

PROTECTING RELIGIOUS FREEDOM AFTER BOERNE V. FLORES

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

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MONDAY, JULY 14, 1997

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

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

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

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

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. The subcommittee will be in order.

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

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

Before we begin, I would like to make two observations: First, there have been questions raised as to whether RFRA is a valid exercise of Congress' authority with respect to Federal laws. The *Boerne* decision struck down RFRA as being outside of the scope of Congress' enforcement authority under section 5 of the 14th Amendment. The 14th Amendment allows Congress to protect individual rights against State infringement. It would appear, therefore, that RFRA is still valid as to the Federal Government. It is, however, noteworthy that the U.S. Supreme Court remanded a case involving an application of RFRA to a Federal bankruptcy issue for

consideration in light of the *Boerne* ruling. If the Federal component of RFRA is struck down, I believe Congress would be well within its authority to enact legislation to instruct Federal agencies to accommodate religious practices that are substantially burdened by the Federal Government's actions.

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

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

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I'd like to begin by thanking you for scheduling the hearing and providing this opportunity for the subcommittee to consider how to address the Supreme Court decision. The Religious Freedom Restoration Act is the product of years of hard work done by uncharacteristically broad coalitions involving religious groups, Members of Congress, civil liberties organizations, and constitutional scholars. Despite their accomplishments, the Supreme Court has spoken, and now we have to respond.

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

There have been a number of ways suggested to maintain the protection of RFRA: Reconfiguring the statute based on an Interstate Commerce clause or on the Spending Clause are the credible options we have before us. We will, however, have to ensure that the manner of implementing these protections does not in any way compromise the original intent of RFRA. Although the task before us is a difficult one, I'm confident that we will be able to craft an effective response to the *Boerne* decision without delay, and I look forward to hearing testimony from today's witnesses and look forward to working with you in developing the ends that we had in RFRA to begin with and working with the coalitions to address this issue.

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

Mr. CANADY. Thank you, Mr. Scott.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But only in recent years has the Court been applying this as recklessly as they have in the *Boerne* decision. Because in the *Boerne* decision, they've created brand-new constitutional law. The Congress must not turn away from this challenge. What they have said to the Congress is, "You can't pass any kind of law that makes a substantive determination about a constitutional right that either adds to or subtracts from it." If that had been enforced during the civil rights movement in this country, we would still have applications of the *Dred Scott* decision and its successor decisions on the books, because what they're basically saying—strip away all the language and all the mistaken interpretations of court decisions and precedents by the Supreme Court—what they're basically saying, is that only the Supreme Court can decide what is a constitutional right, and only the Supreme Court can enforce what is a constitutional right.

Congress is reduced to procedural powers only. This is a preposterous challenge to the authority of this body which represents the people. When the people of the United States, through their elected representatives, almost unanimously say this is how we want to protect our first freedom, and for the Supreme Court to say this body acting on behalf of the people does not have authority, is a preposterous challenge. It is throwing down the gauntlet, and if

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

I'd just say, finally, Mr. Chairman, that one of the things that I think all of us should fear most is if we now say, "OK, let's have a constitutional amendment," acknowledging that the Court's interpretation on the *Boerne* case is correct, what happens to all the other legislation that rests upon section 5 of the 14th Amendment which is designed to protect or define constitutional liberties or even restrict them, as in the case of something I know is close to the chairman's heart and close to my heart. The Partial Birth Abortion Ban Act would be, by the *Boerne* decision, something Congress does not have the power to do. I hate to say that; I hate to plant that thought, but it will be very clear. But there are many others in civil rights and in voting rights where the Congress will end up being told, if it accepts *Boerne*, that it can no longer legislate in this area.

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

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

Thank you, Mr. Chairman.

[The prepared statement of Mr. Colson follows:]

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

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

In the *Boerne v. Flores* decision, Justice Kennedy, writing for a 6-to-3 majority, invalidated the Religious Freedom Restoration Act, which Congress passed in 1993

with only three nay votes, and which President Clinton signed into law with much fanfare. This legislation was made necessary by the Court's 1989 decision *Employment Division v. Smith*, which overturned what religious freedom litigators had thought was a well-established rule, namely, that government had to show a compelling interest before it can prohibit religiously motivated conduct (or compel religiously prohibited conduct). In *Smith*, Justice Scalia, writing for a five-vote majority of the Court, held that the Free Exercise Clause of the First Amendment does not require religiously-based exemptions from laws that are facially neutral.

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

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

With due respect for Justice Scalia's faith in democratic procedures, and with due admiration for his general approach to the role of the judiciary in a democratic system, I stand with the vast majority of religious freedom experts in decrying the dangers facing believers as long as faith-based conduct is deprived of heightened legal protection. For those who actually litigate religious freedom cases, *Smith* started causing problems on the ground almost from day one. I know. I've spent the last twenty years working in prisons. I've seen the doors slam shut to religious services on the whim of administrators. I have experienced the arbitrary refusal of some officials to allow religious activities. And immediately after the *Smith* decision, prison officials were able to prevent Jewish prisoners from wearing yarmulkes, deny Catholic prisoners access to a priest, and restrict Bible studies for evangelical prisoners.

