S. HRG. 105–405

CONGRESS' CONSTITUTIONAL ROLE IN PROTECTING RELIGIOUS LIBERTY

HEARING

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

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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 morning to begin our discussion of what Congress may do to protect 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 [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 Hashana, 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 religious liberty.

I hope that we will begin here to make substantial steps toward greater deference to religious belief and practice, and that government 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 practice that belief as we wish without government interference. This promise of the freedom of worship is, for many, the country's founding and guiding principle, the Pilgrims' reason for braving thousands and thousands of miles of dark and dangerous seas and countless privations just to arrive here, and privations when they got here.

As one scholar has noted, "While only a few important immigrants bear the name Pilgrim in American myth, most of the new arrivals [in America] came as Pilgrims from other lands—and Pilgrims 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 government, 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 becomes 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 Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

This acknowledgment of the precedence of duty to God over demands 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 exercise claims, holding that, as a general matter, neutral and generally applicable laws will be upheld against free exercise challenges, no matter how onerous the burden on religious practice, unless 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 itself. 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 Religious 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 disappointment 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 appropriate bounds of our power.

Hence, we are here to discuss what options the Congress has before 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

Court's current posture. We also need to continue the discussion with the Court about our respective roles as co-equal branches operating 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 religious 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

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 PROFESSOR OF LAW, UNIVERSITY OF MINNESOTA, MINNEAPOLIS, MN; ERWIN CHEMERINSKY, SYDNEY M. IRMAS PROFESSOR OF LAW AND POLITICAL SCIENCE, UNIVERSITY OF SOUTHERN CALIFORNIA, LOS ANGELES, CA; AND DANIEL O. CONKLE, PROFESSOR OF LAW AND NELSON POYNTER SENIOR 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 problem. 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. Differentially 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 religious 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-

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 religious 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 questions.

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 Justices believe they have delivered the best possible interpretation of the Constitution. But respect does not mean immunity from criticism, and the *Boerne* opinion has serious 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 liberties 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 vision, 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 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 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 designed 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 statute. 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 disagreement about what would count as a violation. The facts relevant to this proportion did not get much attention in the briefing, because no one had reason to anticipate that such facts would be dispositive. In any event, facts about the relative magnitude of societal problems should be legislative facts, not judicial ones.

The standard of "congruence and proportionality" is inherently vague, and the litigation process is probably incapable of producing good data on the relevant proportions. Under this standard, it is little more than guesswork to decide which enforcement legislation is valid and which invalid. With respect to future legislation, Congress would be well advised to compile a detailed factual record of constitutional violations 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 suggests 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 precedent. 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 earlier 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 responses 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

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 judicial 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 neutrality and general applicability. *Lukumi* compared the local ordinances regulating religious practices to a broad range of other state and local laws dealing with analogous 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

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* illustrates. 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 applicability. Senators must resist the temptation to bash the Court by exaggerating the harm it has caused; the unexaggerated harm is quite enough to justify Congressional 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 affecting 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 regulation 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

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 subject 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 interprets it, providing stronger remedies and facilitating proof of violations in cases where proof is difficult. If the connection between judicial interpretation and Congressional 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 *Employment Division* v. *Smith.* Plainly the Court means to require a more detailed factual record than Congress 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 Enforcement 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 violate the Constitution as the Court interprets it. And the Court may well uphold

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 impact on churches, which is administered through highly discretionary and individualized 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 administered 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 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 cannot be. But so many churches would not be investing so much effort in litigation 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 manipulable; 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 applied 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 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 legislation even under *Boerne*. Indeed, to subject the location of churches to the zoning and landmarking procedures in many jurisdictions is to subject the First Amendment 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).

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 standards 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 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 inevitably 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 process can easily gather anecdotal evidence. Systematic quantitative evidence is scarcer, partly because the studies have not been done, and partly because few people consciously admit to bigotry even when they are guilty. Despite these difficulties, the Gallup Poll has gathered some remarkably revealing information.

In 1993, 45 percent of Americans admitted to "mostly unfavorable" or "very unfavorable" 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 fundamentalists" as neighbors, and 62 percent said they would not like to have "members 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 members 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 Student Affairs) "manifested a degree of antipathy toward members of [Christian Student 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 refused 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 available. Judges are reluctant to impute bad motive to government officials. And although 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 minority 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

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 liberty 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 practice, suits for personal injury and other torts, and suits by individuals whose religious 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 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 University*, 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." 117 S.Ct. 2171. 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 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 contributions made in good faith. Congress could at the same time address the related problem 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 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 particularly important to provide for private enforcement in Spending Clause legislation; it is ex-

tremely unlikely that any federal grant will be revoked because of one or a few incidents 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 Supreme Court has already held and not taking action that is in conflict 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 appropriate 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, Congress may enforce the Free Exercise Clause as expounded by the Supreme Court in *Employment Division* v. *Smith* and *Boerne,* establishing remedies, presumptions, procedures designed to enforce the core religious liberty interests already identified by the Supreme 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 constitutionally 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 liberties standards consistent with the standard of RFRA.

