the States, in attempting to help define the proper protec
tion given to religious liberty.
At the same time, through spending power legislation, Congress
can encourage the States, can encourage the Supreme Court, can
influence those other constitutional actors to move in a direction
more productive and more protective of religious freedom. Spending
power legislation might not accomplish all of Congress' objectives,
but it would at least push the law in the right direction. And at
least for now, it seems to me that perhaps that is all Congress can
or should attempt to do.
The CHAIRMAN. Well, thank you.
[The prepared statement of Mr. Conkle follows:]
PREPARED STATEMENT OF DANIEL O. CONKLE
Mr. Chairman and Members of the Committee:
Thank you for allowing me to testify. The issues now before the Committee are
momentous. They relate not only to the protection of religious freedom, but also to
the proper roles of Congress, the Supreme Court, and the States in protecting that
freedom, I am grateful to have the opportunity to testify on matters of such enor
mous significance.
I am a Professor of Law at Indiana University in Bloomington, where I also serve
as Nelson Poynter Senior Scholar and as Director of the Religious Liberty Project
of the Poynter Center for the Study of Ethics and American Institutions. I am not
testifying on behalf of Indiana University or any other organization, however, but
instead am here on my own behalf, as a citizen who hopes he might contribute to
the Committee's informed consideration of the matters before it.
I have written broadly on issues of constitutional law, with a special emphasis on
questions relating to religious liberty. Of particular relevance is an article I pub
lished in 1995, "The Religious Freedom Restoration Act: The Constitutional Signifi
cance of an Unconstitutional Statute," 56 Mont. L. Rev. 39 (1995). In this article,
I contended that Employment Division v. Smith, 494 U.S. 872 (1990), which essen
tially limited the protections of the Free Exercise Clause to laws that discriminate
against religion, took an unduly restrictive approach to religious freedom, and I
urged the Supreme Court to reconsider its decision. At the same time, however, I
argued that as long as Smith remained the constitutional law of the land, the Reli
gious Freedom Restoration Act (RFRA)—insofar as it applied to state and local gov
ernmental action—exceeded the power of Congress and therefore was unconstitu
tional. In this respect, of course, my article foreshadowed the Supreme Court deci
sion that is the occasion for this hearing—City of Boerne v, Flores, 117 S. Ct. 2157
(1997).
The principal question now before the Committee is whether or how Congress

should respond to Boerne's invalidation of RFRA as applied to state and local gov ernments. As an opponent of the Smith decision and as a supporter of religion-based exemptions from general, nondiscriminatory laws that unduly burden religious prac tices, I am quite sympathetic to the basic substantive policy that RFRA was de-signed to implement. From my perspective, then, the questions at this point are ba sically questions of means: what sorts of congressional action would be constitu tionally permissible and appropriate, and what sorts of congressional action, if any, would best serve the cause of religious freedom at the state and local level, includ ing the recognition of appropriate religion-based exemptions?

I understand that the Committee, at this stage, is not considering the possibility of a constitutional amendment, but is focusing instead on potential statutory re sponses to Boerne. I will address the following statutory possibilities: RFRA-like leg islation grounded on Congress's power over interstate commerce or its power to im plement treaties; more narrowly drawn, remedial legislation under Section 5 of the Fourteenth Amendment; and spending-power legislation imposing RFRA-like or other conditions on the receipt of federal funding by state and local governments. Although some constitutional scholars would disagree, I do not believe that the Es tablishment Clause stands in the way of RFRA-like legislation,[1] and so I will focus

1 Justice Stevensfiled a brief concurring opinion in Boerne, indicating that in his view, RFRA not only exceeded the power of Congress under Section 5 of the Fourteenth Amendment, but

Continued

my attention on questions of constitutional federalism. I will argue that Congress's power over interstate commerce probably would not support RFRA-like legislation and that its power to implement treaties might or might not be adequate to the task. More limited congressional responses, grounded on Section 5 or on the spend ing power, would rest on considerably stronger constitutional footing, although they probably could not accomplish the full objective of RFRA. In conclusion, I will sug gest that spending-power legislation might be the best course of congressional action and that there might be room for creative exercises of this power.[2]

I should add a preliminary observation. Even apart from its decision in Boerne, the Supreme Court recently has revitalized constitutional federalism in various con-texts, limiting the power of Congress and protecting the rights and prerogatives of the States. See, e.g., United States v. Lopez, 514 U.S. 549 (1995) (commerce power); New York v. United States, 505 U.S. 144 (1992) (state sovereignty); Printz v. United States, 117 S. Ct. 2365 (1997) (state sovereignty); Seminole Tribe of Florida v. Flor ida, 116 S. Ct. 1114 (1996) (11th Amendment); Idaho v. Coeur D'Alene Tribe of Idaho, 117 S. Ct. 2028 (1997) (11th Amendment). It is difficult to determine the full meaning of Boerne and of the Court's other federalism decisions, and it is even more difficult to predict whether or how the Court might continue to develop this trend of judicial decisionmaking. As a result, much of what I say necessarily takes the form of conclusions that are guarded or tentative in nature.

I. RFRA-LIKE LEGISLATION GROUNDED ON CONGRESS'S POWER OVER INTERSTATE COMMERCE OR ITS POWER TO IMPLEMENT TREATIES

To accomplish all that RFRA was designed to accomplish, Congress would have to reenact RFRA, or enact a law similar to RFRA; that is, Congress would have to make all state and local laws and practices, however nondiscriminatory they might be, presumptively invalid (i.e., subject to something like the "compelling interest" test) to the extent that they substantially burden religious conduct. As Boerne makes clear, Section 5 of the Fourteenth Amendment cannot support such legisla tion, but Boerne does not foreclose the use of other sources of congressional power. In the aftermath of Boerne, two possible sources of power have been suggested: Congress's power to regulate interstate commerce and its power to implement trea ties.

A. Congreas' power over interstate commerce

During the twentieth century, Congress's power over interstate commerce has been interpreted to justify broad and far-reaching federal legislation. Utilizing this power, Congress has addressed various sorts of economic problems, but its power has not been limited to the pursuit of economic objectives. Title II of the Civil Rights Act of 1964, for example, was grounded primarily on the Commerce Clause, and the Supreme Court upheld the law on that basis. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

Although Congress's power over interstate commerce is broad, it is not without limit. In United States v. Lopez, 514 U.S. 549 (1995), the Supreme Court ruled that the Commerce Clause did not justify a congressional attempt to ban the possession of guns in the vicinity of schools. The Court reaffirmed that Congress has the power to regulate local economic activities, as long as those activities—either alone or in the aggregate—have a substantial effect on the national economy. See 514 U.S. at 556; see also Wickard v. Filburn, 317 U.S. Ill, 127-28 (1942). In the case at hand, however, the Court noted that the activity being regulated, that of gun possession (not sale), was in no sense "commercial" or "economic." Although its opinion is sub ject to interpretation, the Court suggested that the Commerce Clause ordinarily does not authorize the regulation of non-economic activity, even if that activity af fects interstate commerce. At the very least, Lopez means that any congressional at- tempt to regulate such activity will be subject to serious judicial scrutiny.

Lopez may present a problem for RFRA-like legislation grounded on the Com merce Clause. Religious conduct sometimes is economic conduct as well, but this is not the ordinary situation. In any event, to focus on the potentially economic char-

also violated the Establishment Clause. City of Boerne v. Flores, 117 S.Ct. 2157, 2172 (1997) (Stevens, J., concurring). No other justice, however, joined Justice Stevens in this conclusion.2 I recently spoke on these topics at a symposium at the University of Arkansas at Little Rock, and I am currently preparing a law review article that will elaborate and explain my views. This article is tentatively entitled "Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement." It is to be published in Volume 20, Issue 3, of the University of Arkansas at Lit tle Rock Law Journal; this issue is scheduled for publication in the Spring of 1998. When the article is finished, I would be pleased to provide the Committee with a copy.

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acter of some religious conduct might be to miss the point. Read literally, Lopez sug gests that the critical question is whether the activity being regulated by Congress is or is not economic. In RFRA-like legislation, Congress is not regulating religious conduct, but rather is protecting it from state and local regulation. What Congress is regulating, in reality, is the state and local regulation that the congressional law is designed to restrain. The Court might regard this state and local activity not as economic, but rather as governmental or regulatory. If so, the Court might be reluc tant to uphold the RFRA-like legislation unless the state and local governmental ac tivity were shown to have an adverse effect on the national economy that was direct, substantial, and demonstrable. In certain circumstances, state and local burdens on religious conduct might have a real and meaningful effect on the national economy, but it is not clear that that effect—even in the aggregate—would be sufficiently direct and substantial to satisfy Lopez.

Although this analysis might follow from a literal reading of Lopez, this interpretation of the Court's decision might be unduly restrictive. At least in some situations, Congress surely is permitted to protect private economic activity from unduly burdensome state regulation by enacting federal laws that govern the field and preempt state law to the contrary. Perhaps the Supreme Court would see RFRA-like legislation to be serving a similar function to the extent that it protected conduct that was economic as well as religious, and this might serve to immunize the legislation from an attack based on Lopez. On the other hand, Lopez certainly signals renewed attention to the judicial enforcement of limitations on the Commerce Clause. And even if Lopez permitted a RFRA-like law to be applied upon a showing that particular governmental burdens on religion actually had a significant economic impact, this would leave the congressional legislation invalid or inapplicable in many or most of the situations that RFRA itself was designed to address.[3]

In addition to Lopez, moreover, there is an independent constitutional difficulty that RFRA-like legislation grounded on the Commerce Clause would face: such legislation probably would violate state sovereignty, as protected by the Supreme Court's decisions in New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 117 S. Ct. 2365 (1997). Congress typically uses the Commerce Clause to regulate private-sector activities, although it sometimes extends the same regulations to state and local governments as well. When Congress is primarily engaged in the regulation of private-sector activities, laws that survive Lopez are constitutionally valid without further analysis.[4] As the Supreme Court explained in New York and confirmed in Printz, however, it is one thing for Congress to extend private-sector regulations to the comparable activities of state and local governments; it is something altogether different, and constitutionally more troubling, for Congress to address its legislation to government alone, effectively requiring state and local bodies to govern in a particular way.

"[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States," the Court wrote in New York. 505 U.S. at 166. Thus, "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." Id. at 162. The Court elaborated in Printz: "[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" 117 S. Ct. at 2377 (quoting The Federalist No. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). As a result, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." 117 S. Ct. at 2380.

3 Indeed, if Congress attempted to draft legislation that limited its coverage to those situations in which governmental burdens on religion actually had a significant economic impact, it might be difficult to develop statutory language that would both (a) support the Commerce Clause theory of congressional power and (b) address the non-economic burdens about which Congress presumably is most concerned, i.e., burdens resulting not from the economic costs of governmental regulation, but rather from the conflicts that can arise when secular obligations conflict with the demands of religious conscience.

4 This is true as long as the Supreme Court adheres to Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). In Garcia, the Court discarded the doctrine of National League of Cities v. Usery, 426 U.S. 833 (1976), which had provided some special protection for state and local governments even from general federal laws that applied to the private and pub lic sectors alike. In light of the Supreme Court trend of federalism decisions, the current validity of Garcia may be an open question.

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Although RFRA-like legislation might not directly require state lawmaking or state executive action, it would appear to violate the basic principle of state sov ereignty that New York and Printz are designed to protect. In particular, such legis lation would be targeted at state and local governments,5 and, in effect, it would require that state and local laws and executive actions include religion-based ex emptions in accordance with congressionally mandated criteria. The Supreme Court would be unlikely to countenance this substantial intrusion on state sovereignty.

As I have suggested, the state sovereignty doctrine of New York and Printz is independent from the basic Commerce Clause analysis of Lopez. In the context of RFRA-like legislation, however, the two lines of reasoning might coalesce. Thus, the Supreme Court's reasoning might be as follows: congressional lawmaking that regu lates state and local governmental activities is not a regulation of "commercial" or "economic" activity, and it therefore is not a permissible regulation of "interstate commerce"; at the same time, and precisely because of its focus on state and local governmental action, it is an impermissible intrusion on state sovereignty. In sup- port of this reasoning, the Court might well repeat what it said in New York: "The allocation of power contained in the Commerce Clause * * * authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." 505 U.S. at 166.

B. Congress' power to implement treaties

Professor Gerald L. Neuman has argued that Congress's treaty-implementing power would support a "verbatim reenactment" of RFRA that would be within the power of Congress and that would therefore be constitutionally binding on the States. See Gerald L. Neuman, "The Global Dimension of RFRA," 14 Const. Comm. 33, 53 (1997).

Professor Neuman relies on Article 18 of the International Covenant on Civil and Political Rights (CCPR), to which the United States is a party. Article 18 provides that "[e]veryone shall have the right to freedom of thought, conscience and religion," including not only "freedom to have or to adopt a religion or belief of his choice," but also "freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teach ing." Article 18 states that the "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and free doms of others." As Professor Neuman argues, Article 18 appears to call for the pro tection of religious freedom, at least to some degree, even from nondiscriminatory, general laws that have the effect of burdening religious practices. Article 18 thus appears to demand more protection of religious freedom than is required by the Su preme Court's decisions in Smith and Boerne. And Congress has the power to imple ment Article 18 by virtue of the Necessary and Proper Clause of the Constitution, which authorizes congressional legislation to implement international treaties such as the CCPR.

I understand that Congress is likely to have serious policy and political reserva tions about relying on the CCPR as a predicate for RFRA-like legislation, so I will not burden the record with a lengthy discussion of the constitutional questions that such reliance might raise. Even so, I do want to offer my opinion that Professor Neuman's constitutional argument, although creative and plausible, is certainly not free from doubt.

In the first place (as Neuman himself concedes), anything close to a "verbatim re-enactment" of RFRA would appear to go well beyond what Article 18 requires. Arti cle 18, for example, permits the government to limit the exercise of religion when the limitation is necessary for the protection of public morals; standing alone, this justification surely would not satisfy the "compelling interest" requirement of RFRA. As a result, if Congress did little more than reenact the terms of RFRA, the Su preme Court might not regard the legislation as a rational or reasonable implemen tation of Article 18.

Beyond the question of congressional rationality, moreover, there is the question of state sovereignty. And despite Professor Neuman's argument to the contrary, I do not believe that Missouri v. Holland, 252 U.S. 416 (1920), entirely eliminates the possibility of a state-sovereignty objection to treaty-implementing legislation, and therefore to RFRA-like legislation enacted on this basis. Particularly in light of more recent cases like New York and Printz, I think the Supreme Court might at least

5 I believe that the Supreme Court would not reach this conclusion even if RFRA or the RFRA-like legislation continued to apply to the federal government's own activities, in that the law presumably would not apply to the private sector, and it therefore would not "govern the Nation directly." New York,505 U.S. at 162.

apply a balancing approach to the question of whether treaty-implementing legisla tion impermissibly intrudes on state and local governmental autonomy.

In order to diminish the risk of invalidation, Congress might adopt a weakened form of RFRA-like legislation, grounded not in the language of "substantial burden," "compelling interest, and "least restrictive means," but instead in language reflect ing the more flexible approach of Article 18 of the CCPR. Needless to say, such a statute would more readily be upheld as a reasonable implementation of Article 18. At the same time, precisely because it would be less intrusive on the States, the statute would be less vulnerable to a state-sovereignty objection. Although not en tirely free from constitutional doubt, this form of RFRA-like legislation would be likely to survive a judicial challenge.

II. REMEDIAL LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

A. Boerne interpretation and application of section 5

In Boerne, the Supreme Court determined that the application of RFRA to state and local governmental action could not be justified on the basis of Section 5 of the Fourteenth Amendment. Although some constitutional scholars have a different as sessment, I believe that the decision in Boerne honored the thrust of the Supreme Court's prior doctrine, even though the Court used its opinion in Boerne to elaborate and clarify the scope of Section 5. Thus, the Court reaffirmed that Congress can enact "remedial or preventive legislation" to enforce not only the Fourteenth Amend ment as such, but also the Fourteenth Amendment's incorporation of Bill of Rights standards, such as those of the Free Exercise Clause. City of Boerne v. Flores, 117 S. Ct. 2157, 2163-64 (1997). At the same time, however, the Court rejected the ar gument that Congress also has a non-remedial, "substantive" power under Section 5—that is, a power to redefine the meaning of constitutional rights. Id. at 2162-

68. In so doing, the Court limited its earlier decision in Katzenbach v. Morgan, 384 U.S. 641 (1966), which arguably had implied that a substantive power did or might exist. See Boerne, 117 S. Ct. at 2167-68.

This limiting effect of Boerne, however, should not be exaggerated. The essence of Section 5 power has always been remedial, and Boerne continues to recognize that Congress has "wide latitude" in the exercise of this power. See 117 S. Ct. at 2164. Not only can Congress create criminal or civil remedies for individual violations of the Fourteenth Amendment, including the Fourteenth Amendment's incorporation of Bill of Rights standards, it also can modify or abbreviate the case-by-case process of adjudicating constitutional claims. Thus, Congress can adopt statutory provisions that are designed either to ensure that prior violations of the Amendment are fully remedied or to guard against the risk of future violations. As the Court wrote in Boerne, "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional * * *." 117 S. Ct. at 2163.[6]

Like its power over interstate commerce, Congress's remedial power under Section 5 is broad, but not limitless. Thus, lawmaking under Section 5 must reasonably be understood as an attempt to vindicate constitutional rights—that is, constitutional rights as the Supreme Court has defined them. In order to satisfy this condition, according to Boerne, "There must be a congruence and proportionality between the injury to be prevented or remedied [that is, violations of the Constitution, as understood by the Supreme Court] and the means adopted to that end." 117 S. Ct. at 2164.

Under the remedial understanding of congressional power, the definition of constitutional violations depends on the Supreme Court's interpretation of the relevant constitutional right. In Smith, the Supreme Court held that general laws affecting religious practices ordinarily do not violate the Free Exercise Clause. See Employment Division v. Smith, 494 U.S. 872, 876-90 (1990). Instead, the Court suggested, religious practices are constitutionally protected only from laws that target religion for special disadvantage[7]—that is, from laws that discriminate against religion.[8] Although the Court's understanding of "discrimination" in this context is not entirely clear, it appears to contemplate deliberate or purposeful discrimination against religion. Accordingly, the Supreme Court wrote in Boerne that RFRA could survive as a remedial measure only if it were designed to redress state and local laws "enacted with the unconstitutional object of targeting religious beliefs and practices." Boerne, 117 S. Ct. at 2168. Only then, the Court explained, could RFRA be regarded as "a reasonable means of protecting the free exercise of religion as defined by Smith." Id. RFRA failed to survive this analysis because of its broad application to state and local laws of all types, however nondiscriminatory they might be. In the view of the Supreme Court, RFRA was dramatically overinclusive and disproportionate, given

6 The Court cited with approval a series of prior decisions granting Congress broad leeway in its exercise of remedial power, including South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); and City of Rome v. United States, 446 U.S. 156 (1980). See Boerne, 117 S.Ct. at 2163.

7 In its attempt to explain prior precedents, the Court treated unemployment cases and hybrid constitutional claims as special situations. See Smith, 494 U.S. at 881-84.

8 Laws that in fact discriminate against religion are subject to extremely rigorous constitutional scrutiny, a level of scrutiny that all but ensures invalidation. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546-47 (1993).

the Court's interpretation of the Free Exercise Clause in Smith.
B. The possibility of new legislation grounded on section 5
Boerne does not foreclose the enactment of new congressional legislation grounded on Section 5. In proceeding under Section 5, moreover, Congress could directly regu late state and local governmental activity, because the state sovereignty doctrine of New York and Printz is not applicable in this context. But the legislation would have to be considerably more narrow than RFRA. Congress would have to accept Smith's interpretation of the Free Exercise Clause, and the congressional legislation would have to satisfy Boerne's requirements of congruence and proportionality.
One could imagine at least three sorts of remedial legislation that Congress might wish to consider. First, Congress might enact purely procedural legislation that would be designed to alleviate difficulties in
proving discrimination against religion,
as contemplated by Smith, or example, Congress might provide that once a religious believer has proved that a law or governmental practice has a substantially dis criminatory effect on religion, that would shift the burden of going forward with the evidence to the government, requiring the government to thereafter present evi dence on the absence of a discriminatory purpose.
Second, Congress might go further in the context of particular areas of state and local regulation, based upon the risk of purposeful discrimination against religion in those particular areas. Land use regulation, for example, may be one area in which a serious risk or likelihood of purposeful discrimination could be documented, making it possible for Congress to make detailed and persuasive congressional find ings. According to Boerne, Congress has the power to address governmental prac tices that "have a significant likelihood of being unconstitutional under Smith, even if the congressional legislation sweeps in "conduct which is not itself unconstitu tional." See Boerne, 117 S. Ct. at 2170, 2163. Because Smith prohibits (at least) pur poseful governmental discrimination against religion, Congress could move against governmental practices that are likely to reflect such discrimination, even if the dis criminatory purpose could not be proven in any given case. If Congress were to fol low this course, it might choose to make unlawful, or presumptively unlawful (for example, subject to a compelling interest" test), specified governmental practices in particular areas, such as land use regulation. Or Congress might declare presump tively unlawful all governmental practices in these areas that can be proven in liti gation to have a substantially discriminatory effect on religion.
Third, Congress might go even further, declaring that the difficulties of proving purposeful discrimination justify a more broadly framed remedial response. Thus, Congress could perhaps enact a general law—not limited to particular areas of state and local regulation—that was designed to redress governmental practices that have a substantially discriminatory effect on religion in situations suggesting a serious risk or likelihood of discriminatory purpose. For example, the legislation might au thorize relief for religious claimants if they are able to (a) prove that the challenged law or governmental practice has a substantially discriminatory effect on religion and (b) present some degree of credible evidence suggesting discriminatory purpose. This evidence of discriminatory purpose might be based upon historical patterns of governmental decisionmaking, for example, or on the contemporary circumstances surrounding the adoption of the law or governmental practice in question.
In the context of voting rights, the Supreme Court has upheld remedial legislation directed toward state and local practices having a discriminatory effect on racial mi norities in situations presenting a serious risk of purposeful—and therefore uncon

stitutional—discrimination based on race. See, e.g., City of Rome v. United States,
466 U.S. 156 (1980). Although Congress may have particularly broad discretion in
dealing with racial discrimination, the Court might well approve similar legislation
in the context of religious freedom, at least if Congress developed a suitable record
and made appropriate findings. Indeed, the Court in Boerne specifically noted that
RFRA was not a "discriminatory effects or disparate impact" statute, implying that
such a statute might call for a different analysis. Boerne, 117 S. Ct. at 2171.
Of the three sorts of remedial legislation that I have described, the first would
be the safest from constitutional challenge, followed by the second. Even the third,
however, would stand a good chance of survival in the Supreme Court, assuming
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that the legislation were crafted with care and were based upon detailed and well-
supported congressional findings.
Although Congress probably would have the power to enact remedial legislation
in one or more of these forms, the impact of this legislation would be limited. At
most, Congress could expend upon Smith by moving against certain governmental
action that has a substantially discriminatory effect on religion. This problem, such
as it is, was not the problem that moved Congress to enact RFRA, which was de-
signed to address nondiscriminatory governmental action that has the incidental ef
fect of burdening religious conduct. Remedial legislation under Section 5 could bene
fit religious freedom to a degree, but it would not directly serve the basic objective
of RFRA.
There is another potential problem with remedial legislation. Although Smith's
understanding of "discrimination" appears to contemplate purposeful discrimination
against religion, this is not entirely clear, especially in light of the Court's more
elaborate discussion of "neutral" laws of "general applicability" in Church of the
Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). In the absence
of congressional legislation, litigants might test the Supreme Court's understanding,
potentially expanding the constitutional protection available under the Free Exer
cise Clause. Conversely, congressional legislation, in order to avoid the risk of in-
validation, probably should accept a narrow understanding of Smith, i.e., one that
finds unconstitutional discrimination only in the presence of purposeful discrimina
tion against religion. This congressional approach, however, could have the effect of
conceding a narrow understanding of the Free Exercise Clause, and it therefore
could tend to impede a favorable evolution of judicial doctrine on this point.