This would be serious enough if only the personal religious rights of prisoners were at issue. But in fact, there is a societal interest involved here as well. Religious observance by prisoners is strongly correlated with successful rehabilitation. While it seems pretty clear that the First Amendment would prohibit the government from overtly pressuring prisoners to practice religion, it is sheer social folly to place any obstacles in the way of the many prisoners who, on their own initiative, seek out ministers, priests, rabbis, Bible studies, and so forth. Yet I myself have spoken with wardens who seem more interested in cost containment than in rehabilitating prisoners, and who have told me that, were it not for prisoners' legal ability to sue for denial of free exercise, they would withhold even ordinary, mainstream, non-controversial forms of religious accommodation.

Whether in a prison or on the outside, the brute fact is that when confronting an overweening bureaucrat, "I'll sue you" is much more effective than, "I'll have my state representative offer a bill changing the statute under which you're doing this to me."

That's why the response to the *Smith* decision from a wide range of religious groups was one of: "Thanks but no thanks. We want judges to handle these questions and we want them to use the legal standard that was in effect before *Smith*"—i.e., that religious practice must be accommodated unless refusing to accommodate it is the least restrictive means of achieving a compelling state interest.

Congress heeded the outcry from the religious community, and passed the Religious Freedom Restoration Act of 1993, or "RFRA," by lopsided majorities. And now the Court has struck it down. Its formal rationale is the theory that Section 5 of the 14th Amendment, which gives Congress the power to "enforce" the substantive clauses of Section 1, does not empower Congress to enlarge the meaning of those clauses beyond the interpretations placed on them by the Supreme Court.

This in itself is a novel and dangerous doctrine. It should be of particular interest to this Subcommittee that the *Boerne* theory of Section 5 casts doubt on Congress's power to legislate on a number of interesting subjects, including, for instance, partial-birth abortion.

But there's more in *Boerne* than this dubious view of Congress's power. The majority implicitly—and Justice Scalia explicitly, in his concurrence—took the occasion to re-argue *Smith* as well. It's not just a question of the meaning of Section 5 of the 14th Amendment: the meaning of the Free Exercise clause is also very much

in issue, and the Court knows it. It is engaged in a high-stakes war with Congress over this question as well as over the general question of Congress's Section 5 powers. For reasons I have already given, I think the Court's view of the meaning of the Free Exercise clause is out of keeping with the values that the clause was drafted to protect. But more to the point, this Congress—our country's national legislature, accountable to the people through direct election of both houses, a fact that ought to satisfy Justice Scalia's concern for democratic decision-making—has resoundingly rejected the Court's view. And the Court has just as resoundingly rejected this body's right to reject its view.

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

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

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

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

But no one at the time or even until modern times believed that power, even if it was rightly assumed by Marshall, to be final. Jefferson, for instance, advocated a theory of coordinate review, in which each of three branches could reach its own conclusion on the constitutionality of congressional enactments or executive actions. President Andrew Jackson, a Jeffersonian, took this view. When the Court upheld the Second Bank of the United States, over Jackson's objection that Congress lacked the power to create such an institution, the ever-belligerent Jackson is said to have remarked: "Justice Marshall has made his decision. Now let him enforce it."

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

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

With due respect to Rep. Ernest Istook and others who are seeking to protect religious liberty through a constitutional amendment, I would point out that the amendment—process which was deliberately and rightly made difficult by the framers of our Constitution—has become a stud farm for moribund causes: causes sent there can continue to have a good time, but their racing days are over. Just ask the supporters of term limits, a balanced budget, and protection for the flag. Amend-

ments on these issues are offered in Congress year after year, failing by a vote here and a vote there, but always providing a rallying cry for the next election.

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

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

There are other strategies as well. Congress could adopt what Judge Bork has advocated so cogently in his recent bestseller *Slouching Toward Gomorrah*: subjecting the Supreme Court's constitutional decisions to a ratification vote in Congress. This would require a constitutional amendment, but it would accurately reflect the intent of the founding fathers more faithfully than our present regime of unlimited judicial review. Or Congress could invoke its powers under Article III, Section 2, paragraph 3 of the Constitution and curb the judiciary's jurisdiction over free exercise cases. Alternatively, Congress could enact a more limited but still valuable RFRA by invoking the spending power: heightened protection for religious exercise would become a condition of receipt of federal funds.

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

Mr. NADLER. Mr. Chairman.

Mr. CANADY. Thank you, Mr. Colson.

Mr. Nadler.