These steps would protect religious liberty in substantial measure. 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 envelope, 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 invalidating 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 committee is you may stay well within the bounds of power that the

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 significant 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 consider what further measures might be in order, exercising its more strenuous constitutional powers with respect to appointments, appropriations, 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 generally. *City of Boerne* invalidated the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. ("RFRA"), as applied to state governments. A constitutional amendment 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 parameters 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 identified by the Court, including rights of religious belief, institutional autonomy, parental 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 governmental 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 religious 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 attempt 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-

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 appropriate, within the constitutional powers of the Congress over matters of appointments, 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 procedure, law and religion, and legal ethics. My primary area of research and scholarship 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 numerous academic articles in these areas. In addition, I have been involved as counsel 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 Constitution.

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 understanding of religious liberty under the Free Exercise Clause of the First Amendment. 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 assure 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 constitutional framework. A constitutional amendment correcting the Supreme Court's decision would be an appropriate and important way for Congress to protect individual 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 Supreme 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 decisions of the Supreme Court, to advance the agreed goal of protection of the free exercise of religion under the First Amendment?

The theme of my testimony today is that, notwithstanding *City of Boerne,* the Supreme 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 decisions. 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

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 affirmed (in *Smith*, *Boerne*, and other cases) the constitutional right of religious liberty. This may be done pursuant to Congress's power under section five of the fourteenth 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 pronouncements. See, e.g., *City of Boerne*, 117 S.Ct. at 2169 (considering the "object" and "purpose" of RFRA in seeking to determine whether there existed a "congruence" between 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 cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. ").

In my opinion, it is therefore important for Congress to be clear in any new statute 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 Congress 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 alternative, more constructive way of thinking of this: Congress is showing its willingness to "go the second mile" in accommodating itself to the Supreme Court's precedents. 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 jurisdiction, 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 (deserved or not) about Congress's good faith. Thus, as I will argue below, I think Congress 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 coverage 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 construing the Commerce Power and Treaty Power more narrowly than before, or distinguishing (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

Congress's exercise of this power had been upheld. Nobody, I trust, wants that. Nobody wants another *Boerne*-style decision narrowing Congress's power to enact constitutional protections of religious or civil rights. Nobody wants this to be an exercise 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 Supreme Court. Congress may express its respectful disagreement with the Court's decisions, but it should emphasize that its present effort seeks to put such disagreement 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, I 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 remedies, 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 governments.

Congress should in my opinion eschew reliance on the Commerce and Treaty powers 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 application 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 Supreme Court in *Employment Division* v. *Smith* and other cases. *Smith* is often discussed in terms of the religious liberty it denied. In considering Congress's enforcement 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. *Verner,* 374 U.S. 398, 402 (1963)).
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> 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).
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> 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 benefits, 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).
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> Fourth, *Smith* expressly embraced and reaffirmed those prior decisions of the Court that had recognized the right of autonomy of religious institutions 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 Or-*

thodox Diocese v. *Milivojevich,* 426 U.S. 696, 708–725 (1976)). *See also Corporation 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 membership in religious organization).

Fifth, both *Smith* and *City of Boerne* expressly affirm the right to free exercise of religion, free from government interference (absent a compelling interest), when the claimed right of religious liberty is allied with other constitutional liberty interests. In this regard, the Court has expressly affirmed "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 restrictive means. The Court in both *Smith* and *City of Boerne* likewise affirmed 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 compelling 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-recognized 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 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. 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 concerning the areas in which religious liberty has received judicial recognition and protection, 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

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, the 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

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[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 Congress' 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 possibility 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 combination 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, freedom of association, and parental freedom to control their children's education as firmly established 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 exercise 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 Council*, 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 amendment), *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.

compelling simply because it entails a policy within the ordinary constitutional powers 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 religion—may well reflect an improper purpose of attempting to target a specific religious practice, religious group, or religion in general, for adverse treatment. The Supreme 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 constitutional violations.