III. SPENDING-POWER LEGISLATION IMPOSING RFRA-LIKE CONDITIONS, OR OTHER CONDITIONS, ON THE RECEIPT OF FEDERAL FUNDING

A. The breadth of the spending power

Under the Spending Clause of the Constitution, Congress is authorized "to pay
the Debts and provide for the common Defence and general Welfare of the United
States." This congressional power to spend public monies is a separate and inde
pendent power, and it is not limited to the fields of permissible congressional regula
tion that are specified elsewhere in the Constitution. Congress's power to spend,
moreover, implicitly includes the power to restrict the use of its appropriations and
to impose conditions that recipients must honor if they choose to accept the federal
funding. State and local governments receive federal funds under a variety of con
gressional programs, and the funds often come with strings attached. As the Su
preme Court has explained, "legislation enacted pursuant to the spending power is
much in the nature of a contract: in return for federal funds, the States agree to
comply with federally imposed conditions." Pennhurst State School & Hospital v.

Halderman, 451 U.S. 1, 17 (1981).
South Dakota v. Dole, 483 U.S. 203 (1987), illustrates the breadth of Congress's power under the Spending Clause. Under the National Minimum Drinking Age Amendment of 1984, 23 U.S.C. § 158, Congress directed the federal Secretary of Transportation to withhold 5 percent of a state's otherwise allocable highway funds if, as a matter of state law, the state did not prohibit the purchase of alcoholic bev erages by persons under the age of 21. In a broadly worded opinion, the Supreme Court rejected South Dakota's challenge to the federal statute, holding that the des ignated federal funds could be withheld from South Dakota unless and until its own law was amended.
Under the reasoning of the Court in Dole, there are only two significant limita tions on the spending power,9 and these two limitations are not particularly restric tive. First, the Court suggested a "relatedness" limitation, stating that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" Dole, 483 U.S. at 207 (quoting Massa chusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).10 The Court concluded that this was not a problem in Dole, however, finding that the drinking-
9 The Court mentioned other requirements, but these are so easily satisfied that they provide no serious limitation on the exercise of congressional power. In particular, Congress readily can satisfy Dole's requirements that it act in pursuit of the general welfare; that it express its condi tions unambiguously; and that it not induce the States to enact legislation that would otherwise violate the Constitution.10 The Supreme Court used stronger language in New York v. United States, 505 U.S. 144
(1992), stating that spending conditions "must (among other requirements) bear some relation-ship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." Id. at 167 (cita tions omitted).
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age condition was "directly related to one of the main purposes for which highway funds are expended—safe highway travel. Dole, 483 U.S. at 208. Second, the Court identified a non-coercion" limitation, noting that "in some circumstances the finan cial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" Id. at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)). But once again, this was not a problem in the case at hand. Describing the 5 percent financial incentive as "relatively minor en couragement," the Court declared that the enactment of drinking-age laws "remains the prerogative of the States not merely in theory but in fact." Id. at 211-12.
As long as the congressional action stops short of coercion, moreover, the state sovereignty doctrine of New York and Printz does not apply to conditional spending. Thus, in this context, Congress need not adopt generally applicable laws; instead, it is free to target state governments for special conditions—such as the condition upheld in Dole—that are not imposed on the private sector. According to the Court in Dole, sovereignty remains in the States because they have a choice: accept the grant, and with it the condition, or reject the grant, and thereby refuse to yield to the congressional inducement. See Dole, 483 U.S. at 210.
B. The possibility of spending-power legislation designed to induce compliance with RFRA-like standards
To achieve the same coverage as RFRA had attempted, Congress would have to impose a funding condition that would reach state and local laws and practices of

all sorts. Thus, Congress might enact legislation stating that no state shall receive any federal funding—or federal funding of a particular sort or particular amount—unless the state, as a matter of its own law, forbids all state and local governmental action that violates RFRA-like standards. This broad a congressional condition, however, would certainly test the limits of the spending power, and, given the Supreme Court's current direction on issues of federalism, it probably would be invalidated—perhaps on "coercion" grounds, but more likely on the ground that this broad a con dition was inadequately "related" to the congressional funding programs to which the condition was attached.

In an attempt to avoid relatedness and coercion issues, Congress could adopt more narrowly confined, program-specific conditions. Congress still might choose to cover a wide range of state and local governmental practices. It might do so one appro priation at a time, or it might act more generally. Thus, Congress might enact gen eral legislation stating that any state or local government that receives federal fund ing for a particular "program or activity" must comply with RFRA-like standards in the context of that state or local program. In the past, Congress has used just this form of legislation to induce compliance with antidiscrimination requirements. See, e.g., 42 U.S.C. §2000d. Although this approach might stretch the relatedness limitation, it could be defended on the ground that one of Congress's purposes, in each of its appropriations, is to protect religious practices in accordance with RFRA-like standards. To express the congressional purpose in negative terms, Congress would be stating that it does not want its appropriations to be spent in ways that (in its view) improperly burden the free exercise of religion. At the same time, a program-by-program condition could substantially reduce the potentially coercive pressure for state compliance, because a state could resist the congressional induce ment in a particular program without jeopardizing unrelated governmental func tions. Thus, for example, if a state wanted to avoid the standards of RFRA in some or all of its correctional institutions or prisoner programs, it might choose to forego federal funding in those contexts.

This analysis assumes that the Supreme Court would evaluate RFRA-like spend ing conditions in accordance with the basic approach of Dole, which accords Con gress generous, if not unlimited, constitutional power. Since Dole was decided in 1987, however, the protection of constitutional federalism has emerged as a strong theme in the Court s decisionmaking. In light of this trend, there is at least some chance that the Court might develop new limits on the spending power. An outright repudiation of Dole, however, is certainly not likely,11 and legislation imposing program-by-program conditions, as noted above, would probably pass constitutional muster.

If the Court were to find new limits on the spending power, they might come in various forms. Two are potentially relevant to the imposition of RFRA-like condi tions on a program-by-program basis.

11 Dole is a relatively recent decision, and it was decided by the lopsided vote of seven-to-two. The majority opinion, moreover, was written by Chief Justice Rehnquist and joined by Justice Scalia, two of the current Court's most forceful advocates of states' rights.

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First, the Court might tighten the requirement of "relatedness." If so, this might affect the Court's willingness to accept a broad congressional definition of a state or local "program or activity" that receives federal funding, and that therefore would be subject to the RFRA-like conditions. Compare Grove City College v. Bell, 465 U.S. 555 (1984) (narrowly construing the "program or activity" limitation of Title DC of the Education Amendments of 1972, 20 U.S.C. §1681(a) (1982)) with The Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687) (responding to Grove City by dramatically broadening the coverage of Title IX and other antidiscrimination provisions). From the perspective of con gressional power, an overly broad understanding of "program or activity" might tend to negate the constitutional benefits of program-specificity. In particular, related ness might become a more serious issue, because the spending condition would be less closely linked to the particular state or local activities that Congress actually was funding.

Second, the Court might develop a limitation on the federal enforcement mecha nisms that are available to Congress under the spending power. In Dole, the Su preme Court approved what might be considered the classic enforcement mecha nism, i.e., the federal government simply terminating funding for states that decline to honor the federal condition. Other Supreme Court cases have approved a quite different enforcement scheme: private enforcement, under federal law and in federal court, of spending conditions that Congress has imposed on state and local recipi ents of federal funds. See, e.g., Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992); Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990); Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987); Maine v. Thiboutot, 448 U.S. 1 (1980). These private-enforcement cases, however, focused largely on issues of statutory interpretation. If the issue of congressional power were squarely presented today, and if the Supreme Court were inclined to find new limits on the spending power, it might conclude that this type of federal-law enforcement partakes of direct regulation, and that the States cannot be asked to consent to it as a condition to the receipt of federal funding. Cf. New York v. United States, 505 U.S. 144, 180-83 (1992) (refusing to give effect to New York's "consent" to direct federal regulation that otherwise would violate state sovereignty).

Whether the Supreme Court might develop limitations along these lines is a mat ter of speculation. I think there is a distinct possibility that it might, especially in the context of legislation that the Court might regard as a congressional attempt to circumvent its decision in Boerne. I would not go further than "distinct possibil ity," however, and other constitutional scholars might not share even my degree of concern.

The most cautious form of spending-power legislation would adopt a relatively narrow definition of "program or activity," and it would not authorize private en forcement of the RFRA-like conditions as a matter of federal law. These statutory limitations, however, could reduce the scope and effectiveness of the congressional legislation, and Congress therefore might be reluctant to approve them. If Congress were to adopt a broad definition of "program or activity" or to authorize private, fed eral-law enforcement, however, I think it would be prudent to include "severability" or "fall-back" provisions in the legislation—provisions designed to take effect in the event that any portion of the legislation were declared unconstitutional.12

C. Other spending-power possibilities

It would be relatively easy to craft spending-power legislation that imposed a program-by-program condition tracking the substantive language of RFRA, but Con gress also has other spending-power options. For example, it might refrain from extending its spending conditions to all state and local programs that receive federal funding; instead, it might choose to respect the rights of states to make their own decisions in certain contexts, such as prisons, in a manner entirely free from federal inducement. In framing its spending conditions, moreover, Congress might choose not to follow the language of RFRA, complete with its "compelling interest" formula. It might devise other, more flexible, standards for the recognition of religion-based exemptions, permitting the States, within the bounds of these standards, to develop their own concrete formulations. Indeed, Congress could simply require the States themselves, with respect to every program receiving federal funds, to seriously con sider—perhaps under specified procedures—the issue of religion-based exemptions,

12 Indeed, a severability provision might be advisable for any legislation that Congress might adopt in response to Boerne, whether under the spending power or otherwise.

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and to formally adopt their own policies.13 A state could deliberate within the con-text of each program, or it could consider the issue as a matter of general legislative policy, with the resulting legislation being as general or as program-specific as the state might choose it to be.

The issue of religion-based exemptions is complex and difficult, and it may be that Congress should accord the States some leeway in the consideration of this matter. On the other hand, Congress might not be satisfied with this approach, and it might prefer to advance a uniform national standard to the full extent that the spending power permits.

IV. CONCLUSION

In response to City of Boerne v. Flores, Congress may wish to enact new legisla tion that is designed, as was RFRA, to protect religious conduct from state and local governmental infringement. If so, it is important that the new legislation be able to survive judicial review; the cause of religious freedom certainly would not be served by the enactment of another statute that the Supreme Court would find un constitutional. Any legislation that Congress adopts therefore should be grounded on a solid constitutional foundation, and it should be crafted in a manner that limits the risk of judicial nullification. This is not the time for Congress to push the limits of its constitutional power, especially when Congress, without pushing those limits, can respond to Boerne in a productive way—even if not as fully or as categorically as Congress might prefer.

Due to the serious risk of invalidation, Congress would be ill-advised to enact leg islation grounded on the Commerce Clause. The power to implement treaties might support some form of legislation, but Congress might well be reluctant to invoke this source of power. More viable options are remedial legislation under Section 5 of the Fourteenth Amendment or legislation grounded on the spending power.

One could argue that Congress should do nothing in response to Boerne; that it should simply accept, at least for now, the judgment of the Supreme Court—not only in Boerne, but also in Employment Division v. Smith. Even prior to its invalida tion in Boerne, RFRA may not have been entirely effective, and it is not obvious that new legislation will be any more successful. Congressional inaction, moreover, would not make Smith and Boerne the last word on religious freedom at the state and local level. States remain free (subject to the Establishment Clause) to protect religious freedom to a greater degree than federal law requires, and some states, as a matter of legislation or state constitutional law, will provide such additional protection. Likewise, the Supreme Court itself may eventually adopt a more generous interpre tation of the First Amendment's Free Exercise Clause.

Yet congressional inaction, in my view, would not be the best response to Boerne. Congress has a role to play in the struggle to protect religious freedom. Under our system of government, Congress cannot and should not ignore the roles and func tions of other constitutional actors, notably the Supreme Court and the States. But Congress properly can attempt to influence those other actors in a manner that not only respects the limits of congressional power, but that also appreciates the Supreme Court's constitutional role, as well as the contributions that the States might make in defining the scope of religious freedom. The spending power may be ideally suited to this purpose.

Through the enactment of spending-power legislation, Congress could induce the States to protect religious practices even from laws of general application. At the same time, Congress would once again be signaling its disagreement with the Supreme Court's decision in Smith, potentially prodding the Court to reconsider that ruling. This course of action might not achieve all of its intended results, but it would push the law in the right direction. And, at least for now, that may be all that Congress can or should attempt to do.

The CHAIRMAN. I think each of you has been very interesting in your comments here today. Let me ask this question. Do you each

13 In FERC v. Mississippi, 456 U.S. 742 (1982), the Supreme Court rejected a state-sovereignty attack on federal legislation, grounded on the Commerce Clause, that had directly required state utility regulatory commissions to "consider" certain federal standards and, in so doing, to follow specified procedural requirements. See id. at 746-50, 761-71. It is an open question whether FERC survives New York v. United States, 505 U.S. 144 (1992) and Printz v. United States, 117 S. Ct. 2365 (1997). Cf. New York, 505 U.S. at 161-62 (attempting to distinguish FERC); Printz, 117 S. Ct. at 2380, 2381 & n. 14 (same). But even if FERC is no longer controlling with respect to direct federal mandates, there is little doubt that Congress, acting under the Spending Clause, can impose a "consideration" requirement as a condition to the receipt of federal funding.

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agree that Congress was within its power to enact the original RFRA as a limitation on the application of Federal law?

Let us start with you, Professor Laycock.

Mr. LAYCOCK. That issue is now being briefed in the eighth circuit, but I don't have any doubt RFRA remains valid as applied to Federal law.

The CHAIRMAN. Let me just also add this part. If so, what do you see as the constitutional source of this power? Would it be the Necessary and Proper Clause, the Commerce Clause, or some other power?

Mr. LAYCOCK. Well, Necessary and Proper is the quickest shorthand label, but I think, in fact, it is an exercise of each of the Federal powers. Every Federal statute is limited and Congress can decide how far each statute ought to reach. And so when it is the bankruptcy power when you limit the reach of the Bankruptcy Act, and it is the commerce power when you limit the reach of a Commerce Clause statute.

The CHAIRMAN. Professor Paulsen.

Mr. PAULSEN. I agree entirely with Professor Laycock. Whatever power gives Congress the authority to pass a given Federal statute in the first place with respect to Federal agencies and Federal exercise of authority, Congress has the same power to limit how far it will go in the exercise of that power.

RFRA, as a self-limitation of Congress on the powers of the Fed eral Government as to citizens, should be entirely constitutional and should be pretty uncontroversial. I would recommend that, therefore, you do not want to repeal RFRA in entirety. You want to retain RFRA insofar as it applies to the Federal Government and then enact further protections with respect to limitations on what State governments may do.

The CHAIRMAN. Professor Chemerinsky.

Mr. CHEMERINSKY. Justice Kennedy's opinion in Boerne focused solely on Congress' authority under section 5 of the 14th amend ment which is relative to State and local governments. Nothing in the opinion speaks to the constitutionality of RFRA as applied to the Federal Government. I think the Necessary and Proper Clause, combined with all of the other congressional powers, gives Congress the ability to apply RFRA to Federal actions. So I very much agree with my colleagues.

The CHAIRMAN. Thank you.

Professor Conkle.

Mr. CONKLE. I don't disagree. I would simply note one point of caution, and that is that there is some language in the Boerne deci sion that does talk about separation of powers and there is pending litigation on the issue of RFRA's constitutionality at the Federal level. On the other hand, I do agree with these witnesses that the proper result in this regard is that RFRA should be declared con stitutional as to Federal laws and practices.

The CHAIRMAN. That is great. Well, then my next question is, so the Supreme Court's jurisprudence construing the Free Exercise Clause is no limitation on Congress' use of its plenary legislative power to enact a RFRA-like rule of construction against Federal Government power and Congress can define that statutorily any way it wants to. Is that right?

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Mr. CONKLE. I would suggest that if Congress attempted to change the terms of RFRA for Federal application, it would want to be cautious in two respects. One is that there is this separation of powers theme in the Boerne decision and it is possible that the Supreme Court, if RFRA was reenacted at the Federal level, could rely on that theme.

More to the point, perhaps, there is the Establishment Clause and if Congress went beyond the terms of RFRA in protecting reli gious practices in ways that the Court might regard as actually fa voring religion or preferring religion, that could be a potential prob lem.

Mr. LAYCOCK. If I could interject, Senator, the separation of pow ers theme in Boerne, it seems to me, is entirely derivative of the focus on section 5 of the 14th amendment. Congress was acting under a power to enforce the Constitution, and so the Court said, well, enforcing the Constitution means enforcing the judicial under-standing of the Constitution. Boerne also says that when Congress acts within its own sphere of authority, it has the right and the duty to act on its own view of what the Constitution means. That is Justice Kennedy's opinion, also.

The CHAIRMAN. Let me turn to Senator Kennedy. I have some other questions, but I will turn to Senator Kennedy.

Senator KENNEDY. Why don't you go ahead, Dick?

Senator DURBIN. If I might, I am fascinated by the topic and voted for the underlying legislation which was found unconstitu tional. I have to say that I am very loathe to turn to a constitu tional amendment to solve our ills. It unfortunately has become a fashionable thing on Capitol Hill and we now have an avalanche of constitutional amendments. I guess, sitting on the Democratic side, it may be hard for some people to understand it, but I am very conservative when it comes to the Constitution, and changing it is something I don't jump at.

Let me just say if I understand the Court's decision in Boerne, here we have a Catholic church right outside of San Antonio, in Boerne, TX. I am going to assume that that probably is the domi nant, majority religion in that area. I am just going to assume that for a second. So the underlying question that the Court asked was, "If we are going to go along with this new statute and this new au thority"—and they made reference to Katzenbach—they said, "We are going to have to see some evidence of real discrimination here and real bigotry, and we don't see it in this case. We see a historic planning commission which set out a standard which applied to ev eryone living in the region," and it happened to apply to this church's plans to expand.

I think if I read it correctly, the Court said, "Congress, you cre ated an extraordinary power here in this legislation and you don't have the facts to back it up. If you are going to argue this section 5 application, you had better show us some pretty clear discrimina tion."

Now, a couple of you in your testimony have said it is out there; there is discrimination against fundamentalists, and so forth and so on. Maybe that is a fact that I am not as aware of as you are, and I would like to invite you at this point to address that very fundamental point.

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Here we have a very tough argument to make that in the San Antonio area of Texas, the Catholic Church is being discriminated against by a local city council. And we have a Supreme Court which says, "You had better give us a better fact pattern than this if you want to justify this kind of expansion of congressional au thority." I invite your comments.

Mr. LAYCOCK. I think one of the ironies of the Boerne case is the leaders of the religious organizations believe if there is any area of regulation where you can make a clear record of widespread dis crimination, it would be zoning and land use regulation. And the Court simply assumed without any record that zoning is a neutral and generally applicable law.

There is widespread discrimination in zoning and land use regu lation, one, because it is so individualized. It is parcel-by-parcel conditional use permits, variance applications, decisions made one lot at a time with almost unbounded discretion. And, two, churches are targets. There is a study in the city of New York that shows that churches are 42 times more likely to be landmarked than any other kind of property.

There are lots of cases where the neighbors come out to say, you know, "we don't want this new and unfamiliar church in the com munity." Liberal Jews come out to say "we don't want these ortho dox Jews in the community." Folks come and say "we don't want these fundamentalists in the community." That is actually quite common.

Senator DURBIN. Did you think that was the situation in the Boerne case?

Mr. LAYCOCK. No, that was not. The situation in the Boerne case was a variant of that. I have never suggested that there was in modern times any Catholic hostility in Boerne. The church is where it is because they wouldn't let them build in the city limits, but that was a couple of generations

Senator DURBIN. Well, isn't that what set the Supreme Court off? In a 6-to-3 decision, they basically said, you know, is this as good as it gets?

Mr. LAYCOCK. Well, let me tell you what it gets. In fact, I don't think there was bigotry in Boerne, but there plainly was discrimi nation in Boerne. The city council proceeded lot by lot and parcel by parcel, and some landowners who objected were excluded. The boundary was redrawn so they wouldn't be burdened.

The initial boundary didn't include the church. The actual ordi nance that we challenged in the Boerne case was not a generally applicable law. It applied to nobody but the church. It didn't even apply to the whole church. It was an amendment to include one part of the church. It was special-purpose, single-parcel legislation, and as compared to other secular owners the church was being dis criminated against. I don't think that should be required, but that was, in fact, what happened.

Senator DURBIN. Well, I think that is what the Court clearly said. I mean, "you had better give me a fact pattern that makes this compelling, and you haven't done it." I think that is what they said.

Mr. LAYCOCK. Right.

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Senator DURBIN. Now, let me ask you about your reference, Pro fessor Laycock, to the city of Chicago, which I have a special inter est in. You seem to suggest that the zoning laws in force in Chicago and its suburbs prevent religious institutions from building or per- haps renting new space. Is this a survey that someone has done or completed to draw that conclusion?

Mr. LAYCOCK. I am not the right witness to ask about that, but I can get you the name of the people who have those facts. There are a couple of things. There is a combination of the zoning laws and of a rule about proximity to places where liquor is sold that effectively requires special-use permits for any church going in on any parcel.

Senator DURBIN. Well, wait a second, wait a second. I happened to be in the State capital when we enacted the law about how close you could build a tavern to a church, and do you know who wanted that law enacted?

Mr. LAYCOCK. Yes, I understand that.

Senator DURBIN. The churches wanted it enacted.

Mr. LAYCOCK. I am not talking about the intention of the legisla ture, Senator. I am talking about how it is played out in practice. How it is played out in practice is if I am a pastor starting a new church and I want to rent a store front to hold services in, we have to have a hearing with participation from the neighborhood. And the neighborhood comes out and says, "Well, you know, who are you? You are not the United Methodists or the First Presbyterians. I don't know who you are. I don't want you in my neighborhood." We can get you a witness who can give you chapter and verse on this.

Senator DURBIN. I would sure be interested in that because it is really kind of hard for me to understand that in the city of Chicago, with as many churches as we have, that there is a zoning policy that is discriminatory against churches and religion.

Mr. LAYCOCK. The practical implementation of the zoning laws is that it is enormously difficult to locate an unfamiliar denomination because the neighborhood has an effective veto. I don't think any-one meant to set it up that way, but that is how it is played out in practice.

Senator DURBIN. My time is up here. I just want to say that I still believe in the basic concept here that the government should be very mindful of our freedom of religion. I think the Boerne deci sion, if that was picked as the case to test RFRA, was a poor choice, and I think the Court jumped on it right away and said the facts just don't sustain the argument that there is a discriminatory practice here.

Mr. PAULSEN. Senator, if I may interject for just 20 seconds, one thing that Congress may consider in deciding whether to fashion a religious liberty statute is not to look at these things retail, sort of like the discussion you have just been having with Professor Laycock, but to look at them more wholesale, to realize that there are many situations where religious freedom is burdened. And it may not be smoking-gun evidence of intentional discrimination, but there is something out there and Congress has to infer from the ex istence of burdens that there is a problem to be remedied.

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I think what both Professor Laycock and I are suggesting is that in these

Senator DURBIN. Well, let me make this point to me, in not my words, but the words of the Supreme Court. They said if you want to liken this to racial discrimination and voting rights cases, "In contrast to the record of widespread and persistent racial discrimi nation which confronted Congress and the judiciary in those cases, RFRA's legislative record lacks examples of any instances of gen erally applicable laws passed because of religious bigotry in the past 40 years." So I mean we did not make a legislative record to sustain it, and therefore they judged it case-by-case and said this case doesn't meet it, doesn't establish it.

Mr. LAYCOCK. Senator, I don't think anyone believed that we had to make a record of religious bigotry, and under the Commerce Clause and the Spending Clause we still don't. I think there was discrimination in Boerne. I think it was subtle. I don't think it was bigotry. I think it was simply uneven treatment.

But under the Commerce Clause, Congress can make the judg ment that when we have a law that results in 400 people being un able to attend mass for 5 years, that is a problem Congress ought to do something about, whether or not it was caused by bigotry or discrimination.

Mr. CONKLE. Senator, if I might interject very briefly, and that is that it is fundamental to know if you are going to act under sec tion 5 what is the free exercise right the Supreme Court is talking about in the Smith case and in the Boerne case.

As I read it, and I think as you read it, the free exercise right is at least primarily a right to be free from deliberate, purposeful discrimination against religion. If that is the right, section 5 legis lation has to be designed to remedy that sort of discrimination, and as a result Congress would have to proceed in a relatively narrow way it uses section 5 if it wants to avoid the serious risk of con stitutional invalidation by the Supreme Court.

I think the spending power is much more likely to be upheld than the Commerce Clause if Congress wishes to go beyond that in an attempt to, in fact, deal with general laws that are entirely non-discriminatory in nature, but have an adverse burden as ap plied to particular religious practices.