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

Mr. CANADY. Without objection.

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

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

In *Flores*, the Court told us that Congress lacks the power to protect religious freedom. According to the current Supreme Court, the Constitution protects religious freedom, but no one has the authority to enforce that protection. That's an absurd reading of the Constitution, one which must not be allowed to stand. The Supreme Court has mindlessly sacrificed religious liberty on the alter of its own cramped view of the Bill of Rights. Clearly, the best course of action would be for the Court to rethink the *Smith* decision. One would at least hope that the Justices would seek the benefit of having such significant changes to the First Amendment briefed and argued, something that has never happened.

Properly and carefully reviewed, I do not believe that *Smith* would hold up, though I am not confident that a majority of the current Justices would so hold. Nonetheless, as Justice Souter has written, “whatever *Smith’s* virtues, they do not include a comfortable fit with settled law.”

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

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

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

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

RFRA was based on the recognition that legislatures, which are responsive to the popular will, are inherently less suited to granting such exemptions than is the independent judiciary. RFRA was based on the recognition that one’s religious freedom should not depend on political popularity or power. RFRA attempted to return the granting of such exemptions back to the independent judiciary on the basis of an appropriated standard: strict scrutiny.

The independent judiciary’s active resistance to fulfilling its role in our system of Government is troubling, but I do not agree with some of our colleagues who have argued that the appropriate response is to join the current majority’s assault on this sound bulwark of our rights. Judicial independence was established to protect the rights of minorities from the majority. RFRA was premised on the belief that the courts, and not the legislatures, should continue in that role.

I am also concerned that, despite the majority’s denials, their narrow reading of Congress’ power to enforce the 14th Amendment threatens other civil rights legislation. If the Court persists in its line of reasoning, and continues to exalt the rights of States at the expense of the rights of individuals, the legal protections many in this country now take for granted may be seriously diminished by future rulings. Indeed, it has already been reported that some States and localities are attempting to capitalize on the reasoning in *Flores* by attacking other civil rights laws. This situation re-

quires swift but careful action on the part of Congress. This hearing is an important first step.

I do not believe that a constitutional amendment is needed or well advised. As today's witnesses and other commentators have correctly pointed out, Congress still has numerous legislative options at its disposal. Pursuing the constitutional amendment route, which at best would result in substantial delay and tremendous uncertainty in its results, would under these circumstances be irresponsible.

If one thing is clear from the Court's decision, it is that we must pay careful attention to the current law on Congress' power with respect to the States and the court, and we produce a careful and complete record to support the legislation we write.

Religion is our most fundamental freedom, our first freedom. It is the reason why many of our families came to this country. That commitment to religious liberty unites Americans from across party lines, across the political spectrum, and across denominational lines. That diversity will be our strength as we all work together to overturn this direct assault on our fundamental freedoms.

Just as a broad and diverse coalition of religious and civil liberties groups, with bipartisan cooperation in the Congress, succeeded in passing the Religious Freedom Restoration Act, I am confident that we will succeed in restoring once more the freedom of religion this Court has so cavalierly stripped from our citizens.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Nadler. We'll go back to the regular order now, and recognize Reverend Thomas.

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

Mr. THOMAS. Thank you, Mr. Chairman. I am Oliver Thomas, special counsel to the National Council of Churches.

The Supreme Court's decision striking the Religious Freedom Restoration Act is not only a blow to the sovereignty of Congress, it is a blow to the American people. As the *Dred Scott* decision of a century ago was for African-Americans, so *City of Boerne v. Flores* is for religious Americans, but as with *Dred Scott*, Americans working together will overcome this setback to freedom. I want to pause and commend the chairman of this subcommittee as well as the members present for beginning this national conversation.

My overriding message to you today is one of caution. When bad things happen, we oftentimes rush in and try with the very best of intentions and in a commendable effort to remedy the problem. It's encouraging that Congress is doing that today, but as we seek to correct the problem let me encourage us not to run the risk of creating a bigger problem. In particular, I want to discourage efforts, premature efforts, I think, to amend the First Amendment.

First, there is the problem with all constitutional amendments: They are broad; they are general; they are risky. While statutes can be drafted with great specificity, constitutional amendments frequently cannot. They speak in broad generalities; they must stand the test of time. Decades pass before the true meaning of the amendment can be deciphered by the courts, and oftentimes, Mr.

Chairman, we are surprised—indeed, dismayed—by the interpretations that the Court gives the very words that we the people select. Who would have thought that laws prohibiting the free exercise of religion, for example, did not include laws prohibiting the free exercise of religion? How could the framers have been more clear? It is stated in the most absolute terms; yet, the Supreme Court has decided that only laws intentionally discriminating against religion are barred by that broad, broad provision.