Nonetheless, there clearly are measures that Congress may take that are much more clearly aimed at the pervasive problem of hidden motives, suspicious government conduct, shifting official explanations for official actions, and the like. Religious 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 consequently that religious liberty under the Free Exercise Clause is severely underenforced 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 motivations 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 articles), and "decent." Brittney Settle had difficulty deciding on a topic, and eventually proposed to write about "The Life of Jesus Christ." Her teacher rejected the proposal, 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 "inappropriate because * * * it was dealing with [Brittney's] personal religion, her personal 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 expression. The teacher had given the students essentially free rein in deciding what topics 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

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[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 government. Michael Stokes Paulsen, "A RFRA Runs Through It: Religious Freedom and the U.S. Code," 56 Montana L. Rev. 249, 263–283 (1995).

constitutionally impermissible to allow a student to write on a topic concerning traditional 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 action.) 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 stated that Brittney had failed to receive permission to write on the topic before handing 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 [are] 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 individuals 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 reality of such situations by establishing administrative rules, evidentiary presumptions, and burden shifting requirements that are designed to effectuate and protect these constitutional rights. Some that I would suggest as possibilities are the following:

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 situations. Where a substantial burden on religious exercise has been established, it is entirely appropriate that the ordinary presumption in favor of the propriety of government policy be forfeited. (This is similar to "disparate 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 convincing" evidentiary standard. This would assist in vindicating meritorious religious freedom claims, while at the same time enabling government reasonable 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 onerous 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.

could be allowed for a response. Such an administrative requirement would serve an extremely important purpose: It would prevent shifting explanations 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 plaintiff's request could be treated as evidence of improper motivation on the part of the government official or agency involved, and thus as presumptive 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 experience 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 almost 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 explanation that, standing alone, would constitute a violation of the Free Exercise 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 unconstitutional action or motivation, where admitted, is not cured by the possible presence of an additional ground for the government action that would have been proper. This again is an eminently reasonable approach for Congress to prescribe as a matter of evidence and proof: If evidence or admission 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 absent 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* establishes 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 immunity for damages, and perhaps provide for statutory or presumed damages (in addition to whatever declaratory and injunctive relief may be appropriate) for violations of a Free Exercise Clause enforcement statute. As dis-

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 federal 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 funding 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 constitutionally valid. *South Dakota* v. *Dole,* 483 U.S. 203, 207–208 (1987). Here, the requirement of religious accommodation within federally funded programs is intended to promote the general welfare by avoiding burdens that might deter or prevent religious 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 religious 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 language 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 assistance in any of its educational programs can be forbidden from discriminating against student religious expression in a limited open forum created by a school district 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).

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, including 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 particular formulation can be considered "safe" will depend on the exact language employed. I do not have a proposal for specific language, however. Nor can I state unequivocally 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 applications, 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 religious 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 because 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 spending 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 reasonably have been expected to know that general language establishing Congress's preferences, goals, and findings, would create determinate substantive legal obligations 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 unconstitutional 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

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 coverage 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 diminution 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 autonomy, 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 commerce 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 affirmatively compelled states to enact or to carry out a regulatory program; a religious liberty statute would simply pre-empt certain state regulatory authority in matters affecting interstate commerce, where the state regulatory program imposed substantial burdens on religious liberty without compelling justification. But *New York* and *Printz*, combined with *Lopez*, are strongly indicative of an attitude of judicial hostility toward expansive applications of the commerce power in ways that tread on traditional state prerogatives and state autonomy, suggesting that the Court is moving 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 commerce. 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 properly, operate only as a restriction on the power of state and local governments. Essentially, 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 commercial 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 Supreme 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 applications of congressional powers even in areas where aggressive or innovative applications 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 of 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" provision 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 commerce 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 commerce 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 possess, 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 religious 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 acceptable 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 enforcement 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 Supreme 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.

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[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 carrying 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) ("Congress 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.

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 Restoration 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 Restoration 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 section 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 existence of other rights. Where are these other rights to come from? Through congressional action. A simple example: There is no constitutional 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 constitutional right to be protected from neutral laws of general applicability. But Congress could create a statutory right protecting individuals, 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 remedial 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 demonstrate that neutral laws of general applicability across the country 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

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 mechanisms.

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 whether Congress may reenact a Religious Freedom Restoration Act that is likely to withstand Supreme Court scrutiny. My conclusion is that such a law is an essential protection 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 exercise of religion is necessary and desirable. The Supreme Court's decision in *Employment Division* v. *Smith,* 494 U.S. 872 (1990), dramatically lessened the protections for religious freedom in the United States. Prior to *Smith,* government actions significantly 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 always 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 general 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: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others 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 constitutional 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 disagrees with a Supreme Court decision that refused to find a right in the Constitution. Some critics of the Religious Freedom Restoration Act emphasized that Congress should not be able to overrule the Supreme Court's "reading" of the Constitution. 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 incompatible 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. Congress, 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 impose a substantial burden on interstate commerce. Congress might point, for example, 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 free exercise of religion and commerce is not an obvious one and the greater the documentation of a substantial effect on commerce the higher the likelihood that the Supreme Court ultimately would uphold the law.