Mr. CHEMERINSKY. Might I interject because I disagree a bit? As you point out, the Supreme Court distinguishes the Voting Rights Act amendments of 1982 from RFRA. If you remember, the 1982 Voting Rights Act amendments were adopted in response to the Su preme Court's 1980 decision in City of Mobile v. Bolden. There, the Supreme Court said the discriminatory impact in election practices does not violate the 14th amendment.

Congress then, in the 1982 Voting Rights Act amendments, says by statute such practices that have discriminatory impact are im permissible. The Supreme Court in Boerne said that record was sufficient to uphold the law that, in essence, overruled the Su preme Court decision. So I don't think that Congress needs to find, to use remedial power under section 5, pervasive discrimination against religion.

I think what Congress needs to do if it wants to use section 5 power is show across the country the substantial burdening of free exercise of religion from neutral laws of general applicability, and that this law is a remedy just like the 1982 Voting Rights Act amendments are a remedy.

Senator DURBIN. Well, six Supreme Court Justices disagree with you, but thank you very much.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. I want to thank Senator Hatch for having the hearing. It is enormously useful, I think, trying to weave our way through what the options are for us legislatively and what the potholes are as we go along this road and what the result of no action would be, as well.

I just want to follow up just quickly with the point that has been referred to, and that is the potential for constitutional challenges to the Voting Rights Act and the Civil Rights Act of 1964 as it applies to State and local government. You have pregnancy discrimination that applies to State and local government, the Civil Rights Act of 1991, and the Violence Against Women Act.

Professor Chemerinsky, you have expressed concerns about the impact on civil rights legislation. Would any of you just expand on what your own sense is of whether you expect challenges in these areas now? Is this moving us in a direction where we ought to expect them, and what you might be able to tell us as to where you think that is going to lead us?

Mr. CHEMERINSKY. I have no doubt there will be challenges. I think in the 1990's, we are in a new era of Supreme Court review of Federal statutes. The decisions in New York v. United States, United States v. Lopez, Boerne, Printz v. United States, all show that the Court is going to be very aggressive in limiting Congress' power, and litigants are going to take the Court up on it.

I would be very troubled by the Court's decision in Boerne about the future of the 1982 Voting Rights Act amendments had Justice Kennedy not explicitly distinguished RFRA from that law. I think Justice Kennedy was trying to give a signal to lower courts that the 1982 Voting Rights Act amendments are constitutional and the Court is not likely to invalidate them. In fact, a year ago, in Bush v. Vera, five Justices of the Court said that they thought that the Voting Rights Act amendments of 1982 met strict scrutiny and thus would be upheld under the Constitution.

Mr. LAYCOCK. I read it rather differently and more alarmingly. Justice Kennedy said explicitly that the 1965 Voting Rights Act was constitutional, which had a very different record. That was the one that responded to the widespread and longstanding use of literacy tests and other devices to keep African-Americans from voting at all.

I read a stunning silence on whether the 1982 amendments are constitutional, whether any of title VII is constitutional as applied to the States, except for pure and simple disparate treatment claims. I think the Violence Against Women Act is dead on arrival. We are going to see challenges to all these things. Now, how suc

cessful those challenges will be remains to be seen.
Boerne may be much more about religious liberty than about fed
eralism, and it may turn out to be a sport, a precedent that never
gets followed. But if they take seriously what they said in Boerne,
then I think a lot of congressional legislation that applies to the
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States and is based on section 5 is going to turn out to be unconsti
tutional.
I can't imagine they would overrule Congress' power to define
badges and incidents of slavery. That seems politically impossible,
but as a logical matter, the power to define badges and incidents
of slavery is a substantive power and it is inconsistent with the
Boerne opinion. And Boerne doesn't explain how that power can
survive. So if they mean everything they said in Boerne, this is a
partial rollback of the Civil War. It takes away the key congres
sional power that was given to implement the fruits of that war.
It is a stunning opinion.
Mr. CONKLE. If I might briefly disagree with Professor Laycock's
explanation or characterization of the Boerne decision, one can dif
fer, and I think reasonably differ, about the full meaning and scope
of the Boerne opinion. On the other hand, as Senator Durbin indi
cated, this was a six-justice opinion. A seventh Justice, Justice
O'Connor, did not disagree with the interpretation of section 5, and
the other two did not comment on the issue.
I think that for the Supreme Court, this was not regarded as a
difficult case precisely because, in my view, the Court at least
viewed the issue in Boerne as whether or not this was a rational
or reasonable means of preventing discrimination against religion.
And if so, the law was just too broad to do that, and as a result
more difficult cases are yet to be decided. Now, maybe the Supreme
Court will go broadly in defense of constitutional federalism and in-
validate other congressional statutes. I think it is too early to tell
that simply on the basis of the Boerne case alone.
Mr. PAULSEN. Stated very simply, Senator, I think that City of
Boerne, taken seriously, is a significant rollback of Congress' power
to enact civil rights legislation. I don't think they mean it other
than in the religious liberty context and I don't think they will fol
low it outside of that context. I think that City of Boerne, in prac
tical effect, is a rule about "we don't like you trying to overrule us
when you don't like Employment Division v. Smith. We don't like
what you are doing and we are going to strike down this one as
going too far, but it doesn't necessarily commit us to going further."
I do agree, however, that VAWA, the Violence Against Women
Act, is probably going to be held unconstitutional as in excess of
Congress' commerce power, but that is distinct from the civil rights
enforcement power under section 5 of the 14th amendment.
Senator KENNEDY. Let me ask about the work that is being done
at the State level, given the fact that a number of the State con
stitutions are very protective of free exercise rights. Many States
since the Boerne decision have initiated efforts to pass State laws.

Given the work being done at the State level, what guidance can you give us as to how significant that is and how we ought to react or respond to it? I mean, is it necessary for us to pass legislation? Is there enough activity going on with State laws? What can you tell us about it?

Mr. PAULSEN. Senator, there is some activity in some States that is providing some measure of enhanced protection as a matter of State law. It is inconsistent State by State, it is haphazard, it does not go as far as RFRA. Some States are going to be doing very good things, some States are going to be doing less good things, and

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some States are going to be doing nothing at all. It is no reason for Congress not to act because Congress could establish within its powers a nationwide rule that would fully protect religious liberty.

Mr. CHEMERINSKY. There is a good deal of activity at the State level. In California, there will be hearings by the assembly judici ary committee next Wednesday. But where I agree with Professor Paulsen is, inevitably, some States won't act on this. There is a need for protection for every American from neutral laws of general applicability, and only Congress can provide that.

Senator KENNEDY. Thank you, Mr. Chairman. My time is up.

The CHAIRMAN. Thank you, Senator Kennedy.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

Thank you, Chairman Hatch for holding today's hearing on Congress' constitu tional role in protecting religious liberty. This is a matter of great importance to the Senate and the country.

Four years ago, members of the Senate and the House of Representatives voted overwhelmingly for the Religious Freedom Restoration Act. Within weeks, President Clinton signed the bill into law. At the heart of our support for the Act were two basic principles—protections for religious liberty can be improved by congressional action in this area, and that Congress had the authority to enact appropriate legis lation.

Our action on that landmark legislation was prompted by the Supreme Court's decision in 1990 in which opened the door to unfortunate and unwise restrictions on religious freedom. A large coalition of religious and civil liberties organizations impressed upon Congress the importance of passing legislation to restore essential protections. The coalition represents millions of Americans who believe that the Free Exercise Clause of the First Amendment protects individuals from blatant reli gious bigotry, as well as inadvertent, but equally harmful acts that unnecessarily burden the free exercise of religion.

As Justice Souter said in his concurring opinion in a separate case, neutral, gen erally applicable laws, drafted by legislators without due regard for religious free dom, can often put "the believer to a choice between God and government.

Hearings conducted in the Senate and the House have clearly demonstrated the validity of Justice Souter's statement. But they also strongly supported Congress' constitutional authority to address the problem by passing legislation. Testimony from around the country pointed to laws that zoned churches out of commercial areas, required compulsory autopsies on Jews and other religious minorities, and mandatory blood transfusions for Jehovah's Witnesses. Constitutional scholars told

the Committee that these and other problems would proliferate in the wake of the
Smith decision, if Congress did not exercise its constitutional authority and pass the
Religious Freedom Restoration Act.

Our authority to do so relied on Section 5 of the 14th Amendment, and our inter
pretation was shared by liberals and conservatives alike. Unfortunately, in its 1997
Boerne v. Flores decision, the Supreme
Court questioned our authority to do so in
some respects, and our goal today is to explore the possibilities for further action
by Congress in accord with the new constitutional guidelines established by the
Court.

In the real world, nothing has changed since the Smith decision. Autopsies con
tinue, zoning laws restrict activities in churches and synagogues, and the parishion
ers of Saint Peter's Catholic Church in Boerne, Texas are still without an adequate
site to hold their religious services.

Given these serious continuing problems, I feel that further action by Congress
is necessary and appropriate. I look forward to the testimony of today's witnesses,
and to their guidance on how we can best protect religious liberty in America.

The CHAIRMAN. Senator Kyl.

Senator KYL. Thank you, Mr. Chairman, and I am sorry I was
not here to hear all of your testimony. One of the inquiries that I
wanted to get into—and with your expertise here, I thought it
would be a good opportunity—is to explore the difference between
language which is included in legislation or an amendment with re-
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spect to enforcement as opposed to implementing. And after the
Boerne case, I am interested in your views as to how broad Con
gress' power to enforce is.

What does "enforce" mean? What are the powers that are in
cluded within the term "enforce," and what things is Congress not
allowed to do with the enforcement power that we might think of
as implementing authority? Would all of you like to respond?

Mr. CONKLE. My understanding of the remedial power of Con
gress under section 5 is that Congress can act in ways that are rea
sonably understood to be designed either to prevent violations of
the Constitution as construed by the U.S. Supreme Court, or to
remedy violations of the Constitution as construed by the U.S. Su
preme Court.

The language in Boerne suggests that if Congress goes after or
attempts to address State laws, for example, that have a significant
likelihood of violating the Free Exercise Clause, that would be re
garded as enforcement. The key distinction, although it is difficult
to draw the line, is that Congress is authorized under the 14th
amendment to enforce, in essence, according to Boerne, the Su
preme Court's understanding of the first amendment. It is not per
mitted to adopt for itself its own differing, substantive interpreta
tion of what the Free Exercise Clause means or requires.

Mr. CHEMERINSKY. I think that the Supreme Court in Boerne de-
fines "enforce" as synonymous with a remedy. In other words, Con
gress can't change the substantive scope of rights when acting
under section 5 of the 14th amendment, but Congress does have

broad authority to provide a remedy.
Justice Kennedy in Boerne complained that Congress had not put forth a record showing a need for a remedy in this case. So I be lieve if Congress had such a record, it could then, as a remedial matter, enact something much like the Religious Freedom Restora tion Act. Also, as I and others have testified, I think Congress could use powers other than section 5 of the 14th amendment, like the commerce power or the spending power authority to again enact something just like the Religious Freedom Restoration Act that would withstand Supreme Court scrutiny.
Mr. PAULSEN. Senator, as near as I understand the distinction that you are drawing between "enforce" and "implement," my opin ion would be that Congress may, consistent with City of Boerne, take actions that will augment slightly the rights that have been judicially declared as long as it does so through the mechanisms of burden of proof-shifting devices, slight prophylactic rules establish ing remedies.
Given what the Supreme Court has held is still yet protected by the Free Exercise Clause, Congress could then establish burden-shifting devices, burden of proof devices, remedies, which would significantly augment the enforcement of these constitutional rights, and that is one thing that is clearly within Congress' power to do even under the City of Boerne decision.
Mr. LAYCOCK. The only thing I would add is that the Court says even though Congress is confined to remedying violations, as the Court defines them, Congress can also prohibit conduct that would not itself violate the Constitution, as the Court defines it. But the Court will be the judge of whether or not that was necessary. The
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Court will be the judge of whether the preventive or prophylactic things that Congress does are proportionate to violations, as the Court defines it.
The CHAIRMAN. Senator, if I could interrupt you, we have a vote that has started and I have to be at the White House. So I am going to give you some additional time for this time I am taking, and then you will wind it up, and then Senator Ashcroft, unless somebody else arrives. I think you would have enough time before you would have to come to vote.
Let me just say this. At the end of this, we will accept written questions by the close of business on Friday. Then we would ask you four to be sure and answer those as quickly as you can, but no longer than 2 or 3 weeks, 3 weeks at the outside, but quicker if you can, so that we can continue to make this record because your testimony has been very important here today and your an swers to these questions are very important.
I have a lot more questions to ask, but it is clear that I just don't have the time to stay and ask them. But I am going to ask them in writing, and I think we will hold the record open for all mem bers of the committee.
[The questions of Senator Hatch appear in the appendix.]

The CHAIRMAN. So, with that, I am going to turn the time to Sen ator Kyl, and then finally to Senator Ashcroft. And if someone else comes, I hope you will yield to them. If not, then I would like you to close the hearing.

Thank you for being here and we appreciate each one of you folks. We have enjoyed having your testimony and we want you back.

Mr. LAYCOCK. Thank you, Senator.

Mr. PAULSEN. Thank you, Senator.

Senator KYL. Thank you, Mr. Chairman. I will just try to clarify one quick thing here and then allow Senator Ashcroft to go ahead.

In the writing of a constitutional amendment, obviously, we can provide for Congress and the States having authority to implement a constitutional amendment—and I am asking a question here, but as a statement—but stating it as the right to implement it, thus conferring on the States and Congress authority to devise all the technical mechanisms by which the right granted would be pro tected and permitted to exist.

But that is a much broader authority, I gather you are saying, than "enforce," which has fairly narrow constraints, and those con straints are to some extent articulated in the Boerne case, then. Is that a fair summary?

Mr. LAYCOCK. Senator, if you read the debates of the 39th Con gress, you will find that that is what they thought they had done with the word "enforce." And over and over, they say the power to enforce is the power to do what is necessary to make these amend ments effective, and it is this body, Congress, that decides what is necessary to make them effective.

Boerne plainly doesn't read it that way and I am not confident they would read "implement" any differently. I don't think we are at constitutional amendment time yet, but if we were and you want to tie this down, you probably actually need to say something ex-

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plicitly that congressional legislation to implement or enforce is not confined to judicial interpretations of the amendment.

Senator KYL. Clearly, implement" is a broader concept than "en- force," but it would be constrained by whatever "enforce" means in the view of the Court.

Mr. LAYCOCK. That is a reasonable prediction. I mean, they will get to interpret it and you won't.

Senator KYL. OK, thanks.

Senator ASHCROFT [presiding]. Thank you very much. I want to thank all of you for coming. I have a more substantial written statement that in the interests of time I have submitted for the record, and would instruct the committee staff to please make that a part of the record.

[The prepared statement of Senator Ashcroft follows:]

PREPARED STATEMENT OF SENATOR JOHN ASHCROFT

The government acts on the highest and best impulses when it affirmatively pro tects religious liberty. For that reason, the Religious Freedom Restoration Act was a tremendously important and popular piece of legislation. The Act recognized that the ever-expanding role of the government at the Federal, state, and local levels has the potential to crowd out religious activity. And that the government must be will ing to accommodate religious activity and protect religious liberty.

The Religious Freedom Restoration Act was an important and proper legislative effort to reflect and enforce the protection of religious liberty provided by the First Amendment. However, as we all know, the Supreme Court took a different view in the City of Boerne case, holding that RFRA was not a proper exercise of Congress' authority under Section 5 of the Fourteenth Amendment.

Although many of us doubt the wisdom of that case—or at least some of the rea soning in that case, we cannot let it stand as an obstacle to Congress' important role in protecting religious liberty. Clearly, there is much Congress can do to protect religious liberty, notwithstanding the Supreme Court's rather miserly view of our section 5 authority. In the first place, even under the City of Boerne decision, Con gress has the authority under section 5 to create purely remedial statutes to imple ment the First Amendment as interpreted by the Supreme Court. I think today's hearing is an important step in exploring Congress' power to use section 5 to vindi cate religious liberty.

Congress' power to protect religious liberty is, of course, not limited to section 5. Congress certainly has the power to use its other sources of authority to promote religious liberty and accommodate religious practices. Senator Grassley's proposal to use Congress' undisputed authority over bankruptcy law to ensure that the bank ruptcy code is sensitive to the need for tithing provides a good example.

Congress also must ensure that the numerous other programs that have been es tablished pursuant to congressional authority are administered in a manner that re spects religious liberty and allows religious and other charitable organizations to participate on the same basis as other private groups. Congress recognized the im portance of allowing the full and equal participation of religious groups in the Wel fare Bill last Congress by adopting my charitable choice amendment. That provision enjoyed solid, bipartisan support when the U.S. Senate voted 67-32 to preserve the provision during consideration of the welfare legislation. The Judiciary Committee has included a similar provision in the Juvenile Justice Bill.

These provisions ensure that religious and charitable organizations can partici pate in government programs on an equal and neutral basis with other private orga nizations. They acknowledge that the government should not discriminate against religious organizations or single them out for disfavorable treatment. These provi sions promote religious Liberty and make good sense. There is no reason to limit their application to these two areas of the law.

I plan to introduce legislation that would apply charitable choice across the board to all federal programs which authorize federal, state, or local governments to use non-governmental organizations in providing services to program beneficiaries with federal dollars. The legislation would include protections both for participating reli gious organizations—who should not be forced to renounce their religious character when providing non-religious services—and for beneficiaries, whose interests in reli gious and individual liberty cannot be ignored.

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A broader charitable choice provision would allow for greater involvement of reli gious organizations in serving people. For example, faith-based organizations could provide low-income housing opportunities, juvenile crime prevention services, substance abuse prevention and treatment programs, abstinence education, and serv ices for seniors, with federal funds provided through contracts, grants, or certifi cates.

America's faith-based charities and nongovernmental organizations, from the Sal vation Army to Catholic Charities, have been successful in moving people from dependency and despair to the dignity of self-reliance. Government alone will never cure our societal ills. We need to find ways to help unleash the cultural remedy administered so successfully by charitable and religious organizations. Allowing a "charitable choice" will help transform the lives of those in need and unleash an ef fective response to today's challenges in our culture.

As we search for new ways to protect religious liberty in the wake of the City of Boerne decision, we should start by making sure that federal government programs fully respect and protect religious liberty. A broad charitable choice bill will do just that. Such a bill, in conjunction with other efforts pursuant to section 5 and other grants of legislative authority, will ensure that Congress once again plays a strong and preeminent role in protecting religious liberty.

Senator ASHCROFT. I would like to make a few observations, and that is that government, in my judgment, acts on its highest and best impulses when it affirmatively protects religious liberty. For that reason, the Religious Freedom Restoration Act was a tremen dously important and popular piece of legislation.

The Act recognized that the ever-expanding role of government at the Federal, State, and local level has the potential to crowd out religious activity and that the government must be willing to ac commodate religious activity and to protect religious liberty. However, as we all know, the Supreme Court took a different view of the Act in the City of Boerne case, holding that the Act was not a proper exercise of Congress' authority under section 5 of the 14th amendment.

Although many of us doubt the wisdom of that case, or at least some of the Court's reasoning, we cannot let it stand as an obstacle to Congress' important role in protecting religious liberty. Clearly, there is much that Congress can do to protect religious liberty, notwithstanding the Supreme Court's rather miserly view of our sec tion 5 authority.

In the first place, even under the City of Boerne decision, Con gress retains the authority under section 5 to enact remedial stat utes to implement the first amendment, as interpreted by the Su preme Court. This hearing is an important step in exploring Con gress' power to use section 5 to vindicate religious liberty.

However, Congress' power to protect religious liberty is not lim ited to section 5. Congress certainly has the power to use its other sources of authority to promote religious liberty and accommodate religious practices. Congress must ensure that existing Govern ment programs are administered in a manner that respects reli gious liberty and allows religious and other charitable organiza tions to participate on the same basis as other private groups.

Congress recognized the importance of allowing the full and equal participation of religious groups in the welfare bill last Con gress by adopting my charitable choice amendment. That amend

ment allowed religious and charitable organizations the same op portunity to receive Government contracts and vouchers as any other private organization. The Judiciary Committee has included
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a similar provision in the juvenile justice bill recently passed out of committee.

These provisions acknowledge that the Government should not discriminate against religious organizations. They promote reli gious liberty and they make good sense. There is no reason to limit their application to these two areas of the law, and I plan to intro duce legislation that would apply charitable choice across the board to all Federal programs which authorize Federal, State, or local governments to use non-governmental organizations in providing services to program beneficiaries with Federal dollars.

A broader charitable choice provision would allow for greater in volvement of religious organizations in serving people. America's faith-based charities and nongovernmental organizations, from the Salvation Army to Catholic Charities, have been successful in mov ing people from dependency and despair to dignity and self-reli ance. The Government should take full advantage of the services these organizations can provide.

As we search for new ways to protect religious liberty in the wake of the City of Boerne decision, we should start by making sure that Federal Government programs fully respect and protect religious liberty. A broad charitable choice bill would do just that, and such a bill, in conjunction with other efforts pursuant to sec tion 5 and other grants of legislative authority, will ensure that Congress once again plays a strong and preeminent role in protect ing religious liberty.

I would note that we have about 6 more minutes left in the vote, and on behalf of the others who were here and myself, I want to thank each of you for your contribution, particularly for the state ments you have submitted and for your willingness to answer fur ther questions in writing.

With that, this hearing is concluded.

[Whereupon, at 11:03 a.m., the committee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

RESPONSES OF DOUGLAS LAYCOCK TO QUESTIONS FROM SENATOR HATCH

Question 1. The City of Boerne opinion is not a model of clarity. It has been de- scribed as adopting a standardless standard. The opinion itself admits that the line between appropriate and inappropriate legislation "is not easy to discern." [95-2074 p. 10.] Can you tell us what "congruence and proportionality" means, or how we can determine the line between "measures that remedy or prevent unconstitutional acts and measures that make substantive change in the governing law?"

Answer 1. No. The best I can do is to suggest some things that will help or tend to keep Congress within bounds acceptable to the Court. Congress must explain what it is doing in terms that accept the Court's definition of the underlying con stitutional right. It must explain a theory under which the statute it enacts address

es violations that the Court would recognize as constitutional violations, at least if the Court had all the facts. Congress can no longer act on the theory that the Court has misdefined the underlying constitutional right.
Congress may respond to judicially defined violations that are difficult to prove or expensive to litigate, so that simplifying or shifting the burden of proof reaches violations that the Court would recognize if all the facts could be readily proved. Or a statute may tend indirectly to prevent a violation the Court would recognize, or correct some of the consequences of a violation the Court would recognize, even though that violation itself is difficult or impossible to remedy directly. Thus, the Court suggested that voting rights for Puerto Ricans in New York might have been a remedy for discrimination in public services. Courts could not effectively police such discrimination, but voters could protect themselves politically.
Congress should record in committee reports or findings of fact its theory of how its legislation addresses constitutional violations the Court would recognize. But City of Boerne also indicates that even if Congress does this, the Court will second-guess Congress' fact finding and its judgment about whether the legislation is need ed to address violations the Court would recognize. This is the requirement of con gruence and proportionality,
 and I do not believe that anyone knows what it means.
The best Congress can do is to make a record of the scope and frequency of the vio lations it is addressing.
Question 2. Is it not just as illegitimate for the Court to alter the substantive meaning of the Constitution as it is for Congress? And is that not what the Court did in Smith and Boerne?
Answer 2. I believe the Court believes in good faith that it adopted the truest or best or most faithful interpretation of the Constitution in Smith and Boerne. But I believe that each decision was egregiously in error, and certainly each decision sharply changed the interpretation in earlier cases.
Question 3. Do you see any incongruity between the Court's notions of judicial su premacy under the 14th Amendment expressed in Boerne and the plain language of section 5, which names Congress as the enforcer of the Amendment, together with the vehement antipathy of many of the framers of the 14th Amendment to contem porary Supreme Court decisions like Dred Scott (which was called a "horrid blas phemy" by John Bingham, the principal author of the 14th Amendment) and Ex Parte Milligan (which was called "a piece of judicial impertinence" by the then-Chairman of the House Judicial Committee, Rep. Wilson)?
Answer 3. Yes. As I have written elsewhere, "our modern view of the Court as the dominant or sole protector of liberty and interpreter of the Constitution is wildly anachronistic." Douglas Laycock, "RFRA, Congress, and the Ratchet," 56 Mont. L.
(55)
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Rev. 145, 157 (1995). Certainly the decision's claim of unchecked judicial power to shrink the meaning of the Fourteenth Amendment is an anachronism. The Court's review of the legislative history ignores the historical context of Dred Scott, Ex parte Milligan, and similar conflicts with the Court, and it omits much affirmative evi dence that the framers of the Fourteenth Amendment viewed the Congressional en forcement power as independent of judicial interpretation. That evidence is reviewed in the Becket Fund's amicus brief in Boerne, 1997 Westlaw 9090.
Question 4. Did the Court in Boerne make a mistake by seeing the options for Congress' role only as either making substantive change in rights or enforcing the

Court's interpretation? Was Cooper v. Aaron rightly decided or does Congress nave some role in offering interpretations of the Constitution? If so, what is that role?