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

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

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

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

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

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

Let me conclude by saying that a constitutional amendment, though an important last resort, is not a sprint; it is a marathon,

and before we begin that marathon let us exhaust all available State and Federal remedies.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Thomas follows:]

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

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

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

The Supreme Court's decision to strike down the Religious Freedom Restoration Act (RFRA) is a blow not only to the sovereignty of the Congress but to the American people as well. As the *Dred Scott* decision of a century ago was for African-Americans, so *City of Boerne v. Flores* is for religious Americans today. But, as with *Dred Scott*, Americans working together will overcome this setback to freedom. Thank you, Chairman Canady and Members of the Subcommittee, for beginning a national conversation on what the proper response to *Flores* should be.

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

First, there is the problem with all constitutional amendments. They are broad. They are general. They are risky.

While statutes can be drafted with great specificity, constitutional amendments frequently cannot. As part of the broader legal/social compact, they speak in what the Supreme Court has called "majestic generalities" that must stand the test of time. Decades pass before the true meaning of an amendment can be deciphered by the courts. Oftentimes we are surprised by their interpretations and wonder how they could have strayed so far from what we understood the language to mean. For example, who would have thought that laws "prohibiting the free exercise" of religion did not include laws prohibiting the free exercise of religion? How could the Framers have been more clear? Yet the Supreme Court in *Employment Division v. Smith*, has interpreted the language to prohibit only the handful of laws that intentionally discriminate against religion, while omitting those that do so incidentally or accidentally.

Then, there is the problem of exemptions. The Congress and the Coalition were able to unite behind a single unifying idea: religious liberty for all. For that reason, exemptions for prisons, historic districts and public schools all were considered and refused. Yet, many state attorneys general and others came to oppose RFRA simply because a smidgen of prisoners filed frivolous claims. In light of all the negative publicity that has been given to this subject, do we really believe that a constitutional amendment that did not exempt prisons could be passed in 38 state legislatures?

Finally, we do well to remember that although the United States is the most religiously diverse nation on earth, we have avoided the religious strife and the bloodshed that has characterized other parts of the world. Many, including myself, would attribute America's success to the genius of the First Amendment.

For all these reasons, a constitutional amendment should be a matter of last resort—to be utilized only when all else has failed.

But, has all else failed?

Close examination reveals that a number of less drastic remedies should be pursued first. True, none provides the universal relief that a constitutional amendment

would offer, but none carries such risks or requires such an investment of time and resources.

Some of the alternatives are:

1. **A JOINT CONGRESSIONAL RESOLUTION**—One thing Congress can do immediately is to speak with one voice on the *Flores* decision through the passage of a joint congressional resolution regarding congressional commitment to address the loss of protection afforded people of faith by the Court's action. Several things could be accomplished with such a resolution. First, Congress could further educate the American people about the inadequacy of the Court's current protections for religious liberty. Second, we could put members on record as supporting reasonable efforts to shore up federal protections for the free exercise of religion.

2. **FEDERAL LEGISLATION**—Additional hearings should be held with participation from a broad array of constitutional scholars to determine what, if any, sort of curative federal legislation might be possible. Possibilities would seem to exist under a variety of constitutional provisions including the spending, commerce, and necessary and proper clauses. Legislation targeted at specific problem areas such as the bankruptcy code or zoning laws might also be considered. Finally, serious thought should be given to determining whether a substantial record of religious discrimination can be proven so as to justify remedial legislation under Section 5 of the 14th Amendment.

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

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

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

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

Mr. CANADY. Thank you, Reverend Thomas.

Mr. Stern.

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

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

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

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

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

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

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

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

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

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

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

Let me suggest just quickly—and there are others have more expert than I—that there are avenues available to you which will both, as Reverend Colson has suggested, assert congressional au-

thority without yielding the field to the Supreme Court, which is what happens if you go first to a constitutional amendment, but will not precipitate a larger constitutional crisis. And here, I part company with Reverend Colson on one important point; I think what the Court did *Boerne* was wrong in substance, but not a departure from the tradition of *Marbury v. Madison*.

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

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

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

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

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

I think the spending power is another power that Congress has. The narrowest version of the spending power that I think is clearly constitutional would be for Congress to say, "We give money to State and local governments, and we want all taxpayers who provided those funds to be able to use them. If in the course of administering that program States or localities have practices which substantially burdens religious practice, and people cannot participate because they don't want to compromise their religious views, Federal tax dollars are being used fairly. We insist as a condition of your taking Federal funds that every taxpayer and every citizen be able to use them." That's the narrowest version of the Spending

Clause. There are broader versions of Congress power under the Clause. The Court has in *South Dakota v. Dole*, some limits.

Let me just close with one word about constitutional amendments. I agree with what's been said, both by the Members and my co-panelists, that a constitutional amendment is not how the appropriate response to *Boerne*. It's not right because, first of all, it yields the power of Congress to the Court. It simply throws in the towel, and says, "You're right. We'll play the game another way."