A second approach available to Congress would be to reenact the Religious Freedom 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 reenact 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 Supreme 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 matters of enormous constitutional significance relating not merely to religious liberty, but also to the proper role of Congress, the Supreme 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 religious 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 suggests that Congress should respect the roles of other constitutional

actors, including the Supreme Court of the United States and including the States, in attempting to help define the proper protection 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 enormous 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 published in 1995, "The Religious Freedom Restoration Act: The Constitutional Significance 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 essentially 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 Religious Freedom Restoration Act (RFRA)—insofar as it applied to state and local governmental action—exceeded the power of Congress and therefore was unconstitutional. In this respect, of course, my article foreshadowed the Supreme Court decision 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 governments. As an opponent of the *Smith* decision and as a supporter of religion-based exemptions from general, nondiscriminatory laws that unduly burden religious practices, I am quite sympathetic to the basic substantive policy that RFRA was designed to implement. From my perspective, then, the questions at this point are basically questions of means: what sorts of congressional action would be constitutionally 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, including 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 responses to *Boerne*. I will address the following statutory possibilities: RFRA-like legislation grounded on Congress's power over interstate commerce or its power to implement 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 Establishment Clause stands in the way of RFRA-like legislation,[1] and so I will focus

[1] Justice Stevens filed 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 spending power, would rest on considerably stronger constitutional footing, although they probably could not accomplish the full objective of RFRA. In conclusion, I will suggest 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 contexts, 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. *Florida*, 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 legislation, 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 treaties.

A. Congress'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. 111, 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 subject to interpretation, the Court suggested that the Commerce Clause ordinarily does not authorize the regulation of non-economic activity, even if that activity affects interstate commerce. At the very least, *Lopez* means that any congressional attempt to regulate such activity will be subject to serious judicial scrutiny.

Lopez may present a problem for RFRA-like legislation grounded on the Commerce 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-

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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 Little 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.

acter of some religious conduct might be to miss the point. Read literally, *Lopez* suggests 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 reluctant to uphold the RFRA-like legislation unless the state and local governmental activity 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.

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[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 public sectors alike. In light of the Supreme Court trend of federalism decisions, the current validity of *Garcia* may be an open question.

Although RFRA-like legislation might not directly require state lawmaking or state executive action, it would appear to violate the basic principle of state sovereignty that *New York* and *Printz* are designed to protect. In particular, such legislation 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 exemptions 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 regulates 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 support 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 teaching." 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 freedoms of others." As Professor Neuman argues, Article 18 appears to call for the protection 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 Supreme Court's decisions in *Smith* and *Boerne*. And Congress has the power to implement 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 reservations 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 reenactment" of RFRA would appear to go well beyond what Article 18 requires. Article 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 Supreme Court might not regard the legislation as a rational or reasonable implementation 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 legislation 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 reflecting 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 entirely 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 assessment, 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 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). At the same time, however, the Court rejected the argument 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 reli-

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[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).

gion. 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 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 regulate 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 discriminatory effect on religion, that would shift the burden of going forward with the evidence to the government, requiring the government to thereafter present evidence 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 findings. According to *Boerne,* Congress has the power to address governmental practices that "have a significant likelihood of being unconstitutional" under *Smith,* even if the congressional legislation sweeps in "conduct which is not itself unconstitutional." See *Boerne,* 117 S. Ct. at 2170, 2163. Because *Smith* prohibits (at least) purposeful governmental discrimination against religion, Congress could move against governmental practices that are likely to reflect such discrimination, even if the discriminatory purpose could not be proven in any given case. If Congress were to follow 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 presumptively unlawful all governmental practices in these areas that can be proven in litigation 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 authorize 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 minorities in situations presenting a serious risk of purposeful—and therefore unconstitutional—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

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 expand 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 designed to address nondiscriminatory governmental action that has the incidental effect of burdening religious conduct. Remedial legislation under Section 5 could benefit 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 Exercise Clause. Conversely, congressional legislation, in order to avoid the risk of invalidation, probably should accept a narrow understanding of *Smith*, i.e., 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.

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 independent power, and it is not limited to the fields of permissible congressional regulation 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 congressional programs, and the funds often come with strings attached. As the Supreme 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 beverages 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 designated 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 limitations on the spending power,[9] and these two limitations are not particularly restrictive. 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 *Massachusetts* 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 conditions 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 relationship 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 (citations omitted).

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 financial 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 encouragement," 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 condition 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 appropriation at a time, or it might act more generally. Thus, Congress might enact general legislation stating that any state or local government that receives federal funding 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 inducement in a particular program without jeopardizing unrelated governmental functions. 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 spending conditions in accordance with the basic approach of *Dole,* which accords Congress 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 conditions on a program-by-program basis.

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[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.

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 IX 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 congressional power, an overly broad understanding of "program or activity" might tend to negate the constitutional benefits of program-specificity. In particular, relatedness 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 mechanisms that are available to Congress under the spending power. In *Dole*, the Supreme Court approved what might be considered the classic enforcement mechanism, 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 recipients 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 matter 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 possibility," 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 enforcement 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, federal-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 Congress 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 consider—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.

and to formally adopt their own policies.[13] A state could deliberate within the context 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 legislation 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 unconstitutional. 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 legislation 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 invalidation 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 interpretation 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 functions 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.