Answer 4. The Court erred in setting up a sharp dichotomy between substantive and remedial theories of the enforcement power. Some enforcement power legisla tion simply creates remedies for judicially defined violations. The best known exam ples are 42 U.S.C. § 1983 and the civil rights criminal enforcement provisions. These statutes are remedial in the ordinary sense of that word.

Most enforcement legislation does more than create judicial remedies. It often en ables litigants to prove violations of the statute without proving anything that the Court would recognize as a violation of the Constitution. The Court now seems to say that some such legislation is remedial, and some is substantive, depending on the congruence and proportionality standard. This legislation is remedial only in a specialized and artificial sense; there is no clear boundary between substantive and this sense of remedial, which is why the standard is so vague as congruence and proportionality.

All the Court had to decide to uphold RFRA was that Congress can dispense with proof of deliberate or overt discrimination against conduct that is specially protected by the Fourteenth Amendment. By "specially protected," I mean conduct that is pro tected by heightened judicial scrutiny in some range of cases. Religious exercise is such a right; it gets heightened scrutiny at least in all cases of discrimination. The Court could nave saved for case-by-case determination what other changes Congress could make in the elements of a constitutional violation.

Cooper v. Aaron was rightly decided on its facts, but the rhetoric of the opinion is overbroad. When the Court announces a constitutional right that constrains the states or the other branches, the states or the other branches must be bound by the constraints. That is the essence of judicial review; if we changed that rule, we could not preserve judicial review. If the Court carries rights too far, the remedy must come from constitutional amendment or judicial reconsideration.

When the Court interprets a constitutional right narrowly, expanding the discre tion of the other branches and the states, Congress should have a broader role. Cer tainly Congress can refrain from using the broader discretion the Court has allowed, and the states can refrain from using it. The enforcement power should mean that when the Court has left a liberty to the discretion of the states and the political branches, Congress can exercise that discretion and constrain the discretion of the states. Whatever the limits on the enforcement power, they do not flow from Cooper v. Aaron, which was about an altogether different situation. Cooper was about whether the states can violate judicially defined liberties; Boerne was about whether Congress can define or increase protection for liberties that the Court has left to political discretion.

Question 5. Some critics will raise the Establishment Clause any time religion is discussed outside a church. How would you respond to someone who might make an Establishment Clause objection, a la Justice Stevens, to religious liberty legisla tion of the type we are discussing?

Answer 5. The Court has repeatedly rejected the view that removing regulatory burdens from religion violates the Establishment Clause. Board of Educ. v. Grumet, 512 U.S. 687, 705-06 (1994); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987). These decisions are clearly correct. Alleviating a regulatory burden at most leaves the church where it would have been if government had not interfered in the first place. Government does not establish a church by leaving it alone.

Justice Stevens' opinion in Boerne gets its categories confused. He says that if the

building in Boerne had been "a museum or an art gallery owned by an atheist," it would not be protected by the Religious Freedom Restoration Act. 117 S.Ct. at 2172. But of course, if it had been a museum or an art gallery owned by a Catholic, or by a person of any other religious faith, it would not be protected by RFRA either. Justice Stevens' hypothetical fails; this much is clear. The better comparison for his purposes would be if the building were a meeting house owned by the local atheist society, and used for the propagation and teaching of atheism. Such a building should be protected under the best and fairest interpretation of RFRA. This is less clear, and perhaps controversial. But legislation to protect religious liberty should
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protect persons acting on the basis of their views about religion, whatever those views are. There is no need for the Establishment Clause attack to be anything but a red herring.

Question 6. If the City of Boerne decision is wrong, which I think it is, is there anything we can profitably do about the mistakes in the decision short of amending the Constitution?

Answer 6. Congress cannot correct the decision short of amending the Constitu tion. Congress can respond with much more careful fact finding and analysis, justi fying proposed legislation in terms that are consistent with Boerne.

Question 7. What would you say is Congress' role with respect to influencing the interpretation of the Free Exercise Clause of the First Amendment or any other sub stantive constitutional right?

Answer 7. Congress can and should make its own independent interpretation of constitutional rights in the exercise of its Article I powers, ensuring that no federal law or agency violates constitutional rights as Congress understands them. The Court in Boerne reaffirms that "When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment of the meaning and force of the Constitution." 117 S.Ct. at 2171.

When Congress has Article I power to regulate or influence the states, as under the Commerce Clause and the Spending Clause, it is acting "within its sphere of power and responsibilities," and it may require or persuade the states to comply with the Constitution as Congress understands it. It is unfortunate that Congress is confined to these indirect methods; the enforcement power was intended as a grant of substantive power to Congress to do what it believed necessary to secure constitutional rights. But that power has been limited or taken away in Boerne.

Question 8. Could you flesh out more completely what are the contours of the right in Smith and can you suggest anything we can do to ensure that courts and other government actors give it as broad a reading as is justified?

Answer 8. This is a very important question, and I will answer in some detail. The initial shock of Smith, and the early interpretations by the lower courts, led to a conventional wisdom that is really a worst case interpretation of the decision. In fact, there is considerable room for interpretation in Smith, as the one subse quent Supreme Court interpretation makes clear.

The requirements of the Free Exercise Clause are set out in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520(1993), and Employment Div. v. Smith, "494 U.S. 872 (1990). The threshold requirements of Smith and Lukumi are that the law be "neutral" and "generally applicable".

Lukumi, 508 U.S. at 531-32, 542, 546; Smith, 494 U.S. at 878-81. "A law failing to satisfy these requirements must be justified by a compelling governmental inter est and must be narrowly tailored to advance that interest." Lukumi, 508 U.S. at

531-32. Such a law "must undergo the most
rigorous of scrutiny." Id. at 546.
The requirement of "general applicability" is not a motive test; it is a test of objec
tively "unequal treatment."
Lukumi, 508 U.S. at 542, quoting Hobbie v. Unemployment Appeals Comm'n, 480
U.S. 136, 148 (1987) (Stevens, J., concurring). If a law allows secular exemptions,
government must have a compelling reason for not allowing religious exemptions.
Smith, 494 U.S. at 884. The religious claimant pointing to a secular exemption need
not prove an anti-religious motive for refusing religious exemptions.
Lukumi applies and expands these principles. Lukumi holds that if a regulation
applies to religious conduct, and does not apply to similar secular conduct, this dis
crimination requires compelling justification. See 508 U.S. at 535-38, 543-45. Even
if the unregulated secular conduct is different from the religious conduct, the law
requires compelling justification if the unregulated secular conduct and the regu
lated religious conduct cause analogous harms. See id. at 543 ("The ordinances
* * * fail to prohibit nonreligious conduct that endangers these interests in a simi
lar or greater degree"); id. at 538-39 (noting that disposal by restaurants and other
sources of organic garbage created same problems as animal sacrifice). Part of the
opinion in Lukumi is based on the City's motive, id. at 540-42 (Kennedy, J.), but
that part got only two votes; it is not the holding. The holding is that the ordinances
were invalid because they gave less favorable treatment to religious killings of ani
mals than to secular killings of animals and to secular sources of organic garbage.
The inquiry is not confined to the four corners of the statute or administrative
practice under review. Government cannot prevail with the circular argument that
a law is generally applicable to whatever it applies to. Nor can it just assert that
cases within the law are "different" from cases that fall outside its scope.
The Supreme Court rejected just such arguments in Lukumi. The City argued
that it had banned all sacrifice, and insisted that "sacrifice is 'different' from the
animal killings that are permitted by law." 508 U.S. at 544. But the Court refused
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to let the defendant define its own category of general applicability. The Court in
quired into all activity that was analogous to sacrifice or that presented the same
alleged evils as sacrifice, ranging widely over various state and local laws. Id. at
543-45. Because they were "underinclusive," Hialeah's laws were not generally ap
plicable. Id. For the same reason, they did not serve a compelling interest. "[A] law
cannot be regarded as protecting an interest of the highest order * * * when it
leaves appreciable damage to that supposedly vital interest unprohibited." Id. at 547
(internal quotations omitted).
In Lukumi, the ordinances had almost no secular applications; religion had been
singled out. There has been some tendency to assume that only discrimination as
egregious as that in Lukumi is subject to compelling interest review. But the Court
expressly denied that. Instead, it said that the ordinances in Lukumi "fall well
below the minimum standard necessary to protect First Amendment rights." Id. at
543. The religious claimant need show only that a law is not generally applicable,
not that it is generally inapplicable except for religion.
Lower court interpretations of Smith began to change in light of Lukumi. One dis
trict court held that a rule requiring all university freshmen to live in the dorm was
not neutral and generally applicable, because nearly a third of freshmen were cov
ered by various exceptions. The Free Exercise Clause—not RFRA—therefore re
quired an exception for a freshman who wanted to live in a religious group house.

Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996). Another district court held that a landmarking law was not neutral and generally applicable, because it con tained three exceptions for various secular situations. The Free Exercise Clause—not RFRA—therefore required an exception for a church stuck with a useless land-mark. Keeler v. City of Cumberland, 940 F. Supp. 879 (D. Md. 1996). If these deci sions are good law, and I think they are, then violations of Smith are common but difficult to litigate. Simplifying the litigation of these constitutional violations would be a remedial measure even under Boerne.

Congress can attempt to codify this interpretation of Smith and Lukumi, or enact presumptions or burden-of-proof rules based on this interpretation of Smith and Lukumi, under section 5 of the Fourteenth Amendment as interpreted in Boerne. This would facilitate litigation on these theories, it would educate the bar, and it would record Congress' view of the law, a view entitled to judicial deference. The Court would retain the ultimate judgment; it might reject the Congressional inter pretation and shrink Smith and Lukumi further. But this would be harder if Con gress had focused the issue by enacting a more optimistic interpretation of Smith and Lukumi.

Finally, Smith and Lukumi clearly reach cases where government acts for motives that are hostile to a particular religion or to religion in general. Motive is often dif ficult to prove, and Congress can facilitate its proof with evidentiary rules and bur-den-shifting rules. A good example is 42 U.S.C. § 2000e-2(m) (1994), which provides that plaintiffs in employment discrimination cases sufficiently prove motive when they show that race, color, sex, religion, or national origin was one of the employer's motives, even if it were not the only motive.

Question 9. Some witnesses alluded to the exceptions or limitations on the rule in the Smith case. Could these be the basis of separate statutory protections? If so, in what way, and could these exceptions and limitations be broadened beyond the specifics listed in Smith to other analogous situations?

Answer 9. Smith and Lukumi recognize an exception for hybrid claims of free ex ercise and some other constitutional right, such as free exercise and free speech, or free exercise and takings in the landmarking cases. Congress can clarify these hy brid claims by codification. If the claimant must show a violation of the Free Exer cise Clause without regard to the other constitutional right, or if the claimant must show a violation of the other constitutional right without regard to free exercise, then the Court's concept of hybrid claims adds nothing to the two rights separately. That cannot be what the Court meant. Congress can usefully clarify this point by codifying protection for hybrid claims as a burden on religious exercise combined with an arguable violation of some other constitutional right.

Smith and Lukumi also preserve the rule that courts should not interfere with internal church disputes. The most familiar applications of these exception are cases involving church schisms, church property disputes, and suits by clergy against their own church. Congress could usefully codify this rule concerning suits by clergy, and expand it to include other employees who sue their church. With a proper fac tual record, Congress could find that most suits by church employees involve an in ternal dispute over the allocation of authority within the church.

Question 10. Are there significant modifications of Smith in the Church of the Lukumi or City of Boerne cases? If so, what are they and what does this suggest

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about what we might most probably do with legislation in this area, especially with regard to enforcement under Section 5 of the 14th Amendment?

Answer 10. Lukumi clarified Smith and showed that the parts of the Smith opin ion that protect religious' liberty were meant to have real meaning. Boerne presented no free exercise issue and could not have changed the meaning of Smith and Lukumi.

The Boerne opinion summarizes the Smith rule without changing it. "Smith held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." 117 S.Ct. at 2161. It again states the exception for hybrid claims. Id. It again states that if a state "has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." Id. This is the fullest dis cussion of Smith in the Boerne opinion, and there is no hint of any change in the Smith rule.

Later in the opinion, explaining that RFRA was disproportionate to the underly ing constitutional violations, the Court says that RFRA reached many laws that were not motivated by "religious bigotry." Id. at 2171. If this is meant to be a new summary of the Smith-Lukumi test, it is a huge change. The word "bigotry" does not appear in either opinion, and as noted above, the motive part of the Lukumi opinion got only two votes. Congress should not read this unexplained phrase as modifying the Smith-Lukumi test that is more accurately summarized earlier in the same opinion.

Question 11. Is the standard for judging "neutral and generally applicable laws" in Smith more in the nature of disparate impact or subject intent to discriminate or does it have components of both?

Answer 11. I think that it is neither. Disparate impact is not enough, and subjec tive intent to discriminate is not required.

As explained in my answer to Question 8, the standard is disparate treatment, regardless of motive.

There is a hint in Boerne that disparate impact might be enough to support legis lation. "If a state law disproportionately burdened a particular class of religious ob servers, this circumstance might be evidence of an impermissible legislative motive. Cf Washington v. Davis, 426 U.S. 229, 241(1976). RFRA's substantial burden test, however, is not even a discriminatory effects or disparate impact test."

It is hard to know what to make of this, but perhaps Congress should act on the invitation. In Smith, the Court assumed that neutral laws that burden religious practices do have disparate impact on religion. 494 U.S. 872, 886 n.3 (1990). Boerne appears to make the opposite assumption. But perhaps Congress could make find ings of disparate impact, or enact protections that would be triggered by a judicial finding of disparate impact.

Question 12. It has been argued by some commentators that Smith was decided largely on so-called "institutional" concerns—namely that the courts are less-well placed to make decisions about weighing the relative merits of legislative priorities and values. But this appears to get confused in Boerne especially (ironically) in Jus tice Scalia's concurrence, where the Court is seen as the one laying down broad rules and the state and local legislatures are the institutions that are to apply the abstract rules of the Court to concrete cases. Does this not turn the traditional divi sion of labor between the legislative and judicial branches on its head?

Answer 12. Yes it does. The amicus brief of the Virginia legislators was very effec tive on this point, explaining how legislatures are really incapable of making the judgments about individual cases that we have traditionally entrusted to courts.

1997 Westlaw 10275.
Question 13. Can we abrogate state sovereign immunity for each of the powers
we might use or is there a different rule under Seminole Tribe for each power we
consider?
Answer 13. I believe that you can abrogate sovereign immunity in enforcement
legislation under section 5 of the Fourteenth Amendment, Fitzpatrick v. Bitzer, 427
U.S. 445 (1976), and presumably under the enforcement clauses of other amend
ments. I read Seminole Tribe to say that you cannot abrogate sovereign immunity
under an Article I power. However, the Spending Clause might be an exception; the
states can waive their sovereign immunity, and it is hard to see why they could not
waive immunity in exchange for federal funds.
Question 14. Some have been disappointed in the way that RFRA has been ap
plied in the Courts—that judicial interpretation has weakened the protection of the
legislation. Could some of the procedural reforms contemplated for section 5 enforce
ment after Boerne actually be useful to strengthening RFRA's application in the
courts, and might they actually go a substantial distance—perhaps even be more ef-
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fective—in accomplishing the goals of RFRA, even when they alone are applied to
the states and localities?
Answer 14. Many courts interpreted RFRA in ways that defeated its purpose.
These cases are reviewed in a forthcoming article by Professor Ira Lupu of George
Washington University, entitled 'The Failure of RFRA." These cases read into the
Act requirements of religious centrality and religious compulsion, were too reluctant
to find a substantial burden, and occasionally, too quick to find a compelling inter
est. Shifting burdens of proof under section 5 might help with these problems, but
probably they need to be addressed directly. See question 15.
Question 15. Are there other improvements upon RFRA that we should consider
as we look at this issue again either in the federal or the state context?
Answer 15. Any new bill should provide explicitly that the burdened religious ex
ercise need not be compulsory or central to a larger system of beliefs. This require
ments were read into RFRA by the lower courts; Congress did not put them there,
and committees in both the House and Senate rejected demands that RFRA be lim
ited to compulsory religious practice. This time Congress should expressly negate
such requirements.
Question 16. Is there any way to guard against judicial narrowing of either the
standards we establish or the Supreme Court establishes to protect religious liberty
in the drafting of legislation?
Answer 16. No. The best you can do is to draft clear and unambiguous legislation
that is hard to misinterpret.
Question 17. On the use of the Spending Power, would you agree that limiting
application to state and local government action is closer to the original spirit of
RFRA and the Free Exercise Clause than application to private recipients? Does
this coverage question make any difference constitutionally?
Answer 17. RFRA applied to actions by government, defined as actions under
color of law. The same limitation should be included in any legislation under the
Spending Clause. A grant of government money does not turn a private recipient
into a state actor; in general, its conduct is state action only when required or sig
nificantly encouraged by the government. Rendell-Baker v. Kohn, 457 U.S. 830
(1982).
An extension to private recipients of government funds not acting under color of

law would raise difficult constitutional questions that divide Congress and divide the Coalition for Free Exercise of Religion. Any legislation to replace RFRA should avoid entanglement in those questions.

Question 18. How tight a fit must there be under the Spending Power? In South Dakota v. Dole, the fit did not seem too tight between setting a minimum drinking age and highway funds, even if the goal is generalized to be ensuring "safe inter-state travel." The agencies charged with administering the highway funds and the drinking age may not even have been the same agencies. Do you think that the small percentage of money at risk was a factor in the Dole case or is there simply substantial latitude here?

Answer 18. I do not know. The small percentage of money may well have been a factor; if not, it can be made a factor retrospectively in an opinion distinguishing the case. There might be more latitude under the Spending Clause, or there might simply have been more latitude in 1987; the Court seems to be steadily cutting back Congressional power.

I think that if Congress tracks Title VI of the Civil Rights Act of 1964, the result ing legislation should be safe from invalidation. Requiring that beneficiaries of fed eral assistance not be excluded because of their religious exercise is a tight enough connection under almost any reading.

Question 19. Do you notice an inherent tension between the language of the 14th Amendment's promise of equal protection and the Court's decision in Boerne to leave decisions about free exercise accommodations to be decided jurisdiction by jurisdic tion instead of nationally, especially given Justice Scalia's notion in his concurrence in Boerne that "the people" in each state and locality will determine the application of free exercise norms in "concrete cases" and his candid admission in Smith that smaller, less well-known sects will be at a "relative disadvantage"in the legislative forum? If so, what are we to do in the face of these constitutional anomalies?

Answer 19. Variations among states do not violate the equal protection clause, which applies only to the states and does not require national equality. But such variations with respect to basic liberties are inconsistent with the central decision of the Civil War and the ensuing constitutional amendments, which is that basic constitutional rights are a national concern and are to be protected by the federal government.

Variations among different faiths and different religious practices, especially with less protection for less popular religions, violate the core of the Free Exercise and

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Establishment Clauses. Compare Justice Scalia's comment about the relative dis advantage of smaller faiths with the Court's statement in Larson v. Valente, 456 U.S. 228, 244 (1982): "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."

I am not sure there is much Congress can do about these constitutional anomalies in the Supreme Court's decisions. The Senate can in the future try to insist on judi cial nominees who will enforce all the rights in the Constitution.

Question 20. Do you see any risks in attempting to define religious activity as interstate commerce in an effort to protect religious exercise under the Commerce Clause?

Answer 20. If religion affects commerce, then Congress can regulate it as well as protect it. But Commerce Clause regulation already applies to churches, especially employment legislation. It is hard to believe that churches would ever win exemp tion from federal regulation on the ground that they do not affect commerce, and even if they succeeded in winning exemption on that ground, they would remain fully subject to state regulation. When the Supreme Court held (not on Commerce Clause grounds) that the National Labor Relations Act does not apply to churches and religious schools, Catholic Bishop v. NLRB, 440 U.S. 490 (1979), states imme diately began regulating under state labor laws. So there is nothing to be gained by pretending that churches do not affect commerce.

Question 21. Mr. Chemerinsky made the point that most free exercise claims chal lenged "neutral and generally applicable laws" of the type Smith decided were not subject to strict scrutiny. I would ask Mr. Chemerinsky to explain why that is so, and ask each of you to respond to that.

Answer 21. I think that his statement was an example of the worst-case interpre tation of Smith that I described in my answer to Question 10. I think that most free exercise claims are to laws with exceptions, administrative policies with excep tions, and narrow exercises of administrative discretion, and that none of these are generally applicable laws.

Question 22. This was a duplicate question.

Question 23. In the Casey plurality opinion of Justices Kennedy, O'Connor, and Souter, these Justices were concerned that if the Court reinterpreted past precedent "under fire" or because of a context of political pressure that such decision would seriously undermine the Court and the rule of law. Is not a clearly expressed opin ion of co-ordinate branches of government, which are closer to the opinion of the people, pretty good evidence that the Court has gotten it wrong, rather than a rea son for the Court to dig in its heels?

Answer 23. When a co-ordinate branch says the Court is underprotecting liberty and giving too much discretion to the co-ordinate branch expressing the opinion, I think that is pretty good evidence that the Court got it wrong. In effect, the co-ordi nate branch is making a declaration against its institutional interest in maximizing its own power, and that is highly persuasive. When a co-ordinate branch says the Court is overprotecting liberty and unduly restricting the discretion of the co-ordi nate branch expressing the opinion, I think that means we have a disagreement be- tween the branches, but the fact of disagreement does not tell us who is right.

Question 24. Were there any issues raised at the hearing that you would like to comment further on or additional questions you believe should be addressed for the benefit of the Committee? If so, please do so.

Answer 24. I said in my prepared statement that churches have found it very dif ficult to locate in the City of Chicago. Senator Durbin questioned that claim, and as I indicated, I am not the expert on the facts in Chicago. I do know that there are an unusual number of church zoning cases pending in the Northern District of Illinois. Some of those cases that have survived motions to dismiss are C.L.U.B. v. City of Chicago, 1997 Westlaw 94731 (N.D. Ill. 1997); Abierta v. City of Chicago, 949 F. Supp. 637 (N.D. 111. 1996); C.L.U.B. v. City of Chicago, 1996 Westlaw 89241 (N.D. 111. 1996). Other cases were dismissed, not on the merits, but in deference to pending state proceedings. Living Word Outreach Full Gospel Church & Min istries, Inc. v. City of Chicago Heights, 1996 Westlaw 529376 (N.D. 111. 1996); Celes tial Church of Christ, Inc. v. City of Chicago, 1994 Westlaw 282304 (1994). C.L.U.B., Civil Liberties for Urban Believers, is an association of some fifty churches that have experienced serious zoning difficulties in Chicago. As I said at the hearing, the Committee should call as a witness one of the lawyers for the churches in these cases.