Secondly, as Reverend Thomas said, it's not so easy to get States to pass constitutional amendments that are aimed only at themselves, because, as the chairman said, the power of the Congress to enact legislation governing how the Federal Government operates seems uncontested.

And thirdly, there is the principle which has served the country well: that constitutional amendments ought not to be used promiscuously; only in case of last resort and need, and we haven't yet exhausted the need. In particular, though, there are two ways of—as a practical matter, now that Congress confronts two methods of amending the Constitution to deal with the *Boerne* case. The first, is a freestanding amendment directed only at *Boerne*. If to go to a constitutional amendment becomes necessary, that would be my strong preference.

What I think would be particularly unhelpful would be to engage in the common practice of tacking an uncertain proposal onto a popular one. Now that happens all the time. I've been guilty of trying to do it myself on occasion. But in terms of a constitutional amendment, it seems to me singularly bad policy to take an amendment dealing with the Establishment Clause, on which there is great disagreement, and there's been for a long time. It's legitimate; it's hard fought, and I don't question anybody's motives, but there's no consensus on what an amendment to the Establishment Clause will look like if we need one at all.

There certainly is a consensus in the religious community and in large parts of the civil liberties community, about what a free exercise amendment ought to look like. It would be a real abuse of the process for us to take an amendment which enjoys broad support and have tacked onto that something that couldn't make it on its own.

And, second, it will be a terrible precedent for amending the Constitution. If you look at the Amendment—since the 14th Amendment, there is not one amendment which covers more than one subject. I think that's a policy that served the nation well. I would urge the committee not to, should we come to that.

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

[The prepared statement of Mr. Stern follows:]

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

Mr. Chairman and members of the Subcommittee, on behalf of the American Jewish Congress,¹ I wish to express appreciation to the Chair and members of this Subcommittee for so promptly convening hearings to explore possible congressional responses to the decision of the United States Supreme Court in *City of Boerne v. Flores*.

City of Boerne not only leaves religious liberty without effective federal protection—that is bad enough—but also cuts a wide swathe through Congress' power to address pressing national social problems under § 5 of the Fourteenth Amendment. The Court's decision is particularly problematic because it does not lay down any discernable rule by which Congress can determine in advance whether a particular piece of legislation does or does not pass muster under § 5.

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

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

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

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

The distortion of federalism occasioned by *City of Boerne* must not overshadow the fact that for the first time since World War II, religious practitioners have no recourse under federal law when government interferes with religious practice. That this state of legal affairs comes at a time of increased diversity in American religion is yet another irony of the *City of Boerne* decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In our view, constitutional amendments should reflect not only a broad consensus that a change is necessary, but address a need that only an amendment can satisfy. If, for example, the entire Court had adopted Justice Stevens' suggestion that statutory exemptions were infirm as establishments of religion, then the only remedy available would be a constitutional amendment. But that is, as best as we can tell, not where we are.

As we read *City of Boerne*, it simply holds that § 5 of the Fourteenth Amendment, the source of authority Congress relied upon did not sustain the broad scope of the Religious Freedom Restoration Act. It does not foreclose the possibility—as Justice Stevens would—of legislation based on other bases of congressional authority. While none of these standing alone might be as comprehensive as RFRA, together with state constitutional protection, and, one hopes, state RFRA's, they might prove sufficiently comprehensive to obviate the need for a constitutional amendment.

Moreover, should Congress simply pass a constitutional amendment now, it will have ceded to the Supreme Court without so much as a protest, much of its authority under § 5 of the Fourteenth Amendment. We think that would be undesirable. Several possibilities suggest themselves for immediate congressional action. First and foremost, should the lower courts hold that so much of RFRA that applies to the federal government is not severable from the invalidated parts, Congress should promptly reenact a federal-only RFRA.

Second, under the Taxing and Spending Clause, Congress could insist that, in any program receiving federal funds, states and local governments apply RFRA standards to laws, regulations or practices that substantially burden religious practice. The federal government, which has bound itself not to interfere with religious practice without a narrowly targeted compelling interest, has a legitimate interest in seeing to it that its funds are used in keeping with this policy. It likewise has an interest in seeing to it that all taxpayers can enjoy the benefits of tax funds, and are not excluded by application of rules which, as a practical matter, exclude them from federally funded programs because of a clash with their religious principles.

Some have suggested a broader use of the spending power, to condition any federal aid on compliance with RFRA. That is to say, a state or local government which accepts any federal funding would be bound in all of its activities by RFRA standards. While we would, other things being equal, endorse this proposal, we are doubtful that it would pass muster with the Supreme Court. We see little benefit in challenging the Court's authority once again when it is doubtful that under existing authority it would pass muster.

In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court explained that the spending power can be used to impose restrictions on the states only if: (1) they further the general welfare; (2) the conditions are stated unambiguously; (3) the conditions are related to the particular interest in the national program; and (4) they do not violate some other constitutional provision.