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 Federal 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 amendment 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* decision 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 constitutional 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?

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 religious practices in ways that the Court might regard as actually favoring religion or preferring religion, that could be a potential problem.

Mr. LAYCOCK. If I could interject, Senator, the separation of powers 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 understanding 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 unconstitutional. I have to say that I am very loathe to turn to a constitutional 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 dominant, 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 authority"—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 everyone 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 created 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 discrimination."

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.

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 authority." 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 discrimination, 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 regulation, 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 community." Liberal Jews come out to say "we don't want these orthodox 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 discrimination 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 ordinance 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 discriminated 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.

Senator DURBIN. Now, let me ask you about your reference, Professor Laycock, to the city of Chicago, which I have a special interest in. You seem to suggest that the zoning laws in force in Chicago and its suburbs prevent religious institutions from building or perhaps 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 legislature, 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 anyone 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* decision, 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 existence of burdens that there is a problem to be remedied.

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 discrimination which confronted Congress and the judiciary in those cases, RFRA's legislative record lacks examples of any instances of generally 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 judgment that when we have a law that results in 400 people being unable 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 section 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 legislation 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 constitutional 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 applied 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 Supreme 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 impermissible. The Supreme Court in *Boerne* said that record was sufficient to uphold the law that, in essence, overruled the Supreme 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 successful those challenges will be remains to be seen.

Boerne may be much more about religious liberty than about federalism, 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

States and is based on section 5 is going to turn out to be unconstitutional.

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 congressional 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 differ, and I think reasonably differ, about the full meaning and scope of the *Boerne* opinion. On the other hand, as Senator Durbin indicated, 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 invalidate 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 follow it outside of that context. I think that *City of Boerne,* in practical 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 constitutions 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

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 judiciary 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' constitutional 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 legislation.

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 religious 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, generally applicable laws, drafted by legislators without due regard for religious freedom, 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 interpretation 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 continue, zoning laws restrict activities in churches and synagogues, and the parishioners 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-

spect to enforcement as opposed to implementing. And after the *Boerne* case, I am interested in your views as to how broad Congress' power to enforce is.

What does "enforce" mean? What are the powers that are included 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 Congress under section 5 is that Congress can act in ways that are reasonably 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. Supreme 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 regarded 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 Supreme Court's understanding of the first amendment. It is not permitted to adopt for itself its own differing, substantive interpretation of what the Free Exercise Clause means or requires.

Mr. CHEMERINSKY. I think that the Supreme Court in *Boerne* defines "enforce" as synonymous with a remedy. In other words, Congress 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 believe if Congress had such a record, it could then, as a remedial matter, enact something much like the Religious Freedom Restoration 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 opinion 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 establishing 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

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 answers 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 members 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 Senator 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 protected 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 constraints 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 Congress, 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 amendments 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-

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 "enforce," 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 protects 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 willing 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 reasoning 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, Congress has the authority under section 5 to create purely remedial statutes to implement 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 vindicate 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 bankruptcy code is sensitive to the need for tithing provides a good example.

Congress also must ensure that the numerous other programs that have been established pursuant to congressional authority are administered in a manner that respects religious liberty and allows religious and other charitable organizations 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 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 participate in government programs on an equal and neutral basis with other private organizations. They acknowledge that the government should not discriminate against religious organizations or single them out for disfavorable treatment. These provisions 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 religious organizations—who should not be forced to renounce their religious character when providing non-religious services—and for beneficiaries, whose interests in religious and individual liberty cannot be ignored.

A broader charitable choice provision would allow for greater involvement of religious 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 services for seniors, with federal funds provided through contracts, grants, or certificates.

America's faith-based charities and nongovernmental organizations, from the Salvation 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 effective 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 tremendously 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 accommodate 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 section 5 authority.

In the first place, even under the *City of Boerne* decision, Congress retains the authority under section 5 to enact remedial statutes to implement the first amendment, as interpreted by the Supreme Court. This hearing is an important step in exploring Congress' power to use section 5 to vindicate religious liberty.

However, Congress' power to protect religious liberty is 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. Congress must ensure that existing Government programs are administered in a manner that respects religious liberty and allows religious and other charitable organizations 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 Congress by adopting my charitable choice amendment. That amendment allowed religious and charitable organizations the same opportunity to receive Government contracts and vouchers as any other private organization. The Judiciary Committee has included

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 religious 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 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.

A broader charitable choice provision would allow for greater involvement 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 moving people from dependency and despair to dignity and self-reliance. 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 section 5 and other grants of legislative authority, will ensure that Congress once again plays a strong and preeminent role in protecting 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 statements you have submitted and for your willingness to answer further 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 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. 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 constitutional right. It must explain a theory under which the statute it enacts addresses 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 needed to address violations the Court would recognize. This is the requirement of congruence 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 violations 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 supremacy 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 *Dred Scott* (which was called a "horrid 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 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.