RESPONSES OF DOUGLAS LAYCOCK TO QUESTIONS FROM SENATOR KYL
Question 1. After Boerne how broad is Congress' power to enforce?
Answer 1. I do not believe that anyone knows. Boerne holds that the Religious Freedom Restoration Act was unconstitutional as applied to state and local govern ments.
Boerne significantly limits Congress's independent power to protect the civil lib erties of the American people. How significantly remains to be seen; the opinion an nounces a vague standard of uncertain scope. The Court reaffirms that Congres sional power to enforce the Fourteenth Amendment includes power to enforce rights incorporated into that Amendment from elsewhere in the Constitution. 117 S.Ct. at 2163-64. But the enforcement power is "remedial" and not "substantive;" Congress is bound by the Court's determination of the meaning of constitutional rights. Id. at 2164. Even so, the remedial power is "broad," id. at 2163, and the Court reaffirms that Congress may "prohibit[] conduct which is not itself unconstitutional." Id. at 2163. But Congress may prohibit such conduct only as a means to "deter[] or remed[y] constitutional violations" as defined by the Court, id., and "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end,"id. at 2164. "[T]he line is not easy to discern, and Congress must pave wide latitude in determining where it lies." Id. But "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Id. at 2170.
The proportionality part of this standard seems to require an empirical judgment: Congressional enforcement legislation is valid if there are violations of the Constitu tion as interpreted by the Court in a sufficiently large proportion of violations of the statute. The standard of "congruence and proportionality" is inherently vague, and the litigation process is probably incapable of producing good data on the rel evant proportions. Congress must build a record of significant numbers of constitu tional violations that the Court would recognize.
There are hints in the opinion that congruence is not a separate requirement, but a synonym for proportionality. The Court attempted to explain how Katzenbach v. Morgan 384 U.S. 641(1966), fit its new theory of section 5. The Court suggested that voting rights for Puerto Ricans in New York might have been intended as a remedy for discrimination in public services. 117 S.Ct. at 2168. Acceptance of a voting rights remedy for a public services violation suggests that the remedy need not closely fit the violation so long as it is responsive to the violation or has the potential to pre- vent the violation. Although the Court did not say so, this suggests to me that the requirement of "congruence" does not add anything to the requirement of "propor tionality."
Question 2. What does "to enforce" mean? What powers are included within that phrase?
Answer 2. To the Thirty-Ninth Congress, "to enforce" meant to do whatever was necessary and proper to secure the rights guaranteed by the Fourteenth Amend ment. Among the meanings of "enforce," more common in the nineteenth century than today, is to "invigorate," "strengthen," or "give force to." See the definitions col lected in the brief of the United States, 1997 Westlaw 13201 (text at notes 6-8):
The Reconstruction Congresses understood the enforcement power to include the power to define the badges and incidents of slavery and the power to dispense with proof of state action. Thus the Civil Rights Act of 1866 forbad discrimination in pri

vate contracts, and the Civil Rights Act of 1871 forbad private conspiracies to vio
late constitutional rights, although the Court could not plausibly do either of these
things as an interpretation of the Thirteenth and Fourteenth Amendments.
To the Supreme Court after Boerne, "to enforce" seems to mean to secure compli
ance with the Court's understanding of the constitutional right to be enforced, or
to provide a remedy for a judicially recognized violation of the right to be enforced.
Question 3. What things is Congress not allowed to do under its enforcement
power?
Answer 3. Congress is not allowed to act on its own view of the substantive mean
ing of the constitutional right to be enforced. City of Boerne v. Flores, 117 S.Ct.
2157, 2167-68(1997). And Congress is not allowed to take incongruent or dispropor
tionate steps to prevent or remedy violations of the Court's understanding of the
constitutional right to be enforced. Id. at 2164.
Question 4. What if Section 5 of the 14th Amendment said "to enforce and imple
ment"?
Answer 4. I do not believe that would help. The textual problem was not with the
verb, but with the object of the verb. Congress has power to enforce "the provisions
of this Article," and the Court said that that means the judicial interpretation of
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the provisions of this article. A power to implement would be subject to the same
interpretation. If the Court were willing to honor the original understanding, it
would have done so with "enforce;" adding "implement" would not change the
Court's mind.
I do not believe a constitutional amendment is the way to proceed. But if I were
trying to amend the enforcement power to correct Boerne, I would do it explicitly
and directly. I would draft an amendment that says something like: "Congressional
power to enforce rights guaranteed by this Constitution shall not be limited by judi
cial interpretation of the right being enforced."
RESPONSES OF DOUGLAS LAYCOCK TO QUESTIONS FROM SENATOR KENNEDY
Question 1. During the October 1, 1997, Senate hearing, you provided the Com
mittee with a brief description of the facts underlying the Boerne litigation. Would
you provide a more detailed explanation of the facts of the case and why RFRA ad
vocates wanted the Supreme Court to review this case?
Answer 1. I represented the Church on appeal in City of Boerne v. Flores. Neither
I nor any other RFRA advocate selected Boerne as the test case in the Supreme
Court. The City filed the petition for certiorari. We then urged the Court to take
the case, because we feared that the City and the District Judge would refuse to
accept the Fifth Circuit's decision upholding the Act, and that we would have an-
other round of appeals after the case was tried. We were confident that RFRA was
valid under earlier decisions, and we did not fear going to the Supreme Court. This
judgment obviously turned out to be mistaken.
The facts in the Boerne case illustrate several of the reasons why churches need
protection from burdensome regulation if the exercise of religion is to be free. I have
never alleged that the City's motivation was either anti-Catholic or anti-religious.
Rather, the Boerne controversy illustrates the "callous indifference" to burdens on
religion that the Supreme Court has repeatedly warned against. Corporation of the
Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987). The City imposed an immense
burden on the Church to achieve a very small benefit for the City, and the burden
on the Church was grossly disproportionate to the burden on other property owners.
The logic that underlies the Boerne ordinance implies that churches cannot build

places of worship without dedicating them to public use. To explain these points will require a detailed review of the facts.
a. The serious burden on the Church. The current St. Peter's is the third church on the site. The first church was destroyed long ago. The second church was built in 1870. St. Peter's has voluntarily preserved that building, from
which it gets no
use whatever.
The current church was built in 1923 and seats 230 people. But the City and County have pursued a pro-growth policy, and the congregation at St. Peters has grown proportionately. By the early 1990s, the Church was celebrating Mass for standing room crowds, and it was turning away forty to sixty people every Sunday. When it eventually moved Mass to the Senior Citizens Center, a large sheet-metal structure nearby, attendance jumped by about three hundred per week. The City's policy had prevented that many people from attending Mass.
The original ordinance drew the boundaries of the Historic District as two parallel lines on either side of Main Street. This boundary bisected the 1923 church, putting the front facade and its two bell towers in the Historic District, and excluding the sanctuary. The Church relied on this boundary; it did not object to the Historic Dis trict or to the inclusion of the front facade. It designed its new sanctuary to preserve the front facade, but to replace the sanctuary behind the front facade.
When the Church submitted its request for a building permit, the permit was de nied. The Historic Commission indicated that the Church must preserve all of the 1923 structure and that no plan for even partial demolition would be approved. So the ultimate dispute was about the sanctuary of the 1923 church.
Preservation of the 1923 sanctuary is expensive, and the Church will get no bene fit from this expenditure. Immediate structural repairs will cost half a million dol lars; then the church must maintain a white elephant in perpetuity. Building the third church behind the 1923 sanctuary requires partial demolition of the parish hall, which will then have to be rebuilt elsewhere on the property. The bottom line is that St. Peter's must maintain the 1870 church, the 1923 church, a new church to worship in, and a new parish hall; this requires a large and perpetual diversion of religious resources to secular uses. For most churches, which do not have enough land to maintain three churches where only one is needed, the City's policy would have meant the absolute impossibility of building a church to serve the congrega tion.
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The burden on the Church is different in kind from the burden on other property owners in the Historic District. Property owners in downtown Boerne appear to be making money from the Historic District. Retail and commercial buildings can be converted to uses that benefit from the historic motif; restaurants and antique shops may replace other kinds of merchandise, but business goes on. The owners of homes in the historic district can still live in their homes. Owners unwilling to tolerate the continuing interference of the Historic Commission can sell to buyers who like the idea of owning a landmark.
None of these options were open to the Church. The building could not be used for its longstanding purpose, because the congregation simply would not fit. The church could not sell the building and move elsewhere, because no one else had any use for it either. It was not feasible for the church to split its religious community in half, and no government should force it to take such a step in any event. I do not doubt that it is burdensome to own property in the Historic District, but only

the church was deprived of its longstanding use of the property and left with no economically viable use at all.

b. The limited benefit to the City. The 1923 church is a modern imitation of a Spanish mission. The church is not very old, not very distinctive, and truth be told, not very attractive. The City's architect describes the church as Mission Revival, defining the imitation as a category distinct from the style that is imitated, and claim ing that examples of the imitations need to be preserved.

The 1923 sanctuary is mostly hidden from view from any point outside the church property. Approaching the church on Main Street, the sanctuary is completely hidden from the north. From directly across the street, the sanctuary is hidden by the front facade that the Church agreed to preserve. No through street approaches from behind. Approaching from the south, one can see parts of the south facade through the trees for the last half block. What the City sought to preserve was this limited view, plus the knowledge that the Church would permit visitors to enter the prop erty to view its buildings.

The Historic District itself is much more about promoting tourism and shopping than about historic preservation. The Historic District lines the two sides of Main Street, which is now a five-lane U.S. highway. Old buildings with no connection to Boerne or even to Central Texas have been hauled in and placed on lots in the His toric District, with the approval of the Historic Commission. The church is several blocks away from the heart of the "historic" tourist and shopping district.

c. The implications of the City's position. We are not talking about a few of the most important or historic or distinctive churches. We are not talking about the eighteenth-century Spanish missions, which the Archdiocese of San Antonio has vol untarily preserved in cooperation with the National Park Service. We are talking about a quite ordinary church with a feature that an architect can label. Every church was built in some period, and every period has a label. If St. Peter's can be landmarked, any church can be landmarked.

The logic of the City's position was that St. Peter's first priority must be to preserve two empty churches for the occasional pleasure of tourists and architecture buffs; if it does that, then it can build a third church to actually worship in. There appears to be no limiting principle; if the City and County continue their growth patterns, the grandchildren of the current generation may fight over whether St. Pe ter's has to preserve three empty churches and build a fourth for worship. This dis pute was an example of government imposing immense burdens on the free exercise of religion to serve an insignificant interest.

In my view, the City's interest is not only insignificant; it is illegitimate. The fea tures that made the 1923 sanctuary even arguably distinctive, and that made the City fight so hard to include it in the District, were features of religious architec ture. This was not a case about preventing the Church from harming its neighbors; it was a case about requiring the Church to provide something that only a church would ever provide. No one thinks the City could build a church itself, or require St. Peter's to build a church, and no one is likely to build a church-like structure for secular uses. It is clear that neither the City nor the neighbors have any right, as against a church, to the existence of a church building.

It is useful to think about whether the City could pay the expenses of preserving the 1923 church. Such a payment would likely be met with a claim that it was vio lating the Establishment Clause—that the primary effect of the expenditure was to advance religion, and that this far exceeded any architectural or historic effect. If courts would say that the secular benefit of preserving a particular church is not great enough to permit government funds, then that small or non-existent secular benefit should not be great enough to permit coercive regulation.

d. The constitutional claims in Boerne. The Boerne case also illustrates the ambi guities in the free exercise test of Smith and Lukumi, and difficulties of proving vio-
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lations under that test. After the City discovered that its Historic District included only the front facade of St. Peter's, the City passed an ordinance adding the rest of St. Peter's to the District. That ordinance was a single-property law; it applied only to St. Peter's and to no other property. The Historic Commission made other decisions about individual parcels, deciding not to extend the District to include property owners who would object, but overriding the objections of the Church. The Historic District included only a tiny fraction of all the properties in Boerne, and only a fraction of all the buildings old enough for inclusion. Despite the absence of any improper motive, the Church was in fact treated differently from other owners of older buildings, and the ordinance was not generally applicable if words have any meaning. This departure from general applicability should have required compelling justification under Smith and Lukumi.

In addition, the ordinance defined a tract of land, and so far as I can tell, took all economic value out of that tract. The Church retained the legal right to use the church for half its congregation, but that right had no economic value; for both reli gious and economic reasons, St. Peter's would have had to abandon the property and build a new church elsewhere before splitting its congregation. I am not an ap praiser or developer, but I find it hard to imagine any viable economic use for an empty church in a small town. St. Peter's could realize any value from the old church only if there were another congregation of just the right size but without a church of its own. Regulation that removes all economically viable use from a parcel is a taking. Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992).

Question 2. There are some constitutional scholars who believe the Smith case was wrongly decided, but oppose congressional action because they believe if Con gress passes legislation, the Supreme Court will not overturn Smith or will take longer to do so than necessary. What is your assessment of this strategy?

Answer 2. This is a risk of legislation, but it is a sensible risk, because there is little reason to be optimistic about overturning Smith. In Boerne, Justices O'Connor, Souter, and Breyer indicate a willingness to reconsider Smith. Chief Justice Rehnquist and Justices Stevens, Scalia, and Kennedy remain from the Smith major ity. They appear to have twice reaffirmed Smith, in Lukumi and Boerne, although these reaffirmances were not essential to the holding in either case.

The two arguable unknowns are Justices Ginsburg and Thomas, who have not expressed any view, except that they both joined the majority opinion in Boerne and Justice Thomas joined the majority opinion in Lukumi. Neither of them has taken available opportunities to indicate any unhappiness with Smith. While on the Court of Appeals, Justice Ginsburg indicated sympathy with an Air Force officer's claim of a right to wear a yarmulke in uniform. Goldman v. Secretary of Defense, 739 F.2d 657 (D.C. 1984) (dissenting from denial of rehearing en banc). But the danger of in ferring her current views from that is highlighted by a simple fact: Justice Scalia was also on the Court of Appeals then, and he joined in her dissent.

Future appointments to the Court are unpredictable no matter who wins the Pres idency. This issue does not divide on simple left-right lines, and it will not itself be the basis for judicial appointments. It is therefore impossible for either side in the debate over Smith to count on additional votes from new appointments to the Court. It is also not obvious that the issue would be squarely presented in the foreseeable future. I have argued two cases in the Supreme Court that I could have won by persuading the Court to overrule Smith. Both times, after careful thought and consultation with other experienced lawyers, I decided not to raise the issue. I thought I had a better chance of winning my case consistent with Smith than by asking them to overrule Smith. Smith has enough ambiguities, exceptions, and limitations that I think lawyers will continue to make that choice. And with only fifty pages and thirty minutes to argue, lawyers have to choose. They cannot fully develop Smith's exceptions and limitations and also make a serious argument for overruling.

Question 3. During the 1993 Senate debate on the Religious Freedom Restoration Act, Senator Reid offered an amendment which would have excluded prisoners from RFRA's application. The concern expressed by Senator Reid and others was that RFRA would encourage frivolous litigation by prisoners and such litigation would unduly burden government resources. Senators supporting the Reid amendment also expressed concern that RFRA would threaten prison security because the courts would second guess decisions made by prison officials.

This year, prior to the Boerne decision, Senator Reid introduced legislation that prohibits RFRA's application to individuals who are incarcerated in Federal, State, or local correctional, detention, or penal facilities. Although RFRA no longer applies to States and localities, the First Amendment rights of prisoners are still a matter of concern for members of the Senate, and this issue will be a matter of debate when Congress considers legislation in the future.

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Members of Congress are appropriately concerned about frivolous litigation initiated by prisoners. Limiting prisoners' free exercise rights, however, appears to be an overly broad solution to the problem. Often, prisoners have valid legal concerns—some regarding their First Amendment rights. Do you believe legislation passed by Congress in the future should exclude those incarcerated in prisons and detention centers? Please use case examples in your response.

Answer 3. We all know that prisoners file frivolous claims. Many prisoners are alienated and suspicious, and they have time on their hands. Before the Prison Litigation Reform Act, filing a frivolous lawsuit was essentially a free activity for prisoners.

It is less well known that prison authorities sometimes impose frivolous regulations. Power corrupts, and the prison's power over prisoners leads to abuses, including abuses of religious liberty. Judge Posner found Wisconsin's ban on crosses and similar religious jewelry unjustified and essentially arbitrary. Sasnett v. Sullivan, 91 F.3d 1018, 1022-23 (7th Cir. 1996), vacated in light of Boerne, 117 S.Ct. 2502 (1997).

Another example is McClellan v. Keen, which involved a Colorado prisoner in a work-release program. McClellan was released during the day to go to work, and on Sunday morning to attend Mass at the local Episcopal Church, where he served as the organist. But he was forbidden to take communion, because the prison authorities viewed communion wine as a violation of prison rules against drugs and alcohol. McClellan filed suit in 1993, and after RFRA was passed, the case settled without a reported opinion.

Exempting prisons from RFRA would prevent relief on valid claims such as these, but it would not reduce the flow of frivolous lawsuits. Texas reported that RFRA

claims by prisoners were less than one-quarter of one percent of the Attorney Gen
eral's caseload. Amicus Brief in City of Boerne v. Flores at 7 (not available on
Westlaw). Many of those claims would have been filed with or without RFRA; a pris
oner with nothing to lose by filing a frivolous lawsuit will file it under the Free Ex
ercise Clause, or substantive due process, or any other source of law, even if the
claim has no chance.

The goal should be to deter frivolous claims whatever the cause of action, and to
permit serious claims whatever the cause of action. The problem is not RFRA; it
is frivolous prisoner suits. It follows that the solution is to make the Prison Litiga
tion Reform Act work effectively with respect to all causes of action. Barring even
meritorious RFRA claims would be a costly and unproductive mistake.

Question 4. In both your oral and written testimony before the Committee, you
suggested that Congress may address some free exercise problems by relying on its
14th Amendment or Commerce Clause authority to enact definitions or create legal
presumptions. Would you expand upon your testimony and explain what Congress
may do in this area?

Answer 4. Congress might protect religious practices to the limit of its power to
do so under the Commerce Clause, leaving it to the courts to define that limit. Then
Congress might enact a rebuttable presumption that any religious exercise of an or
ganization affects commerce, or that any religious exercise of an organization over
a certain size affects commerce, or that commerce is affected by any religious exer
cise using property of a kind that is bought and sold in commerce, or that construc
tion or modification of property over a certain value affects commerce.

Under the Fourteenth Amendment, Congress might enact that if the religious
claimant produces some evidence of improper motivation, government must bear the
burden of persuasion on the issue of motive; or that if the claimant produces some
evidence that the burdensome law does not apply to analogous secular conduct, gov
ernment must bear the burden of justification; or if the claimant produces some evi
dence of a hybrid right, government must bear the burden of justification.

RESPONSES OF DOUGLAS LAYCOCK TO QUESTIONS FROM SENATOR THURMOND

Question 1. Professor Laycock, assume that the Congress is able to pass a new
statute with RFRA protections that is Constitutional such as through the spending
power, but it exempts prisoners from its coverage. Would excluding protections for
prisoners be unconstitutional as a violation of equal protection or a similar Constitu
tional right?

Answer 1. No. I think that excluding prisoners would be a mistake, for the rea
sons stated in my answer to Senator Kennedy's third question. But I cannot imagine
that the Court would hold it

Question 2. Professor Laycock, are prisoners' cases challenging prison rules be-
coming successful under RFRA (at least by Federal inmates convicted of Federal
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crime) that would otherwise have been rejected based on the Constitutional Free
Exercise standard? Please explain.

Answer 2. Most prisoner claims under RFRA were unsuccessful, because prisoners
file many frivolous claims, because courts defer to prison authorities, and because
the courts tended to underenforce RFRA in any event. But the few successful pris
oner claims deserved to be successful, and would have faced greater difficulty with-
out RFRA.

In my answer to Senator Kennedy's third question, I described McClellan v. Kean,
in which a prisoner on work release was denied the right to receive communion

wine. Plaintiff's lawyer pleaded that claim under the First Amendment as a means of challenging Smith, but I do not think that he was entitled to relief under the First Amendment as interpreted in Smith. RFRA made settlement possible. I also described Sasnett v. Sullivan, involving religious jewelry, where there was no First Amendment claim.

Cases involving dietary rules, such as refusing to eat pork, should be winnable under RFRA but not under Smith. Some cases about haircuts and beards should be winnable under RFRA, where the hair is still cut short enough not to be a security risk; an example is the Orthodox Jewish earlocks in Estep v. Dent, 914 F. Supp. 1462 (W.D. Ky. 1996). These cases are not winnable under Smith unless the pris oner shows some kind of discrimination.

However, there is a curious thing about the prison cases. Some courts have im plicitly assumed that prison cases are still governed by Turner v. Safley, 482 U.S. 78 (1987), and that Employment Division v. Smith does not apply. Turner requires a reasonable relationship to a legitimate penological interest, which is a highly def erential standard of review. Even so, this standard requires more justification than Smith requires for free citizens whose religious exercise is burdened by a neutral and generally applicable law. So, for example, in Longstreth v. Maynard, 961 F.2d 895 (10th Cir. 1992), the Court issued a preliminary injunction against cutting a prisoner's hair, relying on Turner and ignoring Smith. Because some prison cases are still being decided under Turner, some prisoners win under the First Amend ment. And because some judges defer to prison authorities even when there is no demonstrable threat to security, some prisoners lose similar cases under RFRA.

Question 3. Professor Laycock, you state that Congress could enact RFRA's level of protection for religious practices pursuant to the Commerce Clause and pursuant to its spending power. Would a solution based on the Commerce Clause and the spending power essentially equal the religious protection that was intended in RFRA?

Answer 3. No. In United States v. Lopez, 514 U.S. 549 (1995), the Supreme Court reminded us that the Commerce Clause has limits. We may not be sure where those limits are, but there will be religious practices that do not affect commerce and do not occur in a federally assisted program. Restrictions on the religious practices of individuals, not in the context of federal financial assistance, are likely to fall in the gaps between federal powers.

RESPONSES OF MICHAEL STOKES PAULSEN TO QUESTIONS FROM SENATORS HATCH AND KENNEDY

MICHAEL STOKES PAULSEN,
MINNEAPOLIS, MN,
December 5, 1997.

Re written questions from October 1 hearing.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, DC.

DEAR CHAIRMAN HATCH: Please accept my apologies for the long delay in respond ing to the Committee member's written questions concerning what Congress may do, in the aftermath of City of Boerne, to protect religious freedom. I have been busy in working on another religious freedom matter (in addition to my teaching duties), which has necessarily had a prior claim on my time because of briefing deadlines.

(I enclose a copy of my brief on appeal in Westendorp v. Independent School District
#273, an important case involving discrimination in government provision of bene
fits to children with disabilities who attend private and religious schools.)
So that the Committee may close the record in a timely fashion, and so as not
to burden the Committee with redundant material, I decided that the most efficient
way of responding would be to review the responses already submitted by the other
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scholars on the October 1 panel and determine whether I had anything especially
important to add. I have determined that most of what I would have to say would
be duplicative. Accordingly, I hope you will allow me to identify and describe, brief
ly, areas of agreement and disagreement. I will also separately answer Senator Ken
nedy's written question addressed to me only.
I am in agreement with substantially all that Professor Douglas Laycock and Pro
fessor Daniel Conkle have said in their written answers to Committee members'
questions. That agreement constitutes a substantial degree of consensus (among us
three at least) that Congress retains a significant measure of constitutional power
to enact religious freedom guarantees, akin to those contained in the Religious Free
dom Restoration Act, under (i) section five of the Fourteenth Amendment, enforcing
judicially identified violations of the Free Exercise Clause; and (ii) the spending
power, as conditions on government grants and contracts Each of us three has
doubts (to differing degrees) about Congress's power to enact comprehensive a
RFRA-like statute pursuant to the Commerce Clause, though there are clearly some
applications of a federal religious liberty statute that could be sustained under the
Commerce Clause. Each of us recognizes that Boerne substantially limits the scope
of Congress's power under section five of the Fourteenth Amendment.
Professor Chemerinsky's testimony takes a broader view of both the commerce
power and the section five power. While I respect his views, I believe, for reasons
stated in my original testimony and in that of Professors Laycock and Conkle, that
his view of congressional power goes much further than the Supreme Court is likely
to sustain in future cases, and arguably conflicts directly with the Lopez decision
(as to the Commerce Clause) and with the Boerne decision (as to Section Five).
My main point of disagreement with Professor Laycock and Professor Conkle is
that I am not as sympathetic to (or resigned to) the Court's assertion of judicial su
premacy in constitutional interpretation as they appear to be. (This issue is raised,
in various forms, by several of the written questions.) I believe that Congress is a
co-equal constitutional interpreter with the courts and the executive and may exer
cise its independent constitutional judgment within the sphere of its constitutionally
designated powers. See generally Michael Stokes Paulsen, "The Most Dangerous
Branch: Executive Power to Say What the Law Is," 83 Georgetown L. J. 217 (1994)
(copy enclosed).
This, however, is primarily an academic and theoretical disagreement. While
Boerne is a significant departure from the premise of the coordinacy of the branches,
it is not the first such departure or even the most important. Moreover, as a prac
tical matter, if the goal is to craft a religious freedom statute that the Supreme
Court will not invalidate, the operating premise of judicial supremacy must be taken
as a given. As set forth in my original testimony, I believe that Congress should
attempt to work within clearly established parameters marked out by the Court's
decisions in Boerne and Employment Division v. Smith. It will be time enough to
consider more aggressive responses if the Supreme Court invalidates Congress's
good faith attempts to take the Court at its word, and to work within the Court's

precedents.
The subject of judicial usurpation of the constitutional prerogatives of the other branches of the federal government is an important topic in its own right; however, I do not believe that consideration of a new religious freedom statute provides the appropriate occasion, need, or vehicle for full consideration of those issues. I will be happy to provide the Committee, or any of its members, for a full analysis of what Congress can do, as a general proposition, to keep the Supreme Court within its assigned sphere within our constitutional order.
With respect to Senator Hatch's Question #9, I disagree with Professor Conkle's suggestion that it would be a "mistake" for Congress to attempt to codify in a stat ute the various situations in which Employment Division v. Smith recognizes excep tions to its rule of diminished scrutiny. For reasons expressed in my original testi mony, I think this would be a worthwhile enterprise.
With respect to abrogation of sovereign immunity (Senator Hatch's Question #13), I am less reticent than Professor Laycock as to use of the spending power: A state's acceptance of a grant which is clearly conditioned by a legitimate regulatory proviso operates as a waiver of sovereign immunity. Professor Conkle says exactly this and I agree. Professor Conkle speculates that the Court might somehow cut back on this principle in the future. This may or may not be true. I see nothing in present case law which would support (or hint at) such a change.
Senator Kennedy asks:
In your testimony, you suggest that Congress may identify and protect cer tain "hybrid" freedoms which involve "a clear religious freedom component in combination with another constitutional liberty interest." Such hybrid
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cases might include fact patterns similar to the facts underlying the Boerne case—a free exercise right in combination with property rights.
• How would this hybrid rights approach substantively differ from the ap proach taken by RFRA and to what extent would religious liberty be pro tected?
• How might various hybrid rights be integrated into coherent legislation?
The chief difference between the "hybrid" approach and RFRA is that RFRA enacted an across-the-board standard governing all situations in which religious lib erty was substantially burdened by government action. The Supreme Court, in Boerne, found this to exceed congressional power, on the theory that the enforce ment power of section five of the Fourteenth Amendment could only reach judicially-identified violations of the Free Exercise Clause and that an across-the-board stat ute such as RFRA was not such an approach. My suggestion is to consider very carefully, and to reproduce in the form of statutory language, all of the situations of hybrid rights already identified by the Supreme Court in the Smith case, plus others that reasonably can be inferred from the Court's language and description of the principle, and to vigorously enforce those Free Exercise rights. This would not cover everything that RFRA covered, because the across-the-board approach nec essarily filled in gaps that might exist between the "hybrid" rights identified by the Court. But, as set forth in my written testimony, I believe that this approach would at least cover a substantial amount of the ground covered by RFRA and, in combina tion with exercise of the spending power, can provide for substantial protection of religious liberty in a way that does not challenge existing Supreme Court case law, and thus is much more likely to be upheld.
I do not at present have specific suggestions for language for a statute. It would

be easy enough, however, to take the description of "hybrid" rights as set forth in my October 1 testimony, and to put them in the form of legislative language. If this appears to be a promising route for proposed legislation, I would be happy to work with your staff in fashioning appropriate language.