A RFRA-like condition targeted at federally funded programs surely satisfies the first, second and fourth provisions. If limited to the program receiving federal funds, it would satisfy even the narrowest reading of the third provision since the regulation would have as its purpose guaranteeing full access to federally funded programs. We would suggest that the definition of "program" be taken from existing civil rights legislation, notably Title VI of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000(d)-4(a).

The exact scope of the third condition is unclear. The Court in *Dole* noted that some have sought a restriction to regulations which are "directly related" to the purposes of the grant. The Court left open the question of whether to accept that reading, or to grant Congress some broader leeway. 483 U.S. at 2797, n.3. We believe that the Subcommittee should explore, with constitutional scholars, the exact parameters of this requirement. Perhaps it will be the consensus of scholars that the

spending clause will sustain broader regulations than just a program-specific one. For example, it might be possible to offer financial incentives to states to enact state RFRA's, or perhaps, federal grants to offset the (minimal) costs imposed by religious accommodation. If so, Congress should take the fullest possible advantage of its authority.

The Commerce Clause, too, should be available as a source of authority to sustain some RFRA-like legislation. The Commerce Clause has sustained other civil rights legislation, beginning with the desegregation of interstate transportation in the 1940's and culminating in the ban on racial and religious discrimination in Title II of the 1964 Civil Rights Act, sustained easily by the Court in *Heart of Atlanta Motel v. Katzenbach*. More recently, the Violence Against Women Act has been built in part on the Commerce Clause.

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

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

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

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

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

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

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

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

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

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

These steps will not directly provide redress in cases where a state or local government acting out of purely benign motives restricts religious liberty unnecessarily. It will, however, redress those cases where there is some indication of religious bias. The increased risks of losing a case premised on bias are likely to make governments more amenable to some reasonable compromise than if it is unlikely that any serious penalties attach to a finding of illicit discrimination.

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

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

CONCLUSION

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

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

Mr. CANADY. Thank you.

Mr. Chopko.

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

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

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

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

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

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

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

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

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

Third, why should Americans care? Because there are thousands of "St. Peter churches" in every part of this country, in the many different ways in which we experience our religious life, and the myriad ways in which our religious institution serve our human needs.

Two faces and two forces in American life pervade almost everything that we do: religion and government. The committee faces the choice of which rule of law shall apply. Shall religion be the supplicant going to government, always looking for something, or shall religion be accommodated as a rule of law? I would urge the committee to choose the latter, as it did before. Our history, our tradition, our law demand as much. I believe that it is consistent with our expectations as American people.

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

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

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

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

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

In closing, I turn to the words of the Canticle of Zechariah (Luke 1:68-79) which restates the promise that God made to Abraham. We are reminded there that God came to set His people free, not free to engage the operations of corporate America, but free to worship him without fear. "Free to worship him without fear, all the days of our lives." We pray and we worship in words and in actions. Our American tradition is that we have room in this country for faith alive. That faith makes us better as a people. That room is what Congress should assure once again.

Thank you.

[The prepared statement of Mr. Chopko follows:]

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

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

Our Tradition of Accommodation

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

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

The Question of Religion

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

step for the Supreme Court in 1990 to abandon the pretext of compelling interest analysis and substitute a simple rational relation test.

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

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

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

Throughout these last several years I asked whether the judicial process itself was contributing to a spirit of hostility towards religion. Indeed, *Smith* laid the problem back at the feet of legislators, noting that if religion wanted some accommodation it should seek accommodations through the legislative process. At the same time, cases like *Aguilar* and *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), raised the specter that, if an accommodation were in fact obtained, it could be declared unconstitutional under the Establishment Clause because it would have failed the very high threshold created by the Court. This situation created, in my view, the politics of doing nothing. Why should government regulators give an accommodation if it would be subject to invalidation under the Establishment Clause? The Religious Freedom Restoration Act addressed some of this problem. The June 23 Supreme Court decision on *Agostini v. Felton*, _____ U.S. _____, 65 U.S.L.W. 4524 (1997),

reversed *Aguilar* and may prove very significant in the long run to promote better cooperative relations between government and religion. For forty eight hours at the end of June, things were looking up. Unfortunately, on June 25, the Court's action in the *City of Boerne v. Flores*, _____ U.S. _____, 65 U.S.L.W 4612 (1997), has brought us back to where we are today.