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 evidence that the framers of the Fourteenth Amendment viewed the Congressional enforcement 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 have 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 legislation simply creates remedies for judicially defined violations. The best known examples 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 enables 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 protected 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 have 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 discretion of the other branches and the states, Congress should have a broader role. Certainly 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 legislation 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

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 Constitution. Congress can respond with much more careful fact finding and analysis, justifying 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 substantive 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 subsequent 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 interest 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 objectively "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 discrimination 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 regulated religious conduct cause analogous harms. See id. at 543 ("The ordinances * * * fail to prohibit nonreligious conduct that endangers these interests in a similar 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 animals 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

to let the defendant define its own category of general applicability. The Court inquired 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 applicable. 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 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 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 interpretation and shrink *Smith* and *Lukumi* further. But this would be harder if Congress 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 difficult to prove, and Congress can facilitate its proof with evidentiary rules and burden-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 exercise 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 hybrid claims by codification. If the claimant must show a violation of the Free Exercise 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 factual record, Congress could find that most suits by church employees involve an internal 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

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* opinion 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 discussion 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 underlying 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 subjective 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 legislation. "If a state law disproportionately burdened a particular class of religious observers, 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 findings 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 Justice 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 division 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 effective 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 amendments. 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 applied in the Courts—that judicial interpretation has weakened the protection of the legislation. Could some of the procedural reforms contemplated for section 5 enforcement 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 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 interest. 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 exercise need not be compulsory or central to a larger system of beliefs. This requirements 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 limited 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 significantly 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 interstate 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 resulting legislation should be safe from invalidation. Requiring that beneficiaries of federal 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 jurisdiction 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

Establishment Clauses. Compare Justice Scalia's comment about the relative disadvantage 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 judicial 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 exemption 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 immediately 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 challenged "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 interpretation 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 exceptions, 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 opinion 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 reason 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-ordinate 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-ordinate branch expressing the opinion, I think that means we have a disagreement between 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 difficult 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 & Ministries, Inc.* v. *City of Chicago Heights*, 1996 Westlaw 529376 (N.D. Ill. 1996); *Celestial 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 governments.

Boerne significantly limits Congress's independent power to protect the civil liberties of the American people. How significantly remains to be seen; the opinion announces a vague standard of uncertain scope. 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. 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 have 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 Constitution 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 relevant proportions. Congress must build a record of significant numbers of constitutional 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 prevent 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 "proportionality."

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 Amendment. Among the meanings of "enforce," more common in the nineteenth century than today, is to "invigorate," "strengthen," or "give force to." See the definitions collected 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 private contracts, and the Civil Rights Act of 1871 forbad private conspiracies to violate 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 compliance 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 meaning 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 disproportionate 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 implement"?

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

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 judicial 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 Committee 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 advocates 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 another 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. Peter's 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 District 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 denied. 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 benefit from this expenditure. Immediate structural repairs will cost half a million dollars; 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 congregation.

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 claiming 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 property 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 Historic 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 voluntarily 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. Peter's has to preserve three empty churches and build a fourth for worship. This dispute 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 features 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 architecture. 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 violating 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 ambiguities in the free exercise test of *Smith* and *Lukumi*, and difficulties of proving vio-

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 religious 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 appraiser 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 Congress 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* majority. 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 inferring 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 Presidency. 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.

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 General'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 prisoner with nothing to lose by filing a frivolous lawsuit will file it under the Free Exercise 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 Litigation 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 organization affects commerce, or that any religious exercise of an organization over a certain size affects commerce, or that commerce is affected by any religious exercise using property of a kind that is bought and sold in commerce, or that construction 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, government must bear the burden of justification; or if the claimant produces some evidence 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 Constitutional right?

Answer 1. No. I think that excluding prisoners would be a mistake, for the reasons 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 becoming successful under RFRA (at least by Federal inmates convicted of Federal

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 prisoner claims deserved to be successful, and would have faced greater difficulty without 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 prisoner shows some kind of discrimination.

However, there is a curious thing about the prison cases. Some courts have implicitly 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 deferential 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 Amendment. 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 responding 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 benefits 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

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, briefly, areas of agreement and disagreement. I will also separately answer Senator Kennedy's written question addressed to me only.

I am in agreement with substantially all that Professor Douglas Laycock and Professor 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 Freedom 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 supremacy 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 exercise 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 practical 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 statute the various situations in which *Employment Division* v. *Smith* recognizes exceptions to its rule of diminished scrutiny. For reasons expressed in my original testimony, 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 certain "hybrid" freedoms which involve "a clear religious freedom component in combination with another constitutional liberty interest." Such hybrid

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 approach taken by RFRA and to what extent would religious liberty be protected?