Thank you once again for the opportunity to address these important issues. If I can be of further assistance, or comment on drafts of legislation once the Committee reaches that stage, please do not hesitate to contact me.

Respectfully submitted, MICHAEL STOKES PAULSEN,
Associate Professor
of Law, University of Minnesota Law School.

RESPONSES OF ERWIN CHEMERINSKY TO QUESTIONS FROM SENATOR HATCH

T H E LAW SCHOOL,
UNIVERSITY OF SOUTHERN CALIFORNIA,
Los Angeles, CA, October 30, 1997.

Senator ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
Washington, DC.

DEAR SENATOR HATCH, I am writing in response to your letter of October 14, 1997. Your letter posed many questions asking for my views concerning the mean ing of City of Boerne v. Flores and the ability of Congress to reenact some form of a Religious Freedom Restoration Act.

I am honored to have had the opportunity to testify at the hearing on October 1 and to respond to the many questions posed by you and other members of the Committee. I reply to each question below. My overall conclusion is that even after Boerne, Congress has the authority to reenact a Religious Freedom Restoration Act either under its commerce power or with detailed findings under section five of the Fourteenth Amendment.

Question 1. The City of Boerne opinion is not a model of clarity. It has been described as adopting a "standardless standard." The opinion itself admits that the line between appropriate and inappropriate legislation is "not easy to discern." Can you tell us what "congruence and proportionality" means or how we can determine the line between "measures that remedy or prevent unconstitutional acts and meas ures that make substantive changes in the governing law"?

Answer 1. No, I cannot tell you what the line is between laws that are remedial or preventative as opposed to laws that make substantial changes in the governing law. No one, but for the Supreme Court in future opinions, can tell you that because no one knows where the Court will draw that line.

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In Boerne, the Court made it clear that it was not overruling Katzenbach v. Mor gan. Yet, the distinction between Boerne and Morgan is illusive at best. Both cases concerned laws adopted in response to Supreme Court decisions. Both statutes cre ated statutory rights after the Supreme Court found no constitutional violation. Nei ther law was designed to prevent or remedy violations of what the Court had defined as a constitutional right. Yet, Morgan was reaffirmed while the Religious Free dom Restoration Act was declared unconstitutional.

In direct answer to the question, I see a continuum of options available to Con gress under section five after Boerne. Most clearly, Congress can provide additional enforcement mechanisms to remedy violations of rights that the Supreme Court has identified. For example, 42 U.S.C. § 1983 is constitutional under Boerne in creating a cause of action for monetary or injunctive relief for violations of constitutional

rights.
Next on the continuum, Congress can create mechanisms, that based on legisla tive findings, are designed to prevent violations of rights identified by the Court. For instance, I think that the 1982 Voting Rights Act Amendments can be defended on this basis. Congress determined that in light of the difficulty of proving discrimi natory intent, the only way to prevent violations of voting rights is, by statute, to allow proof of discriminatory impact to suffice in proving a violation.
Finally, I believe that Congress, based on detailed findings, can identify a problem with violations of a constitutional right and can enact laws to remedy them. Thus, I think that Congress could make detailed findings that neutral laws of general ap plicability are a threat to free exercise of religion and reenact the Religious Freedom Restoration Act as a remedy. The analogy Here is to Katzenbach v. Morgan or to the Voting Rights Act Amendments of 1982. In both instances, Congress changed the substantive law because of proof of a serious problem with violations of voting rights. This is where proportionality is key. Congress must make sufficient findings of a problem so that the law seems reasonably tailored to deal with the issue. No formula for proportionality was articulated in Boerne or ever is likely to exist. But the greater the proof of tine problem, the broader the solution likely to be accepted by the Court.
Question 2. Is it not just as illegitimate for the Court to alter the substantive meaning of the Constitution as it is for Congress? And is that not what the Court did in Smith and Boerne?
Answer 2. First, I do not believe that the Religious Freedom Restoration Act changed the substantive meaning of the Constitution. The Court in Smith said that there was no constitutional right to be protected from neutral laws of general appli cability. Congress then, in the Religious Freedom Restoration Act, created a statu tory right to be protected from such laws unless strict scrutiny is met. Congress, and state legislatures, surely can create statutory rights even where there is no con stitutional right.
Second, the Supreme Court inevitably must interpret the Constitution and the in terpretation in many areas will change over time. Brown v. Board of Education changed the "substantive meaning" of the Constitution in overruling Plessy v. Fer guson, but it was surely correct. In terms of free exercise of religion, strict scrutiny is not written into the Constitution. Indeed, it was not used for free exercise clause claims until 1962 in Sherbert v. Verner. Smith was a terribly wrong decision in abandoning strict scrutiny for neutral laws of general applicability, but not because it was changing the substantive meaning of the Constitution. Smith was flawed because free exercise of religion can be undermined and infringed by neutral laws of general applicability.
Finally, Congress cannot change the substantive meaning of the Constitution; that was established in Marbury v. Madison. But Congress can create statutes that provide and protect rights where the Court has found none in the Constitution. For example, the Court concluded that private race discrimination does not violate the Constitution, but Congress has created many statutes prohibiting such conduct.
Question 3. Do you see any incongruity between the Court's notion of judicial su premacy under the 14th Amendment expressed in Boerne and the plain language of Section 5, which names Congress as the enforcer of the Amendment, together with the vehement antipathy of many of the framers of the 14th Amendment to contemporary Supreme Court decisions like Dredd Scott (which was called a "horrible blasphemy' by John Bingham, the principal author of the 14th Amendment) and Ex

parte Milligan (which was called a piece of judicial impertinence" by the then-
Chairman of the House Judiciary Committee, Rep. Wilson)?
Answer 3. The key issue is what "enforce" means in section five. The word "en-
force" is sufficiently ambiguous to allow either view as a plausible interpretation of
section five. The Supreme Court in Boerne claimed that the word necessarily means
that Congress only can remedy and that Congress cannot determine the substantive
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meaning of rights. Justice Kennedy, writing for the majority, stated: "Congress'
power under §5, however, extends only to 'enforc[ing]' the provisions of the Four
teenth Amendment. * * * The design of the Fourteenth Amendment and the text
of §5 are inconsistent with the suggestion that Congress has the power to decree
the substance of the Fourteenth Amendment's restrictions on the states. Legislation
which alters the meaning of the Free Exercise Clause cannot be said to be enforcing
the Clause. Congress does not enforce a constitutional right by changing what the
right is."
But this begs the key question of what "enforce" means. One dictionary defines
"enforce" as: "Urge, press home (argument, demand); impose (action, conduct upon
person); compel observance of." "The Concise Oxford Dictionary of Current English"
375 (1929). Another dictionary defines "enforce" as: "1. to give force to: strengthen;
2. to urge with energy; 3. constrain, compel; 4. to effect or gain by force; 5. to exe
cute vigorously." "Webster's Seventh New Collegiate Dictionary" (1965) 275. From
the perspective of these definitions, Congress very much is "enforcing" the Four
teenth Amendment when it expands the scope of liberty under the due process
clause or increases the protections of equal protection. In this sense, Congressional
expansion of rights is enforcing by strengthening the Fourteenth Amendment.
Dictionaries, of course, do not determine the meaning of the words in the Con
stitution. My point is simply that there is nothing certain about the meaning of the
word "enforce" that supports Justice Kennedy's claim that it precludes Congress
from using it to expand the scope of constitutional rights. Justice Kennedy argued
as if the term enforce had a precise meaning that supported his position as the cor
rect way to understand Congress' section five power. No such precise meaning ex
ists.
Phrased slightly differently, the word "enforce" might be defined in many alter-
native ways, two of which are to implement and to remedy. Justice Kennedy chooses
the latter. But the former seems equally plausible in the context of section five. Con
gress, by that provision, is given the authority to implement, as best it can, the pro
tections of the Fourteenth Amendment, such as due process and equal protection.
Congress can do this by expanding the scope of these rights if it decides that it is
the best way to ensure, or to implement, these protections. I believe that this latter
interpretation is consistent with the views of the drafters of the Fourteenth Amend
ment, such as those quoted in the question.
Question 4. Did the Court in Boerne make a mistake by seeing the options for
Congress' role only as either making substantive changes in rights or enforcing the
Court's interpretation? Was Cooper v. Aaron rightly decided or does Congress have
some role in offering interpretations of the Constitution? If so, what is that role?
Answer
4. Every member of Congress must evaluate the constitutionality of any
bill before deciding how to vote on it and only should vote in favor of those that
he or she regards as constitutional. In this sense, members of Congress are bound
by their oaths of office to interpret the Constitution.

Marbury v. Madison establishes that the judiciary determines whether a law is
constitutional. Marbury declared: "It is emphatically the province and duty of the
judicial department to say what the law is." Cooper v. Aaron surely was correct in
saying that state governments do not have the authority to ignore or violate Su
preme Court rulings.

It is very important, though, to distinguish Supreme Court decisions refusing to
find a constitutional right from those where the Court finds constitutional limits on
government. For the former, Congress can by statute create rights; for the latter,
only a constitutional amendment can overturn the Supreme Court's decision.

Question 5. Some critics will raise the Establishment Clause any time religion is
discussed outside a church. How would you respond to someone who might make
an Establishment Clause objection, a la Justice Stevens, to religious liberty legisla
tion of the type that we are discussing?

Answer 5. Any protection of free exercise of religion arguably violates the estab
lishment clause. Under the prevailing test for the establishment clause, articulated
in Lemon v. Kurtzman, any government action that has the primary purpose or ef
fect of advancing religion is impermissible. Yet, any law safeguarding free exercise
of religion, by definition, will have as its primary purpose and effect advancing reli
gion.

Under Sherbert v. Werner and subsequent cases, strict scrutiny was used for the
free exercise clause, including in evaluating neutral laws of general applicability. No
court ever has found that using strict scrutiny for the free exercise clause violates
the establishment clause, though it does advance religion. Therefore, nor does it vio
late the establishment clause if Congress by statute protects religion by using strict
scrutiny.

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The response might be that there is a difference between the Court finding that
the Constitution requires employment of strict scrutiny and Congress imposing it;
the latter does not violate the establishment clause, but the former does. The an
swer to this is that protecting free exercise of religion, as accomplished through
RFRA, could be deemed a compelling interest sufficient to justify the statute even
if it does infringe the establishment clause. The establishment clause, like all rights,
is not absolute. The protection of free exercise of religion, as implemented through
RFRA, should be found to meet strict scrutiny. This is not to say that every imag
inable law protecting religious freedom is immune from establishment clause scru
tiny. Rather, it is to say that the Court could find that RFRA simply returned the
law to what it was before Smith and served the compelling purpose of protecting
people from the burdens of neutral laws of general applicability.

Question 6. If the City of Boerne decision is wrong, which I think it is, is there
anything we can profitably do about the mistakes in the decision short of amending
the constitution?

Answer 6. Definitely. I believe that Congress should reenact a Religious Freedom
Restoration Act. Congress could do this in either or both of two ways. First, Con
gress could find that neutral laws of general applicability interfering with religion
place a substantial burden on interstate commerce. Congress thus could create a
statutory right, under its commerce clause authority, for individuals to be protected
from neutral laws of general applicability unless the laws are necessary to achieve
a compelling interest.

Second, Congress could find that there is a significant national problem with neu
tral laws of general applicability interfering with free exercise of religion and reen

act a Religious Freedom Restoration Act as a remedy. The Court in Boerne empha sized the lack of a "record;" Congress could reenact RFRA with a much more detailed record.

Question 7. What would you say is Congress' role with respect to influencing the interpretation of the Free Exercise Clause of the First Amendment or any other sub stantive constitutional right?

Answer 7. As explained above, where the Court fails to find a constitutional right under the free exercise clause, or any other constitutional provision, Congress and the states may create a statutory right. This is what the Religious Freedom Restora tion Act accomplished. The Court found that individuals have no constitutional right to be protected from neutral laws of general applicability, but Congress, properly in my view, created a statutory right.

Question 8. Could you each flesh out more completely what are the contours of the right in Smith and can you suggest anything we can do to ensure that courts and other government actors give it as broad a reading as is justified?

Answer 8. Under Smith, the free exercise clause is violated only be a law that either is motivated by a desire to infringe religion or treats religion (or particular religion) differently from secular activities. Congress obviously cannot change that holding, but Congress by statute can protect rights where the Court has found none in the Constitution. For instance, the Court has held that the Constitution does not limit private race or gender discrimination, but Congress by statute has recognized and protected such a right.

As described above, Smith holds that there is no constitutional right to be pro tected from a neutral law of general applicability that burdens religion. Congress by statute can provide such protection. Congress could do so either under its com merce power or under section five if there are sufficiently developed findings to show that the law is a needed remedy.

Question 9. Some witnesses alluded to the exceptions or limitations on the rule in the Smith case. Could these be the basis of separate statutory protections? If so, in what way and could these exceptions and limitations be broadened beyond the specifics listed in Smith to other analogous situations?

Answer 9. Smith recognizes three situations where the free exercise clause ap plies. One, as described in the prior answer, is for laws that are not neutral or of general applicability (i.e., laws that either are motivated by a desire to infringe reli gion or treats religion (or particular religion) differently from secular activities). Sec ond, the Court said that cases involving both religion and other constitutional rights receive protection. The Court here recharacterized Wisconsin v. Yoder as being such a "hybrid" case. Third, the Court reaffirmed that laws which deny benefits to people who quit their jobs for religious reasons violate the free exercise clause.

Under Smith, Congress certainly could provide remedies for all of these constitu tional violations. However, it is unclear what would be gained by such laws because these are the areas protected by the judiciary and the courts have authority to provide needed remedies under § 1983 and Bivens.

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Question 10. Are there significant modifications of Smith in the Church of the Lukumi or City of Boerne cases? If so, what are they and what does this suggest about what we might most profitably do with legislation in this area, especially with regard to enforcement of section 5 of the 14th Amendment?

Answer 10. Neither Church of the Lukumi Babalu Aye nor Boerne modified Smith in any significant way. The former simply held that where a law targets a religious practice and is motivated by a desire to infringe religion it violates the free exercise clause unless strict scrutiny is met. The latter, of course, held that the Religious Freedom Restoration Act was unconstitutional as exceeding Congress' power under section five. I see no modification of Smith in either case.

Question 11. Is the standard for judging "neutral and generally applicable laws" in Smith more in the nature of disparate impact or subjective intent to discriminate or does it have components of both?

Answer 11. This is an excellent question, but unfortunately one that has not been answered by the Supreme Court. The Church of the Lukumi case is the only one in which the Court has applied Smith. In that case, there was both subjective intent (the Hialeah law was intended to limit a practice of the Santaria religion) and dis parate impact (the law burdened that religion more than other religions or secular practices).

On the other hand, I am skeptical that the Court would allow discriminatory im pact to suffice. First, Smith holds that burden on religion is irrelevant if the law is neutral and of general applicability. Focusing on discriminatory impact shifts the focus back to the burdens imposed by a law. The Oregon law challenged in Smith had a greater impact on Native Americans than others, yet this was irrelevant to the Court. Second, the Court generally has been hostile to disparate impact in the constitutional context. In equal protection law, at least since Washington v. Davis in 1976, the Court has rejected disparate impact and required proof of subjective intent to discriminate.

Question 12. It has been argued by some commentators that Smith was decided largely on so-called "institutional" concerns—namely that courts are less-well placed to make decisions about weighing the relative merits of legislative priorities and val ues. But this appears to get confused in Boerne especially (ironically) in Justice Scalia's concurrence, where the Court is seen as laying down broad rules and the state and local legislatures are the institutions that are to apply the abstract rules of the Court to constitutional cases. Does this not turn the traditional division of labor between the legislative and judicial branches on its head?

Answer 12. Smith, in large part, rested on the Court's value judgments that it is undesirable to protect religions from neutral laws of general applicability. Justice Scalia said that "[p]recisely because 'we are a cosmopolitan nation made up of peo ple of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming pre sumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." Smith also rests on the Court's view that those seeking religious exemptions from laws should look to the democratic process for protection, not the courts.

The flaw in Boerne is that it fails to recognize the authority of Congress to create a statutory right where the Court has found no right in the Constitution. Smith said that individuals do not have a constitutional right to protection from neutral laws of general applicability; RFRA created a statutory right.

As for Scalia's concurrence in Boerne, both courts and legislatures make general rules and both apply general rules to specific cases. For example, many legislatures have created exemptions to peyote laws for religious use; thus dealing with a spe cific application by statute. Every time a law is challenged "as applied" the Court is considering a specific application of a constitutional rule. But obviously courts and legislatures both make general rules, such as in pronouncing separate can never be equal in public education and in enacting laws prohibiting race and gender discrimi nation in the workplace (Title VII).

Question 13. Can we abrogate sovereign immunity for each of the powers we might use or is there a different rule under Seminole Tribe for each power we con sider?

Answer 13. Congress can authorize suits against the federal government, local governments, and federal, state, and local officers without regard to sovereign im munity. Congress, by statute, can waive the sovereign immunity of the United States government. Additionally, the Supreme Court consistently has held that the Eleventh Amendment and sovereign immunity do not protect local governments from suit in federal court. Nor, according to cases such as Ex parte Young and Edelman v. Jordan, does sovereign immunity preclude suits against government of ficers.

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However, the Eleventh Amendment precludes suits against states in federal court. In Seminole Tribe v. Florida, the Court held that Congress cannot authorize suits against states in federal court, except where Congress is acting under its powers under section five of the Fourteenth Amendment. The Court in Seminole Tribe re-affirmed Fitzpatrick v. Bitter, which held that Congress may authorize suits against states when acting under section five. The rationale is that the Fourteenth Amend ment uniquely was intended as a limit on state sovereignty.

Therefore, if a new RFRA is adopted under the commerce or spending power it cannot authorize suits against state governments. But if a new RFRA is enacted pursuant to section five, based on detailed findings showing that it is a necessary remedy, then Congress can authorize suits against state governments.

Question 14. Some have been disappointed in the way that RFRA has been ap plied in the Courts—that judicial interpretation has weakened the protections of the legislation. Could some of the procedural reforms contemplated for section 5 enforce ment after Boerne actually be useful to strengthening RFRA's application in the courts, and might they actually go a substantial distance—perhaps even be more ef fective—in accomplishing the goals of RFRA, even when they alone are applies to states and localities?

Answer 14. I am skeptical that a revised RFRA could be substantially more effec tive than its predecessor. Lower court decisions that weakened RFRA did so pri marily by failing to find a substantial burden on religion or by finding a sufficient government interest. I do not see how procedural changes in RFRA would address either of these forms ofjudicial decision-making.

Question 15. Are there other improvements upon RFRA that we should consider as we look at the issue again either in the federal or state context?

Answer 15. I think that it should be made clearer that Congress is creating a stat utory right for individuals to be free from neutral laws of general applicability. RFRA was written primarily in terms of the test that courts should apply in free exercise clause cases. In this way, it appeared that RFRA was overruling the Su preme Court's interpretation of the appropriate constitutional test for the tree exer cise clause.

A preferable approach would be a statute more similar to Title VII or the Ameri cans with Disabilities Act, though it could be much shorter and simpler. The key is the creation of a statutory right for individuals to be protected from the govern ment imposing significant burdens on religion. The law could specify that the plain-tiff must present a prima facia case of a burden (as in Title VII), but then the bur-

den shifts to the government to prove either that the law does not burden religion
or that it is necessary to achieve a compelling purpose.
Question 16. Is there any way to guard against Judicial narrowing of either the
standards we establish or the Supreme Court establishes to protect religious liberty
in drafting the legislation?
Answer 16. Obviously, the more specific the language in a law, the less oppor
tunity for judicial narrowing. Laws protecting free exercise in specific contexts have
less chance of being narrowed by interpretation than do broader, more general laws.
On the other hand, inevitably, courts will need to decide what is a significant bur-
den on religion and what is sufficient to meet strict scrutiny. There is little that
Congress can do to constrain the courts' discretion in making such judgments.
Question 17. On the use of the Spending Power, would you agree that limiting
the application to state and local government action is closer to the original spirit
of RFRA and the Free Exercise Clause than application to private recipients? Does
this coverage question make any difference constitutionally?
Answer 17. It makes sense to limit the use of the spending power to state and
local governments for many reasons. First, the free exercise clause only applies to
the government. Therefore, if the goal is restoring the law to what it was before
Smith, the objective should be to restore strict scrutiny for government actions bur
dening religion. Second, as the question implies, I understand the purpose of RFRA
was requiring that government actions burdening religion meet strict scrutiny; it
was not intended, as I understand it, to apply to private conduct. Third, extending
RFRA to private recipients of federal money could raise establishment clause issues.
As explained above, strict scrutiny for government infringements of free exercise
never has been thought to violate the establishment clause. But to extend free exer
cise protections to private actions, when no other aspects of the First Amendment
are applied to private conduct, raises substantial establishment clause concerns.
Question 18. How tight a fit must there be under the Spending Power? In South
Dakota v. Dole, the fit did not seem to tight between setting a minimum drinking
age and highway funds, even if the goal is generalized to be ensuring "safe inter-
state travel." The agencies charged with administering the highway funds and the
drinking age may not even have been the same agencies. Do you think that the
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small percentage of money at risk was a factor in the Dole case or is there simply
substantial latitude here?
Answer 18. Unfortunately, it is uncertain because the Supreme Court has not di
rectly addressed the scope of Congress' ability to put strings on grants since its fed
eralism decisions in the 1990s. In cases such as New York v. United States (1992)
and Printz v. United States (1997), the Court has revived the Tenth Amendment as
a significant limit on Congress' powers. In United States v. Lopez (1995) and City
of Boerne v. Flores ('1997), the Court narrowly construed Congress' powers under the
commerce clause and section five of the Fourteenth Amendment. South Dakota v.
Dole precedes these cases. It is unknown whether the Court will limit the scope of
the spending power or impose Tenth Amendment constraints in light of these subse
quent decisions.
On the one hand, the Court may adhere to the view that Congress has broad lati
tude to place strings on grants to state and local governments. The rationale is that
state and local governments do not have to accept federal funds, but if they do, they
must comply with conditions. Under this approach, there are two main limits on
Congress. First, the conditions must relate to the purpose of the spending program

(articulated in South Dakota v. Dole and reaffirmed in New York v. United States). Second, the conditions must be expressly stated (articulated in Pennhurst v. Halderman (1980)). The Court has not insisted on a "tight fit" between the spending and the conditions.