The Boerne Case

In *City of Boerne v. Flores*, the Court followed the restoration rhetoric and not the law. The Court took seriously the proposition that the Religious Freedom Restoration Act "restored the Free Exercise Clause" to its pre-eminent position in American life. It was a political proposition, not a statutory rule. The rhetoric was not law. If RFRA were simply restoring the Free Exercise Clause, USCC and others might have continued to resist RFRA as potentially unconstitutional. Congress does not have the authority simply to restore the Free Exercise Clause. But the Congress, we thought, and still think, does have the power to enact a statutory remedy to protect religious rights. The brief of Archbishop Patrick Flores, ably prepared and argued by one of the preeminent constitutional lawyers in the United States today, Professor Douglas Laycock, lays out the reasons why the Religious Freedom Restoration Act was well supported by the Court's precedent in the Voting Rights Act and other cases. If the Court had followed the law and followed the theme of its own decisions, instead of the rhetoric, it would have reached the same conclusion as the federal courts of appeals: that the Religious Freedom Restoration Act was constitutional.

What the Court did was write a decision about power and the allocation of constitutional power, not a decision about religious liberty. Certainly, there is almost no mention about the idea of religious liberty and the need to protect it extensively except in the dissenting opinions. *Smith* is (and was) the law on Free Exercise and there may not be sufficient votes on the Court to revisit *Smith* anytime soon. Without the Religious Freedom Restoration Act, we are thrown back into the chaos that confronted religious organizations from 1990 to 1993. Others, notably the Baptist Joint Committee on Public Affairs, have catalogued the litigation results in cases following *Smith*. As the analyses prepared prior to the adoption of the Religious Freedom Restoration Act bear out, courts which applied the *Smith* analysis to a variety of civil statutes and claimants almost inevitably reached the result that religion loses and the government prevails. This is not a good state of affairs for religious claimants and it is distinctively un-American.

RFRA followed the best of our traditions. It required adjustments to the regulatory and service machinery of government for religious persons and practices unless some countervailing important reason was being sacrificed in the process and could not itself be obtained in some other way. It tipped the scales of justice slightly back in the direction of religion. Given our history and public traditions, the near united support among the American people and the Congress, RFRA seemed to strike a responsive chord in the soul of our country. We were finding ways to accommodate our differences in a complex highly regulated society. In simpler times, we might have been able to do so by persuasion or by making accommodations as "the right thing to do." In our litigious society, dealing with bureaucracies that expect conformity and lack mechanisms to make exceptions or evaluate the strength or weakness of various requests for exemption, RFRA served as an important tool in negotiation, bargaining, and reaching compromise in more instances than we can count.

Why a Religious Freedom Act is Needed

It is for this reason, primarily, that USCC still advocates some legislative remedy to protect the religious freedom of all Americans. We do not believe that anti-religious discrimination is rampant. In fact the *Smith* case, confirmed several years later in *Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), notes that governmental entities which target religious practice for adverse treatment must show a compelling interest in order to sustain this kind of action. Intentional discrimination is not the rule and discrimination is not tolerated in this society. But anti-religious feelings, especially about religious minorities—and we are all a minority somewhere in this country—is still felt even if it is not express. Moreover, it is also widely recognized that burdens can be created for religious practitioners and on religious practices in myriad unintended ways. The litigation which gave rise to the conflict in the City of Boerne is an apt illustration. There, the facade of the Church extended into a historic district. The Church leadership was willing to make an accommodation and preserve the facade but it needed to expand its sanctuary in order for that Catholic parish to worship as a community.

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

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

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

What Shall We Do?

I must note that my own thoughts about how to deal with the *City of Boerne v. Flores* decision are still in a very preliminary state. Indeed, they are evolving the more that I have discussions and the more that I read and research. I also confess that I must rely, and I would urge the Committee to rely, on experts on Separation of Powers and Section 5 of the Fourteenth Amendment. Although I believe that I have some learning in the law, especially on constitutional process, religious liberty, and liability theories, Separation of Powers, federalism, and the intricacies of Section 5 and other avenues of Congressional authority are not my strong suit. I would urge the Committee to seek experts to provide opinions on what the limits and reach of Congress' authority would be in light of the decision in *City of Boerne*. I would especially invite the Committee to ask those who have been critical of the approach adopted in the Religious Freedom Restoration Act to outline possible legislative remedies. Some are already outlined in the legislative record compiled in 1992. There is more work to be done.

My own view is that the Congress should explore a statute first. Only if it is satisfied that a statute would not solve the problem which the *City of Boerne* decision created, should Congress consider a constitutional amendment. In designing a statute, obviously, the Congress would have to explore alternative and different bases for legislative action. These would include the Spending Clause, the Commerce Clause, Privileges and Immunities, and even Section 5 if a record can be compiled showing the precise nature of the problem and the way in which the problem must be solved. Second, it is important that Congress itself be on record, not against *Boerne* and not necessarily against *Smith*, but *for* religion and *for* religious liberty. The Congress can recommit itself to this value in any number of ways but it should be on record to seek solutions for religion, recognizing that it will explore other ways in which it can exercise its power to protect the American public.