• 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 liberty was substantially burdened by government action. The Supreme Court, in *Boerne*, found this to exceed congressional power, on the theory that the enforcement 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 statute 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 necessarily 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 combination 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

THE 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 meaning 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 measures 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.

In *Boerne*, the Court made it clear that it was not overruling *Katzenbach* v. *Morgan*. Yet, the distinction between *Boerne* and *Morgan* is illusive at best. Both cases concerned laws adopted in response to Supreme Court decisions. Both statutes created statutory rights after the Supreme Court found no constitutional violation. Neither 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 Freedom Restoration Act was declared unconstitutional.

In direct answer to the question, I see a continuum of options available to Congress 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 legislative 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 discriminatory 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 applicability 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 the 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 applicability. Congress then, in the Religious Freedom Restoration Act, created a statutory 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 constitutional right.

Second, the Supreme Court inevitably must interpret the Constitution and the interpretation in many areas will change over time. *Brown* v. *Board of Education* changed the "substantive meaning" of the Constitution in overruling *Plessy* v. *Ferguson*, 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 supremacy 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 "enforce" 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

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 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 execute vigorously." "Webster's Seventh New Collegiate Dictionary" (1965) 275. From the perspective of these definitions, Congress very much is "enforcing" the Fourteenth 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 Constitution. 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 correct way to understand Congress' section five power. No such precise meaning exists.

Phrased slightly differently, the word "enforce" might be defined in many alternative 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. Congress, by that provision, is given the authority to implement, as best it can, the protections 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 Amendment, 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 Supreme 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 legislation of the type that we are discussing?

Answer 5. Any protection of free exercise of religion arguably violates the establishment clause. Under the prevailing test for the establishment clause, articulated in *Lemon* v. *Kurtzman*, any government action that has the primary purpose or effect of advancing religion is impermissible. Yet, any law safeguarding free exercise of religion, by definition, will have as its primary purpose and effect advancing religion.

Under *Sherbert* v. *Verner* 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 violate the establishment clause if Congress by statute protects religion by using strict scrutiny.

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 answer 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 imaginable law protecting religious freedom is immune from establishment clause scrutiny. 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, Congress 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 neutral laws of general applicability interfering with free exercise of religion and reenact a Religious Freedom Restoration Act as a remedy. The Court in *Boerne* emphasized 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 substantive 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 Restoration 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 protected from a neutral law of general applicability that burdens religion. Congress by statute can provide such protection. Congress could do so either under its commerce 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 applies. 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 religion or treats religion (or particular religion) differently from secular activities). Second, 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 constitutional 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.

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 disparate 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 impact 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 values. 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 people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively 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 specific 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 discrimination 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 consider?

Answer 13. Congress can authorize suits against the federal government, local governments, and federal, state, and local officers without regard to sovereign immunity. 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 officers.

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* reaffirmed *Fitzpatrick* v. *Bitzer,* which held that Congress may authorize suits against states when acting under section five. The rationale is that the Fourteenth Amendment 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 applied in the Courts—that judicial interpretation has weakened the protections of the legislation. Could some of the procedural reforms contemplated for section 5 enforcement 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 effective—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 effective than its predecessor. Lower court decisions that weakened RFRA did so primarily 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 of judicial 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 statutory 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 Supreme Court's interpretation of the appropriate constitutional test for the free exercise clause.

A preferable approach would be a statute more similar to Title VII or the Americans 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 government imposing significant burdens on religion. The law could specify that the plaintiff must present a prima facia case of a burden (as in Title VII), but then the burden 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 opportunity 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 burden 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 burdening 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 exercise 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 interstate 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. Unfortunately, it is uncertain because the Supreme Court has not directly addressed the scope of Congress' ability to put strings on grants since its federalism 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 subsequent decisions.

On the one hand, the Court may adhere to the view that Congress has broad latitude 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 focus 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 jurisdiction 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 political process. Neutral laws of general applicability, by definition, do not discriminate against religion; rather, religion is seeking an exception because of the burden imposed. Therefore, it seems very difficult for religions seeking an exception from such laws 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 majoritarian legislative process. It is highly unlikely that such religions, 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 substantial effect on interstate commerce. In other words, the law need not identify religious 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 interstate commerce. The Court upheld the law as a permissible exercise of the commerce 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 "neutral 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-

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); *Thomas* v. *Review Board* (1981); *Hobbie* v. *Illinois* (1987)). All were instances where individuals 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 general applicability. Examples include, *Braunfeld* v. *Braun* (1961) (seeking an exemption based on free exercise to Sunday closing laws); *Wisconsin* v. *Yoder* (1972) (seeking 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 military 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 applicability 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 opinion 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 law. 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 constitutionality. 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 Education.*

I believe that *City of Boerne* v. *Flores* got it wrong for two reasons. First, it interprets 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 general 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 unconstitutional 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.