On the other hand, the Court, in light of its new commitment to federalism and limiting Congress' powers, might narrow the scope of the spending power. The Court might locus on the coercive nature of conditions on grants and the lack of real choice available to many states. The Court might insist on a much tighter fit between the purpose of the spending and the conditions.

It is simply unclear at this point and will be until the Court decides another spending power case involving conditions on federal money.

Question 19. Do you notice an inherent tension between the language of the 14th Amendment's promise of equal protection and the Court's decision in Boerne to leave decisions
about free exercise accommodations to be decided jurisdiction by jurisdic
tion instead of nationally, especially given Justice Scalia's notion in his concurrence in Boerne that "the people" in each state and locality will determine the application of free exercise norms in "concrete cases" and his candid admission in Smith that smaller, less well-known sects will be at a "relative disadvantage" in the legislative forum? If so, what are we to do in the face of these constitutional anomalies?

Answer 19. I do not see the problem in terms of equal protection, but do see a serious problem in leaving protection of minority religions to the majoritarian politi cal process. Neutral laws of general applicability, by definition, do not discriminate against religion; rather, religion is seeking an exception because of the burden im posed. Therefore, it seems very difficult for religions seeking an exception from such taws to argue that they are discriminated against and denied equal protection.

However, as the question observes, Scalia's position leaves the protection of small religions to the maioritarian legislative process. It is highly unlikely that such reli gions, especially when they are unpopular, will succeed. In this sense, there is an analogy to equal protection law. The Court consistently has used equal protection law to protect "discrete and insular minorities" from discrimination. Likewise, there should be judicial protection of minority religions from the burdens of laws that interfere with their religious practices. This, of course, is what RFRA did.

Question 20. Do you see any risks in attempting to define religious activity as interstate commerce in an effort to protect religious exercise under the Commerce clause?

Answer 20. My recommendation would be for Congress to make detailed findings that laws burdening religion, looked at cumulatively across the country, have a sub stantial effect on interstate commerce. In other words, the law need not identify reli gious activity as commerce. Rather, the law should be founded on the premise that government burdens on religion have a substantial effect on interstate commerce. The analogy should be to the Civil Rights Act of 1964 which used the commerce power to prohibit race and gender discrimination in the private section. Congress made detailed findings that such discrimination had a substantial effect on inter-state commerce. The Court upheld the law as a permissible exercise of the com merce power in Heart of Atlanta Motel v. United States (1965) and Katzenbach v. McClung (1965).

Question 21. You made the point that most free exercise claims challenged "neu tral and generally applicable laws" of the type Smith decided-were not subject to strict scrutiny. I would ask for you to explain why that is so and to respond to that.

Answer 21. Virtually all of the Supreme Court cases dealing with free exercise
have involved challenges to neutral laws of general applicability that burden reli-
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gion. For example, many Supreme Court cases have involved denial of benefits to
those who quit their jobs for religious reasons. (See Sherbert v. Verner (1962); Thom
as v. Review Board (1981); Hobbie v. Illinois (1987)). All were instances where indi
viduals were granted an exemption based on religion to a general law.

Almost every other case considered by the Supreme Court involving free exercise
has been a request for an exemption, based on free exercise, to a neutral law of gen
eral applicability. Examples include, Braunfeld v. Braun (1961) (seeking an exemp
tion based on free exercise to Sunday closing laws); Wisconsin v. Yoder (1972) (seek
ing an exemption to compulsory schooling laws based on free exercise); Bowen v.
Roy (1986) (seeking an exemption to requirement for Social Security numbers based
on free exercise); Goldman v. Weinberger (1986) (seeking an exemption from mili
tary dress requirements based on free exercise); Jimmy Swaggert Ministries v.
Board of Equalization of California (1990) (seeking an exemption from sales and
uses taxes for religious goods and literature).

Why? It is unusual, though not unheard of, for government to enact laws
targeting particular religions. The Church of the Babalu, discussed above, would be
an example of a law that was directed at a particular religion. More common, is the
insensitivity of government to the burdens of general laws on minority religions.
Hence, the vast majority of cases involving free exercise in both the Supreme Court
and the lower courts have involved challenges to neutral laws of general applicabil
ity that burden religion.

Question 22. Can we abrogate state sovereign immunity for each of the powers
that we might use or is there a different rule under Seminole Tribe for each power
we consider?

Answer 22. Please see answer under Question 13 (the questions are identical).

Question 23. In the Casey plurality opinion of Justices Kennedy, O'Connor, and
Souter, these Justices were concerned that if the Court reinterpreted past precedent
"under fire" or because of a context of political pressure that such decision would
seriously undermine the Court and the rule of law. Is not a clearly expressed opin
ion of co-ordinate branches of government, which are closer to the people, pretty
good evidence that the Court has gotten it wrong, rather than a reason for the Court
to dig in its heels?

Answer 23. I do not accept the premise that the Court is a fragile institution and
that any single decision, however controversial, is likely to undermine the Court and
the rule of Taw. The Court's institutional legitimacy is firmly established and it
would take much more than decisions concerning abortion rights or free exercise to
undermine the Court or the rule of law.

Nor do I accept the premise that the popularity of a law is indicative of its con
stitutionality. Laws requiring segregation were popular in parts of the country. They
were enacted by levels of government "closer to the people." But their popularity
was not indicative that the Court had "gotten it wrong in Brown v. Board of Edu
cation.

I believe that City, of Boerne v. Flores got it wrong for two reasons. First, it inter
prets Congress' section five power in far too narrow a manner. Congress should have
authority under section five to expand rights, as the Court held in Katzenbach v.
Morgan. Second, the Court wrongly perceived the Religious Freedom Restoration
Act as in conflict with Smith. However, as explained above, Smith held that there

is not a constitutional right of individuals to be protected from neutral laws of gen eral applicability. RFRA created a statutory right.

RESPONSES OF ERWIN CHEMERINSKY TO QUESTIONS FROM SENATOR KYL

Question 1. After Boerne, how broad is Congress' power to enforce?

Answer 1. It is unclear. Boerne clearly holds that Congress' power under section five is limited to preventing or remedying violations of rights. Yet, Justice Kennedy acknowledges: "While the line between measures that remedy or prevent unconstitu tional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed." 117 S.Ct. at 2164.

Significantly, Boerne does not overrule Katzenbach v. Morgan, 384 U.S. 641 (1966). Katzenbach concerned the constitutionality of section 4(e) of the Voting Rights Act of 1965 which provides that no person who has completed sixth grade in a Puerto Rican school, where instruction was in Spanish, shall be denied the right to vote because of failing an English literacy requirement. Earlier, in Lassiter v. Northampton Election Board, 360 U.S. 45 (1959), the Supreme Court had upheld the constitutionality of an English language literacy requirement for voting.

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Congress, in the Voting Rights Act, sought to partially overturn Lassiter by pro viding that failing a literacy test could not bar a person from voting if the person was educated through the sixth grade in Puerto Rico. The Supreme Court in Katzen bach v. Morgan upheld this provision as "a proper exercise of the powers granted to Congress by §5 of the Fourteenth Amendment." 384 U.S. at 646-47.

The law in Katzenbach was remedial or preventative only in a very broad sense. This seems to accord Congress great latitude in identifying a problem with the pro tection of a constitutional right and adopting laws to prevent or remedy its violation. Thus, I believe that with detailed findings that neutral laws of general applicability threaten free exercise of religion, Congress could reenact a Religious Freedom Res toration Act.

Question 2. What does "to enforce" mean? What powers are included within that phrase?

Answer 2. [My answer here is very similar to that provided above in answer to Question 3 from Senator Hatch]:

The Supreme Court in Boerne claimed that the word necessarily means that Con gress only can remedy and that Congress cannot determine the substantive meaning of rights. Justice Kennedy, writing for the majority, stated: "Congress' power under § 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amend ment. * * * The design of the Fourteenth Amendment and the text of § 5 are incon sistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the states. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Con gress does not enforce a constitutional right by changing what the right is." 117 S.Ct. at 2164 (emphasis added).

But this seems an unduly narrow definition of "enforce." One dictionary defines "enforce" as: "Urge, press home (argument, demand): impose (action, conduct upon person); compel observance of." "The Concise Oxford Dictionary of Current English" 375 (1929). Another dictionary defines "enforce" as: "1. to give force to: strengthen; 2. to urge with energy; 3. constrain, compel: 4. to effect or gain by force; 5. to exe cute vigorously." "Webster's Seventh New Collegiate Dictionary" (1965) 275. From

the perspective of these definitions, Congress very much is "enforcing" the Four teenth Amendment when it expands the scope of liberty under the due process clause or increases the protections of equal protection. In this sense, Congressional expansion of rights is enforcing by strengthening the Fourteenth Amendment.
Indeed, the Court's opinion in Katzenbach v. Morgan took this broad view of the meaning of "enforce." 384 U.S at 169. The Court expressly rejected the view that Congress under section five was limited to remedying violations of rights. The Court disagreed with the position that the legislative power is confined "to the insignifi cant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional." The Court explained that "[b]y including §5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause." Id. at 650.

Phrased slightly differently, the word "enforce" might be defined in many alter- native ways, two of which are to implement and to remedy. Justice Kennedy chooses the latter. But the former seems equally plausible in the context of section five. Con gress, by that provision, is given the authority to implement, as best it can, the pro tections of the Fourteenth Amendment, such as due process and equal protection. Congress can do this by expanding the scope of these rights if it decides that it is the best way to ensure, or to implement, these protections. I believe that this latter interpretation is consistent with the views of the drafters of the Fourteenth Amend ment, such as those quoted in the question.

Question 3. What things is Congress not allowed to do under its enforcement power?

Answer 3. Under Katzenbach v. Morgan, Congress could not lessen or dilute con stitutional rights under its section five powers. The problem is that if Congress can use its power under section five to interpret the Constitution, it conceivably could use this authority to dilute or even negate constitutional rights. In a footnote, Jus tice Brennan, the author of the majority opinion, responded to this concern: "Con trary to the suggestion of the dissent, § 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guar antees." Id. at 651 n. 10.

Under Boerne, there are much greater limits on Congress. Congress only can act to prevent or remedy violations identified by the Supreme Court. However, as ex-

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plained above, even Justice Kennedy in Boerne recognized that Congress "must have wide latitude" in devising remedies. 117 S.Ct. at 2164.

Question 4. What if Section 5 of the 14th Amendment said "to enforce and imple ment"?

Answer 4. It is possible that the addition of the word "implement" would be re garded as allowing Congress more latitude under section five. But it also is possible that the Court would say that Congress was limiting to adopting legislation to im plement rights protected by the Court. In other words, "implement like "enforce" could be restricted to the power to enact laws to prevent or remedy violations of ju dicially recognized rights.

RESPONSES OF ERWIN CHEMERINSKY TO QUESTIONS FROM SENATOR KENNEDY

Question 1. Would you elaborate on what you believe Congress may do pursuant

to its 14th Amendment enforcement authority?
Answer 1. Under Boerne, Congress may act to prevent or remedy violations of rights, but it may not change the substantive content of rights. Justice Kennedy ac knowledges that this line is "not easy to discern." 117 S.Ct. at 2164.
In my view, it is significant that the Court does not overrule Katzenbach v. Mor gan and that it goes out of its way to distinguish the Voting Rights Act. In Lassiter v. Northampton Election Board, 360 U.S. 45 (1959), the Supreme Court had upheld the constitutionality of an English language literacy requirement for voting. Con gress, in the Voting Rights Act, sought to partially overturn Lassiter by providing that failing a literacy test could not bar a person from voting if the person was edu cated through the sixth grade in Puerto Rico. The Supreme Court in Katzenbach v. Morgan upheld this provision as "a proper exercise of the powers granted to Con gress by §5 of the Fourteenth Amendment." 384 U.S. at 646-47.
The law in Katzenbach was remedial or preventative only in a very broad sense. This seems to accord Congress great latitude in identifying a problem with the pro tection of a constitutional right and adopting laws to prevent or remedy its violation. Indeed, Justice Kennedy in Boerne spoke of the lack of a "record" and the lack of proportionality between the Religious Freedom Restoration Act and the proven problem. Thus, I believe that with detailed findings that neutral laws of general ap plicability seriously threaten free exercise of religion, Congress could reenact a Reli gious Freedom Restoration Act. The key is for Congress to prove the problem and make it clear that the new law is preventative and remedial.
Question 2a. Given RFRA's legislative history, would you explain how the law was applied by the courts? Would you provide examples of cases litigated after Congress passed RFRA and prior to the Boerne decision?
Answer 2a. There was not a consistent pattern of lower court enforcement of RFRA. Some courts used a very deferential approach to strict scrutiny, others were more aggressive. For instance, in Rader v. Johnston, 924 F.Supp. 1524 (D.Neb. 1996), the court found a religious exemption from a requirement that students who wanted to live off-campus in a religiously-oriented house. Interestingly, the same issue is now being litigated with Yale University, though RFRA would not apply, even if it had been upheld, because there is not government action. Indeed, most of the lower courts to consider RFRA upheld it and applied it a wide variety of contexts. See, e.g., Abordo v. State of Hawaii, (D. Ha. 1995); Sasnett v. Department of Corrections, 891 F.Supp. 1305 (W.D. Wis. 1995); Belgard v. State of Hawaii, 883 F.Supp. 510 (D.Ha. 1995).
Most importantly, in assessing the use of RFRA in the lower courts, it must be recognized that the law was less than four years old when it was declared unconsti tutional. It truly was too soon to assess its full effects.
Question 2b,c. Do the cases litigated after Congress passed RFRA differ signifi cantly from those litigated prior to the O'Lone decision? Given the concern about government resources, would you provide statistical data about the number of cases filed by prisoners?
Answer 2b,c. Statistics show that approximately 50 cases per year have been filed by prisoners in federal courts under RFRA in the entire country. I have provided Ms. Melody Barnes of your staff a detailed breakdown of the number of prisoner cases filed in federal courts for the entire country. Because the document is over 50 pages and because it was previously provided, I will not append it here, but can provide an additional copy if necessary.
Most claims by prisoners under RFRA have failed, but some succeeded. Although

courts have been deferential to the needs of prisons in order and discipline, some courts applying RFRA also have been sensitive to the religious needs of prisoners. For instance, prior to O'Lone and Smith, lower courts consistently found that Ortho-
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dox Jewish and Muslim inmates had a right to a non-pork diet. Some lower courts after O'Lone and Smith rejected such claims. After all, prison diets are not moti vated by a desire to infringe religion and they are set generally. But after RFRA, Orthodox Jewish and Muslim inmates again were successful in gaining non-pork diets.

Question 3. Given the Lopez decision, its it advisable for Congress to use the Com merce Clause to address religious free exercise problems? If Congress does—in whole or in part—rely upon the Commerce Clause, what types of cases may be ad-dressed by legislation? Given the types of cases that may be addressed through Commerce Clause-based legislation, what kind of fact-finding must be done by Con gress? Given New York v. United States and Printz v. United States, would such leg islation violate state sovereignty?

Answer 3. In Lopez, the Court recognized three situations where Congress can regulate under its commerce power. First, Congress can "regulate the use of the channels of interstate commerce." 115 S.Ct. at 1629. Second, the Court said that Congress may legislate "to regulate and protect the instrumentalities of interstate commerce." Id. The Court said that this includes the power to regulate persons and things in interstate commerce.

Finally, the Court said that Congress may "regulate those activities having a sub stantial relation to interstate commerce." Id. at 1629-30 Chief Justice Rehnquist said that the prior case law was uncertain as to whether an activity must "affect" or "substantially affect" interstate commerce to be regulated under this approach. Chief Justice Rehnquist concluded that the more restrictive interpretation of con gressional power is preferable and that "the proper test requires an analysis of whether the regulated activity 'substantially affects interstate commerce." Id.

Congress could enact a new version of RFRA by making detailed findings that neutral laws of general applicability burdening religion have a substantive effect on interstate commerce. Even after Lopez, Congress can regulate if it determines that an activity, looked at cumulatively across the country, has a substantial impact on interstate commerce. Congress reasonably can make such findings with regard to laws burdening religion. Thus, I believe that it is advisable for Congress to use its commerce clause authority to reenact RFRA. The Court in Lopez expressly distin guished the Civil Rights Act of 1964. That law was adopted by Congress under its commerce clause authority based on detailed factual findings of the burden of dis crimination on interstate commerce. A new RFRA should be based on findings con cerning the burden on commerce of laws infringing free exercise of religion.

Finally, I do not see New York v. United States or Printz v. United States threat ening such a law. Those cases held that Congress cannot force states to adopt laws or regulations or to administer federal programs. However, the cases, especially New York y. United States, expressly indicate mat Congress can require that states com ply with federal law in their activities. RFRA would not require that states enact any laws or administer any federal operations. Rather, RFRA would set a judicially-enforced federal standard applicable to all levels of government. Even after New York v. United States and Printz v. United States there is no doubt that federal laws prohibiting employment discrimination apply to state and local governments. Likewise, a federal law protecting a right to be protected from laws burdening religion would not raise Tenth Amendment concerns.

I have attempted to fully answer all of the questions. Please let me know if I can provide the Committee or any of the Senators with any additional information.

Sincerely, ERWIN CHEMERINSKY.

RESPONSES OF DANIEL O. CONKLE TO QUESTIONS FROM SENATOR HATCH

Question 1. The City of Boerne opinion is not a model of clarity. It has been described as adopting a "standardless standard." The opinion itself admits that the line between appropriate and inappropriate legislation "is not easy to discern." [95-2074 p. 10.] Can you tell us what "congruence and proportionality" means, or how we can determine the line between "measures that remedy or prevent unconstitutional acts and measures that make substantive change in the governing law"?

Answer 1. The essential meaning of Boerne is that Congress power under Section 5 of the Fourteenth Amendment is limited to lawmaking that reasonably can be understood as an attempt to vindicate constitutional rights—that is, constitutional rights as the Supreme Court has defined them. The Court's requirements of "congruence" and "proportionality" are designed to explain and refine this limitation on congressional power.

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Boerne's requirement of "congruence" demands that the congressional statute, viewed as an attempt to prevent or remedy constitutional violations, not be unduly overinclusive. Congress certainly need not limit itself to individual violations of the Constitution. Boerne explicitly reaffirms that Congress is free to write more general laws, explaining that "[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. City of Boerne v. Flores, 117 S. Ct. 2157, 2170 (1997). But if Congress adopts a law that indiscriminately sweeps in a broad array of otherwise lawful state and local practices, the very breadth of the law suggests that it cannot be understood as remedial.

A remedy is "proportional" if it is justified by the magnitude of the constitutional injury. "Strong measures appropriate to address one harm," the Court wrote in Boerne, "may be an unwarranted response to another, lesser one." 117 S. Ct. at 2169. As I understand the Court's opinion, however, the requirement of proportionality is not an independent variable; instead, it is closely related to the requirement of congruence.1 In particular, the nature and extent of the constitutional problem being redressed affect the degree of overinclusiveness that is permissible. A extremely broad congressional prohibition might be permissible in response to serious and widespread constitutional violations by state and local governments, especially if those violations would be difficult to prove through case-by-case litigation. For example, as the Court explained in Boerne, "strong remedial and preventive measures" have been upheld when they have been designed to redress the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." Id. at 2167. Conversely, if the constitutional problem is less severe, Congress must proceed more cautiously. Indeed, the less serious the constitutional problem, the more likely it is that broad legislation is designed not to remedy that problem, but instead to accomplish another end, such as the substantive redefinition of constitutional rights.

Question 2, Is it not just as illegitimate for the Court to alter the substantive meaning of the Constitution as it is for Congress? And is that not what the Court did in Smith and Boerne?

Answer 2. As I indicated in my original written statement, I believe that Smith reflects an unduly restrictive interpretation of the Free Exercise Clause; in my view, the Court was wrong to adopt this interpretation in Smith, and it was wrong to re-affirm it in Boerne. Even so, the meaning of the Free Exercise Clause is a matter of dispute, and, in our constitutional system, the Supreme Court has the primary responsibility for determining that meaning. As a result, I would describe the Smith interpretation as erroneous, but not illegitimate.

Question 3. Do you see any incongruity between the Court's notions of judicial su premacy under the 14th Amendment expressed in Boerne and the plain language of section 5, which names Congress as the enforcer of the Amendment, together with the vehement antipathy of many of the framers of the 14th amendment to contem porary Supreme Court decisions like Dred Scott (which was called a "horrid blas phemy" by John Bingham, the principal author of the 14th Amendment) and Ex Parte Milligan (which was called "a piece of judicial impertinence" by the then-Chairman of the House Judiciary Committee, Rep. Wilson)?

Answer 3. This evidence of the framers' intentions certainly is relevant to the scope of Congress' power under Section 5, and therefore to the question addressed in Boerne. At the same time, however, the Court's opinion presents substantial his torical evidence in support of its interpretation of Section 5, according to which Con gress' power to "enforce" is remedial only. See Boerne, 117 S. Ct. at 2164-66.

Question 4. Did the Court in Boerne make a mistake by seeing the options for Congress' role only as either making substantive change in rights or enforcing the Court's interpretation? Was Cooper v. Aaron rightly decided or does Congress have some role in offering interpretations of the Constitution? If so, what is that role?

Answer 4. In a 1995 law review article, I argued that as long as Smith remained the constitutional law of the land, the Religious Freedom Restoration Act (RFRA)—insofar as it applied to state and local governmental action—exceeded the power of Congress and therefore was unconstitutional. At the same time, however, I argued that the Supreme Court should treat the opinion of Congress, as reflected in RFRA, as highly relevant to the Court's own interpretation of the Free Exercise Clause. More specifically, I suggested that the congressional adoption of RFRA, coupled with

1 Indeed, the Court in Boerne did not clearly distinguish the two requirements. My discussion is designed to suggest how these two requirements can and should be understood. I believe that my explanation is consistent with the basic reasoning of Boerne, if not with all of the Court's specific language.

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other arguments concerning the proper meaning of the Free Exercise Clause, would support a Supreme Court decision rejecting the approach of Smith and returning to a more generous constitutional doctrine of religious freedom. See Daniel O. Conkle, "The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute, 56 Mont. L. Rev. 39 (1995). In Boerne, the Court ig nored the possibility that RFRA could be read to influence, but not control, the Court's Free Exercise doctrine.

Question 5. Some critics will raise the Establishment Clause any time religion is discussed outside a church. How would you respond to someone who might make an Establishment Clause objection, a la Justice Stevens, to religious liberty legisla tion of the type we are discussing?

Answer 5. If an accommodation required by RFRA-like legislation were deter-mined to exceed the limits of the Establishment Clause, a court would be required to reject that particular accommodation, for Congress clearly has no power to "re- strict, abrogate, or dilute" the meaning of any provision in the Bill of Rights, includ ing the Establishment Clause. See Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982).

Beyond this, however, one could argue that a RFRA-like scheme of religious ac commodations would promote religion to the point that the statute, on its face, would violate the Establishment Clause. I believe that this is the view of Justice Stevens, as expressed in Boerne. See 117 S. Ct. at 2172 (Stevens, J., concurring).

As long as the statute did no more than protect religion from governmentally im posed burdens, however, I believe that this sort of facial argument would be difficult to maintain. See Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987) ("There is ample room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without inter ference.' ") (citation omitted); id. at 338 ("Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular en tities. "); but cf. Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (invalidating a Texas sales tax exemption that was granted to religious literature, but not to other literature).

One recent Establishment Clause case suggests that a generalized, RFRA-like scheme of accommodations might actually mitigate one Establishment Clause con cern, the risk of selective accommodations that discriminate among similar religious claims. See Board of Educ. v. Grumet, 512 U.S. 687, 705-10 (1994) (rejecting an ac commodation argument, in part because of a concern that the state's preferential treatment for a particular religious group would not be extended to similar groups); id. at 706-07 ("[W]hatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among religions must be honored.") (citations omit ted).