Congress, 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 educated 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 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 protection 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 Restoration 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 Congress 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 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." 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 execute vigorously." "Webster's Seventh New Collegiate Dictionary" (1965) 275. From the perspective of these definitions, Congress very much is "enforcing" the Fourteenth 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 insignificant 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 alternative 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. Congress, by that provision, is given the authority to implement, as best it can, the protections 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 Amendment, 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 constitutional 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, Justice Brennan, the author of the majority opinion, responded to this concern: "Contrary 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 guarantees." 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-

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 implement"?

Answer 4. It is possible that the addition of the word "implement" would be regarded 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 implement 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 judicially 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 acknowledges 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. *Morgan* 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. Congress, 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 educated 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 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 protection 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 applicability seriously threaten free exercise of religion, Congress could reenact a Religious 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 unconstitutional. It truly was too soon to assess its full effects.

Question 2b,c. Do the cases litigated after Congress passed RFRA differ significantly 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-

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 motivated 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 Commerce 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 addressed 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 Congress? Given *New York* v. *United States* and *Printz* v. *United States*, would such legislation 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 substantial 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 congressional 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 distinguished 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 discrimination on interstate commerce. A new RFRA should be based on findings concerning 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* threatening 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* v. *United States*, expressly indicate that Congress can require that states comply 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.

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 reaffirm 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 supremacy 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 *Dred Scott* (which was called a "horrid 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. 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 historical evidence in support of its interpretation of Section 5, according to which Congress' 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.

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 ignored 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 legislation of the type we are discussing?

Answer 5. If an accommodation required by RFRA-like legislation were determined 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 "restrict, abrogate, or dilute" the meaning of any provision in the Bill of Rights, including 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 accommodations 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 imposed 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 interference.' ") (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 entities. "); 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 concern, 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 accommodation 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 omitted).

If, following the approach of RFRA, a statute limited accommodations to the "exercise 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 nondiscriminatory 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 objectors 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 options are remedial legislation under Section 5 of the Fourteenth Amendment or legislation 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 substantive constitutional right?

Answer 7. As I have suggested in response to Question 4, I believe that the Supreme 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

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.

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 disadvantage—that is, from laws that discriminate against religion. Although the Court's understanding 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 difficulties in proving the existence of purposeful discrimination against religion, as contemplated by *Smith*. For example, I believe that Congress could authorize a permissive inference, or perhaps a rebuttable presumption, of discriminatory purpose upon a claimant's showing of substantially discriminatory effect. (The precise phrasing 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.* v. *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 otherwise have a discriminatory effect on religion—even in the absence of a discriminatory 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 interpretation 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 effect 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 object of targeting religious beliefs and practices." See *Boerne*, 117 S. Ct. at 2168.

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 legislation, litigants might advance their interpretive arguments in the courts, potentially expanding the constitutional protection available under the Free Exercise Clause. Conversely, congressional legislation, in order to avoid the risk of invalidation, 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 interpretation 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 Justice 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 division 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—including 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 legislating 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 Congress 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 "manifest[] a clear intent to condition participation in [the relevant funding programs] on a State's consent to waive its constitutional immunity." *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 federal enforcement mechanisms that might otherwise be available.

Question 14. Some have been disappointed in the way that RFRA has been applied in the Courts—?that judicial interpretation has weakened the protections of the legislation. Could some of the procedural reforms contemplated for section 5 enforcement 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 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 objective 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 especially 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 research 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 suggested 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 governments, 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 interstate 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 encouragement," 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 generally, 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 congressional 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 Senator 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 jurisdiction 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-

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 rather from the conflicts that can arise when secular obligations conflict with the demands of religious conscience. More generally, for the reasons identified in my original written statement, I think that Congress' power over interstate commerce probably 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 challenged "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 generally 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 inclined 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 involved a very different problem—the problem of nondiscriminatory governmental action 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 opinion 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 reason for the Court to dig in its heels?

Answer 23. As indicated by my responses to Questions 4 and 7, I believe that Congress 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 relevant 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*

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 unconstitutional * * *." *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, violations 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 "proportionality," 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 nonremedial, "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 Supreme Court's substantive understanding of the Constitution; Congress is not permitted 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 implement"?

Answer 4. One could argue that this phrasing would enhance the power of Congress, 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 synonymous with "enforce."

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[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 concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.").

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 "relatedness 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 authority 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 reason 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 Congress could not directly mandate under its other Article I powers "). If the Supreme Court perceives congressional legislation as an attempt to circumvent *Boerne*, moreover, 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, justices 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 dissent 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 statement. In particular, I believe that Congress should impose spending conditions only on a program-by-program basis (although this could be accomplished through general legislation). Whether Congress should be even more cautious is a difficult question. 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.

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.