If, following the approach of RFRA, a statute limited accommodations to the "ex ercise of religion," this in itself could raise an Establishment Clause issue. See Grumet, 512 U.S. at 715-16 (O'Connor, J., concurring in part and concurring in the judgment) (suggesting that accommodations must be extended, in a nondiscrim inatory fashion, to deeply held beliefs that are not traditionally religious). But as long as the legislation did not define the "exercise of religion," except by reference to the First Amendment, the Supreme Court could construe the term "religion" broadly enough to avoid any Establishment Clause issue that might otherwise be presented. Cf. United States v. Seeger, 380 U.S. 163 (1965) (avoiding constitutional questions by construing a military conscientious objector provision to extend to ob jectors not holding traditional religious beliefs); accord, Welsh v. United States, 398 U.S. 333 (1970).

Question 6. If the City of Boerne decision is wrong, which I think it is, is there anything we can profitably do about the mistakes in the decision short of amending the constitution?

Answer 6. In my original written statement, I outlined various sorts of legislation that Congress might wish to consider. I continue to believe that the most viable op tions are remedial legislation under Section 5 of the Fourteenth Amendment or leg islation grounded on the spending power.

Question 7. What would you say is Congress' role with respect to influencing the interpretation of the Free Exercise clause of the First Amendment or any other sub

stantive constitutional right?
Answer 7. As I have suggested in response to Question 4, I believe that the Su
preme Court should seriously consider the views of Congress when the Court itself
interprets constitutional provisions protecting individual rights. Notwithstanding
Boerne, moreover, I believe that Congress can and should attempt to influence the
direction of the Supreme Court's Free Exercise doctrine. The spending power may
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be ideally suited to this purpose. Through the enactment of spending-power legisla
tion, Congress could induce the States to protect religious practices even from laws
of general application. At the same time, Congress would once again be signaling
its disagreement with the Supreme Court's decision in Smith, potentially prodding
the Court to reconsider that ruling.
Question 8. Could you each flesh out more completely what are the contours of
the right in Smith and can you suggest anything we can do to ensure that courts
and other government actors give it as broad a reading as is justified?
Answer 8. In Smith, the Court held that general laws affecting religious practices
ordinarily do not violate the Free Exercise Clause. See Employment Div. v. Smith,
494 U.S. 872, 876-90 (1990). Instead, the Court suggested, religious practices are
constitutionally protected only from laws that target religion for special disadvan
tage—that is, from laws that discriminate against religion. Although the Court's un
derstanding of "discrimination" in this context is not entirely clear, it appears to
contemplate deliberate or purposeful discrimination against religion.
As I indicated in my original written statement, I believe that Congress could
adopt remedial legislation under Section 5 that would be designed to alleviate dif
ficulties in proving the existence of purposeful discrimination against religion, as
contemplated by Smith. For example, I believe that Congress could authorize a per-
missive inference, or perhaps a rebuttable presumption, of discriminatory purpose
upon a claimant's showing of substantially discriminatory effect. (The precise phras
ing of this sort of provision would be extremely important; for instance, I doubt that
Congress has the power to authorize an inference or presumption of discriminatory
purpose based merely upon the showing of a substantial, but nondiscriminatory,
burden on the exercise of religion.) I describe other remedial options in my original
written statement.
Question 9. Some witnesses alluded to the exceptions or limitations on the rule
in the Smith case. Could these be the basis of separate statutory protections? If so,
in what way, and could these exceptions and limitations be broadened beyond the
specifics listed in Smith to other analogous situations?
Answer 9. In its attempt to explain and preserve prior precedents, the Court in
Smith suggested that certain situations, including unemployment cases and hybrid
constitutional claims, were outside the scope of the general approach that the Court
was adopting. See Smith, 494 U.S. at 881-84.
I think it would be a mistake for Congress to attempt to define the meaning and
scope of these exceptions to the general approach of Smith. Legislation along these
lines probably would either (a) do no more than protect religious practices that the
Supreme Court would protect independently or (b) exceed the limits of Congress'
Section 5 power by redefining the substantive meaning of the Constitution. (For
similar reasons, I do not think Congress should attempt to define the meaning of
"compelling governmental interest," nor should it attempt to indicate what sorts of
interests do or do not qualify.)
Question 10. Are there significant modifications of Smith in the Church of the

Lukumi or City of Boerne cases? If so, what are they and what does this suggest about what we might most profitably do with legislation in this area, especially with regard to enforcement under Section 5 of the 14th Amendment?

Answer 10. One could argue that Smith itself, coupled with the Supreme Court's subsequent decision in Church of the Lukumi Babalu Aye, Inc. y. City of Hialeah, 508 U.S. 520 (1993), should be interpreted to require Free Exercise protection from a variety of laws that require individualized governmental assessments or that oth erwise have a discriminatory effect on religion—even in the absence of a discrimina tory purpose. If so, then remedial legislation under Section 5 might permissible go even further, extending its reach to state and local laws and practices that are likely to reflect the constitutionally forbidden discriminatory effects.

The difficulty with this argument, however, is that it depends on a disputed inter pretation of Smith and Lukumi. To be sure, Smith suggested that as compared to general laws, situations involving "individualized governmental assessments" would be more likely to trigger serious judicial scrutiny under the Free Exercise Clause, and Lukumi makes clear that a law having a dramatically discriminatory effect on religion is likely to be invalidated under the Clause—if only because that sort of ef fect makes evident the law's discriminatory purpose. See Smith, 494 U.S. at 884; Lukumi, 508 U.S. 520. In the absence of unusual or special circumstances, however, the Supreme Court is unlikely to find that the Free Exercise Clause, standing alone, has been violated in the absence of purposeful discrimination against religion. This is all the more so after Boerne, in which the Court described the rule of Smith and Lukumi as a prohibition on governmental action tainted by "the unconstitutional ob ject of targeting religious beliefs and practices." See Boerne, 117 S. Ct. at 2168.

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Despite my reading of the cases, however, a more expansive interpretation of Smith and Lukumi certainly is possible. But this possibility itself creates a potential problem in the crafting of remedial legislation. In the absence of congressional legis lation, litigants might advance their interpretive arguments in the courts, poten tially expanding the constitutional protection available under the Free Exercise Clause. Conversely, congressional legislation, in order to avoid the risk of invalida tion, probably should accept a narrow understanding of Smith and Lukumi—that is, one that finds unconstitutional discrimination only in the presence of purposeful discrimination against religion. This congressional approach, however, could have the effect of conceding a narrow understanding of the Free Exercise Clause, and it therefore could tend to impede a favorable evolution of judicial doctrine on this point.

Question 11. Is the standard for judging "neutral and generally applicable laws" in Smith more in the nature of disparate impact or subjective intent to discriminate or does it have components of both?

Answer 11. I believe that the Court's analysis of whether laws are "neutral and generally applicable" is designed, at least primarily, to ferret out laws that involve a deliberate or purposeful discrimination against religion. A more expansive inter pretation of Smith and Lukumi is possible, however, and it might eventually be adopted by the Supreme Court.

Question 12. It has been argued by some commentators that Smith was decided largely on so-called "institutional" concerns—namely that the courts are less-well placed to make decisions about weighing the relative merits of legislative priorities and values. But this appears to get confused in Boerne, especially (ironically) in Jus

tice Scalia's concurrence, where the Court is seen as the one laying down broad rules and the state and local legislatures are the institutions that are to apply the abstract rules of the Court to concrete cases. Does this not turn the traditional divi sion of labor between the legislative and judicial branches on its head?
Answer 12. Case-by-case decisionmaking is, indeed, the hallmark of the judicial process, so the "institutional" reasoning of Smith cannot be explained apart from the particular context of the Court's decision. In my view, Smith was grounded not only on institutional reasoning, but also on other, more substantive considerations—in cluding a particular understanding of religious equality, as well as a concern for the rights and prerogatives of the States.
Question 13. Can we abrogate state sovereign immunity for each of the powers we might use or is there a different rule under Seminole Tribe for each power we consider?
Answer 13. I am not an Eleventh Amendment scholar, and so I answer with some hesitation. As I read Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), however, legislation grounded on Congress' power over interstate commerce cannot abrogate the Eleventh Amendment immunity of the States. By contrast, when legis lating within the proper scope of its power under Section 5 of the Fourteenth Amendment, Congress is free to abrogate Eleventh Amendment immunity, as long as it clearly expresses its intent to do so. See Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976); see also Seminole Tribe, 116 S. Ct. at 1125; id. at 1131 n.15 (noting that Congress' Fourteenth Amendment authority to abrogate Eleventh Amendment immunity is "undisputed ").
Like its power over interstate commerce, Congress' power to implement treaties is based upon Article I of the Constitution. As a result, I suspect that Seminole Tribe would be controlling in the context of treaty-implementing legislation, and that any attempt to abrogate Eleventh Amendment immunity would be ineffective. Congress' spending power also derives from Article I, but the force of spending-power legislation actually rests on the funding recipients' agreement to be bound by the spending conditions contained in the legislation. It would seem, then, that Con gress could simply require that States consent to federal-court enforcement as one of the conditions attached to the federal funding in question. In doing so, however, Congress would have to "manifesto a clear intent to condition participation in [the relevant funding programs] on a State's consent to waive its constitutional immu nity." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 247 (1985). As I suggested in my original written statement, moreover, there is a chance that the Supreme Court might find new limits on the spending power, limits that could affect the fed eral enforcement mechanisms that might otherwise be available.
Question 14. Some have been disappointed in the way that RFRA has been ap plied in the Courts—?that judicial interpretation has weakened the protections of the legislation. Could some of the procedural reforms contemplated for section 5 en forcement after Boerne actually be useful to strengthening RFRA'S application in the courts, and might they actually go a substantial distance—perhaps even be more ef-
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fective—in accomplishing the goals of RFRA, even when they alone are applied to the states and localities?
Answer 14. Remedial legislation under Section 5 could benefit religious freedom to a degree, and it certainly is worthy of consideration. In light of Boerne, however, this form of legislation would have to focus on the problem of discrimination against religion. As a result, it would not directly advance what I regard as the basic objec

tive of RFRA—to provide relief from nondiscriminatory governmental action that has the incidental effect of burdening religious conduct.

Question 15. Are there other improvements upon RFRA that we should consider as we look at this issue again either in the federal or the state context?

Answer 15. Many of the judicial interpretations that weakened the force of RFRA were based upon the statute's "substantial burden" requirement. Others arose in the context of prisoner claims. In the drafting of any new legislation, Congress might wish to consider (a) reformulating RFRA's substantive language, including espe cially the "substantial burden" requirement, and (b) adopting an explicitly different standard for prisoner cases, so that the results in prisoner cases do not adversely affect the results in non-prisoner cases. These suggestions are based upon the re-search and analysis of Professor Ira C. Lupu of the George Washington University Law School. See Ira C. Lupu, "The Failure of RFRA," 20 U. Ark. Little Rock L.J. (forthcoming 1998).

Question 16. Is there any way to guard against judicial narrowing of either the standards we establish or the Supreme Court establishes to protect religious liberty in the drafting of legislation?

Answer 16. In formulating its legislation, Congress obviously should be as clear and specific as it can be—although this may not be easy in the present context. In addition, Congress should consider a separate standard for prisoner cases, as sug gested in response to Question 15.

Question 17. On the use of the Spending Power, would you agree that limiting application to state and local government action is closer to the original spirit of RFRA and the Free Exercise clause than application to private recipients? Does this coverage question make any difference constitutionally?

Answer 17. I agree with your suggestion that any spending-power legislation should be limited to state and local governments. I doubt that this limitation would affect the constitutionality of the legislation as applied to state and local govern ments, although it is conceivable that this could make a difference if the Supreme Court were to identify new limits on the spending power.

Question 18. How tight a fit must there be under the Spending Power? In South Dakota v. Dole the fit did not seem too tight between setting a minimum drinking age and highway funds, even if the goal is generalized to be ensuring "safe inter-state travel." The agencies charged with administering the highway funds and the drinking age may not have even been the same agencies. Do you think that the small percentage of money at risk was a factor in the Dole case or is there simply substantial latitude here?

Answer 18. In rejecting South Dakota's "coercion" argument, the Supreme Court in Dole described the five percent financial incentive as relatively minor encourage ment," so the small percentage of money at risk may have been a factor in the Court's decision. See South Dakota v. Dole, 483 U.S. 203, 211 (1987). More gen erally, however, I think that Dole does give Congress substantial latitude in the adoption of spending-power legislation, and I believe that this sort of legislation—within the limits discussed in my original written statement—might be the best con gressional response to Boerne.

For further discussion of the spending power and of the "relatedness" requirement for spending-power legislation, please refer to my response to the question from Sen ator Kennedy.

Question 19. Do you notice an inherent tension between the language of the 14th Amendment's promise of equal protection and the Court's decision in Boerne to leave

decisions about free exercise accommodations to be decided jurisdiction by jurisdic
tion instead of nationally, especially given Justice Scalia's notion in his concurrence
in Boerne that "the people" in each state and locality will determine the application
of free exercise norms in "concrete cases" and his candid admission in Smith that
smaller, less well-known sects will be at a "relative disadvantage" in the legislative
forum? If so, what are we to do in the face of these constitutional anomalies?
Answer 19. I agree that Smith reflects an unduly restrictive interpretation of the
Free Exercise Clause—an interpretation that permits state and local governmental
action that, in my view, should be constrained by national constitutional norms. The
rule of Smith does protect against discriminatory lawmaking and, to that extent, it
continues to recognize a national constitutional norm—an "equal protection" re-
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quirement of sorts—in the context of religious freedom. But I agree that this is not
sufficient.
Question 20. Do you see any risks in attempting to define religious activity as
interstate commerce in an effort to protect religious exercise under the Commerce
clause?
Answer 20. Yes. I think it would be difficult to draft legislation that would both
(a) support the Commerce Clause theory of congressional power and (b) address the
non-economic burdens about which Congress presumably is most concerned, that is,
burdens resulting not from the economic costs of governmental regulation, but rath
er from the conflicts that can arise when secular obligations conflict with the de
mands of religious conscience. More generally, for the reasons identified in my origi
nal written statement, I think that Congress' power over interstate commerce prob
ably would not support RFRA-like legislation, so the definitional exercise would
probably be futile.
Question 21. Mr. Chemerinsky made the point that most free exercise claims chal
lenged "neutral and generally applicable laws" of the type Smith decided
were not
subject to strict scrutiny. I would ask Mr. Chemerinsky to explain why that is so,
and ask each of you to respond to that.
Answer 21. As I have suggested in response to Question 11, I believe that laws
not involving deliberate or purposeful discrimination against religion will ordinarily
be regarded as "neutral and generally applicable laws. In the contemporary United
States, laws that purposefully or deliberately discriminate against religion are quite
uncommon. Rather, the vast majority of laws—even those that burden religious
practices in particular applications—are laws that the Supreme Court would regard
as nondiscriminatory; that is, the Court would regard them as "neutral and gen
erally applicable laws."
One could argue that governmental officials in the contemporary United States,
in general, are inclined to appreciate and support the exercise of religious freedom.
Witness, for example, the overwhelming congressional support for RFRA itself. In
any event, there is little evidence that governmental officials, in general, are in
clined to discriminate against religion in a manner that would violate the standard
of Smith. As a result, it is not surprising that most Free Exercise claims have in
volved a very different problem—the problem of nondiscriminatory governmental ac
tion that has the incidental effect of burdening religious conduct.
Question 22. Can we abrogate state sovereign immunity for each of the powers
we might use or is there a different rule under Seminole Tribe for each power we
consider?

Answer 22. Please refer to my response to Question 13.
Question 23. In the Casey plurality opinion of Justices Kennedy, O'Connor and Souter, these Justices were concerned that if the Court reinterpreted past precedent "under fire" or because of a context of political pressure that such decision would seriously undermine the Court and the rule of law. Is not a clearly expressed opin ion of co-ordinate branches of government, which are closer to the opinion of the people, pretty good evidence that the Court has gotten it wrong, rather than a rea son for the Court to dig in its heels?
Answer 23. As indicated by my responses to Questions 4 and 7, I believe that Con gress has a role to play in influencing the Supreme Court's interpretation of the Constitution. The opinion of Congress, in my view, cannot and should not trump the Supreme Court's independent judgment concerning the meaning of the Constitution. But congressional judgments always are entitled to respectful judicial consideration.
Question 24. Were there any issues raised at the hearing that you would like to comment further on or additional questions you believe should be addressed for the benefit of the Committee? If so, please do so.
Answer 24. Thank you for this opportunity, Senator Hatch, but I have nothing to add at this point.
RESPONSES OF DANIEL O. CONKLE TO QUESTIONS FROM SENATOR KYL
To the following questions, please provide detailed answers with citations to rel evant case law and articles.
Question 1. After Boerne, how broad is Congress' power to "enforce"?
Answer 1. In Boerne, the Court reaffirmed that Congress can enact "remedial or preventive legislation" to enforce not only the Fourteenth Amendment as such, but also the Fourteenth Amendment's incorporation of Bill of Rights standards, such as those of the Free Exercise Clause. City of Boerne v. Flores, 117 S. Ct. 2157, 2163-64 (1997). The essence of Section 5 power has always been remedial, and Boerne
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continues to recognize that Congress has "wide latitude" in the exercise of this power. See id. at 2164.
Question 2. What does "to enforce" mean? What powers are included within that phrase?
Answer 2. In the exercise of its remedial, enforcement power, Congress can create criminal or civil remedies for individual violations of the Fourteenth Amendment, including the Fourteenth Amendment's incorporation of Bill of Rights standards. It also can modify or abbreviate the case-by-case process of adjudicating constitutional claims. Thus, Congress can adopt statutory provisions that are designed either to ensure that prior violations of the Amendment are fully remedied or to guard against the risk of future violations. See Daniel O. Conkle, "The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute," 56 Mont. L. Rev. 39, 42-45 (1995). As the Court wrote in Boerne, "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself un constitutional ** *" Boerne, 117 S. Ct. at 2163. The Court cited with approval a series of prior decisions granting Congress broad leeway in its exercise of remedial power, including South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); and City of Rome v. United States, 446 U.S. 156 (1980). See Boerne, 117 S. Ct. at 2163.
Although Congress' remedial power is broad, it is not without limit. Previous cases had suggested that Congress' remedial judgments must be "rational,"2 and

Boerne confirms this approach. Thus, although Congress retains "wide latitude," its lawmaking must reasonably be understood as an attempt to vindicate constitutional rights—that is, constitutional rights as the Supreme Court has defined them. In order to satisfy this condition, according to Boerne, "There must be a congruence and proportionality between the injury to be prevented or remedied [that is, viola tions of the Constitution, as understood by the Supreme Court] and the means adopted to that end." Boerne, 117 S. Ct. at 2164.

For an explanation of the Court's requirements of "congruence" and "proportion ality," please refer to my response to Question 1 from Senator Hatch.

Question 3. What things is Congress not allowed to do under its enforcement power?

Answer 3. In Boerne, the Court rejected the argument that Congress has a non-remedial, "substantive" power under Section 5—that is, a power to redefine the meaning of constitutional rights. Boerne, 117 S. Ct. at 2162-68. In so doing, the Court limited its earlier decision in Katzenbach v. Morgan, 384 U.S. 641 (1966), which arguably had implied that a substantive power did or might exist. Boerne, 117 S. Ct. at 2167-68.

Boerne thus makes clear that Congress is limited to the "enforcement" of the Su preme Court's substantive understanding of the Constitution; Congress is not per mitted to modify the substantive content of constitutional rights. Congress "has been given the power 'to enforce,'" the Court reasoned, "not the power to determine what constitutes a constitutional violation." Boerne, 117 S. Ct. at 2164. In reaching this conclusion, the Court relied not only on the text of Section 5, but also on the history of its enactment as well as early and more recent judicial interpretations of its meaning. See id. at 2162-68.

This limiting effect of Boerne, however, should not be exaggerated. A theory of substantive power was, at best, an alternative ground of decision in Morgan; the Court had not relied on the substantive theory in its other Section 5 cases; and there had been judicial statements expressing doubts concerning the validity of such a theory. See Conkle, supra, 56 Mont. L. Rev. at 46-53.

Question 4. What if Section 5 of the 14th Amendment said "to enforce and imple ment"?

Answer 4. One could argue that this phrasing would enhance the power of Con gress, but it is not clear that it would have that effect. The word "implement" might be taken to expand the power of Congress, or it might be read to be largely synony mous with "enforce."

2 See, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) ("Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."); City of Rome v. United States, 446 U.S. 156, 177 (1980) ("Congress could rationally have con cluded that, because electoral changes by jurisdictions with a demonstrable history of inten tional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.").

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RESPONSE OF DANIEL O. CONKLE TO A QUESTION FROM SENATOR KENNEDY

Background: Professor Conkle, your testimony provides an excellent overview of the statutory alternatives available to Congress after the Boerne decision. At the end of your testimony, however, you identify the Spending Clause as one of the two most viable alternatives—but not without some concern.

One of your concerns is that if the Supreme Court views congressional legislation as an attempt to circumvent its Boerne decision, the Court may tighten limitations

on Spending Clause authority. For example, the Court may tighten the so-called "re latedness test" that requires conditions imposed on the expenditure of federal funds be "reasonably related" to the purpose for which the funds are expended.
Your concern is bolstered by Justice O'Connor's dissent in the South Dakota v. Dole decision. In her dissent, Justice O'Connor expressed keen displeasure with the majority's application of the "relatedness" standard. Today, only three members of the Dole majority remain.
Question. How concerned should Congress be about using the Spending Clause au thority given the concerns you have raised and the current composition of the Court?
Answer. Thank you, Senator Kennedy, for your comment on my testimony.
I think your question is extremely important, and I agree that there is some rea son to be concerned.
In the wake of recent Supreme Court decisions, including United States v. Lopez, 514 U.S. 549 (1995), some scholars have urged the Court to repudiate Dole and thereby cabin Congress' power under the Spending Clause. See, e.g., Lynn A. Baker, "Conditional Federal Spending After Lopez," 95 Colum. L. Rev. 1911, 1914 (1995) ("a reexamination of Dole should be next on the Lopez majority's agenda "); id. at 1916 (proposing that "the Court presume invalid that subset of offers of federal funds to the states which, if accepted, would regulate the states in ways that Con gress could not directly mandate under its other Article I powers "). If the Supreme Court perceives congressional legislation as an attempt to circumvent Boerne, more-over, that might give the Court added reason to develop new limits on the spending power.
Despite arguments along this line, however, I think that an outright repudiation of Dole is quite unlikely. Dole is a relatively recent decision, and it was decided by a vote of seven-to-two. See South Dakota v. Dole, 483 U.S. 203 (1987). As you point out, only three members of the Dole majority remain on the Court, but it is notable, I think, that two of those three are Chief Justice Rehnquist and Justice Scalia, jus tices who are among the current Court's most forceful advocates of states' rights. Indeed, Chief Justice Rehnquist authored the majority opinion in Dole, over the dis sent of Justice O'Connor.
Most of the Supreme Court's recent decisions limiting the power of Congress have been five-to-four rulings, with the majority being composed of Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor, and Kennedy. See, e.g., Lopez, 514 U.S. 549 (commerce power); Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996) (11th Amendment); Printz v. United States, 117 S. Ct. 2365 (1997) (state sovereignty). Unless Chief Justice Rehnquist and Justice Scalia both were to disclaim the views they expressed in Dole, it is doubtful that there would be five votes to overturn that decision.
Although an outright repudiation of Dole is not likely, I do believe that there is some possibility that the Court, without renouncing the basic approach of Dole, might nonetheless find new limits on the spending power, limits that might include an invigorated understanding of the "relatedness" requirement. As a result, I would recommend that Congress refrain from testing the limits of the spending power, and that it craft its legislation in the manner suggested in my original written state ment. In particular, I believe that Congress should impose spending conditions only on a program-by-program basis (although this could be accomplished through gen eral legislation). Whether Congress should be even more cautious is a difficult ques

tion. As I indicated in my original written statement, the most cautious approach—some would say an unduly cautious approach—would adopt a relatively narrow definition of "program or activity," and it would not authorize private enforcement of the conditions as a matter of federal law.

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Despite the potential hazards, I continue to believe that spending-power legislation might be the best response to Boerne. Properly crafted, it would be quite likely to survive judicial review, and it could push the law of religious freedom in the right direction.