Third, I would also note that some exploration of the intricacy of state laws, of litigation and of a constitutional amendment should also occur. There are disadvan-

tages associated with each of these concepts and, therefore, I assign them a lower priority on my own set of remedies. State laws will create a hodgepodge of rules that will create uneven protection for religion across the country. We could be creating new and unique problems, especially in those states which have Blaine amendments that have denied religion the benefit of public programs. A litigation strategy may be a way of testing whether there is strength beyond the three dissenters in the *City of Boerne* case or the proposition that *Smith* should be revisited and abandoned. The Court revisited and abandoned *Aguilar* when there was a sufficient passage of time and a sufficient change in law. The Court did not reverse *Aguilar* because it created an inequity in the delivery of services to poor children, but because Establishment Clause jurisprudence had evolved. So, too, I do not think that the Court will revisit *Smith* because it has created practical problems for the religious community in the United States. The Court would have to be persuaded that *Smith* does not adequately or accurately state the constitutional law. It is not at all clear that the Court will do so anytime soon.

Finally, a constitutional amendment process would be divisive, and there are many issues that would have to be evaluated and resolved in order for an amendment to move forward. USCC believes that some of the present difficulty for religion has occurred because the Religion Clauses have often been read and interpreted as somehow in competition with each other. The Court contributed to this problem through separate interpretations of these Clauses in the 1940's and separate and differing constructions in the evolving litigation process. A constitutional amendment would have the opportunity, I think, to address this problem and perhaps get at the root of the difficulty, namely, a unitary construction of the Religion Clauses in a way that it is beneficial to religion. USCC has tried to contribute to this debate by writing briefs, first attacking *Smith* in *Church of Babalu Aye* case noted above, by the brief that we filed in the *Agostini* case, and through scholarly articles. I would be happy to provide copies of these briefs and articles either for the record of these hearings, if this Committee believes it appropriate, or later if the Committee or its staff wants to explore a broader approach to the question of religion in America.

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

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

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

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

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

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

Mr. STERN. If I might, sir—

Mr. CANADY. Mr. Stern.

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

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

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

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

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

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

As a practical matter, I think that, regardless of whether you believe in a broad or a narrow construction of the *City of Boerne* decision, in any legislative remedy, the Congress could consider, for ex-

ample, separate sections that lay out specifically Federal protections, State protections, a severability clause, and additional findings, and so on. Anything that you do is going to be back in the courts, and that would probably enhance the clarity of legislative action and the likelihood of its passing judicial muster.

Mr. STERN. If I might add one thing to my answer?

Mr. CANADY. Mr. Stern.

Mr. STERN. It occurs to me that, given that remand and the fact that the Eighth Circuit will be reconsidering it, and given this language that may talk about judicial prerogatives—at least at first thought, and I haven't thought it through—it might be unwise to proceed immediately to try and short-circuit that with a formal congressional decision in the form of a law that said, "We now determine that that part of RFRA that affects the Federal Government remains in place." If, in fact, the Court is concerned about its prerogatives against Congressional intervention in pending litigation, I'm not sure how wise it is to sort of quickly throw the gauntlet down right now. It may pay to wait an Eighth Circuit decision; see where that comes down, and then act in response to that if that's necessary, but, again, I'd like to hear from Mr. Laycock myself.

Mr. CANADY. Anyone else with a comment on that point? Mr. Thomas.

Mr. THOMAS. I do think that it's very important that Congress move as rapidly as possible. Religious liberty is a wildly popular concept in the abstract, but when, as you know, as from some of these prison cases, when you start applying it to specific cases, that's where we split apart. We have an extraordinary, unprecedented coalition of religious and political and civil liberties groups working together now, ranging literally from the Traditional Values Coalition to the American Civil Liberties Union—I could go on—68 national organizations. And having been through this one time, I know that when the religious community finally gets together with the Congress, we can do something pretty quickly. We spent a lot of time haggling among ourselves—some of that was my fault—haggling within the religious community, but at this point I feel like we have a real consensus on how to do this; what the broad principle ought to be, and once the constitutional scholarship satisfies the Members as to the proper avenue—is it the Spending Clause?—which I tend to agree with the chairman on—or is it another provision? Then, I think we ought to move as quickly as we can.

Mr. CANADY. Mr. Colson.

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

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

Now, this Court has shown a certain degree of elasticity in its reading of prior decisions, to say the least. The legal gymnastics it has gone through—but it could never go through contortions great enough that once they say the Congress doesn't have power with respect to the 14th Amendment, it does have it with respect to Federal jurisdiction. This issue is over as far as RFRA's application: It will be no longer valid in the Federal jurisdiction where they could reason their selves into that, given the decision they've written.

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

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

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

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

Mr. CANADY. I thought you would.

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

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

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

I also don't think it's wise to act in ways that are nothing more than a declaration of war. That the cautious approach that I've outlined in my testimony suggests that there are powers of Congress that the Court has recognized; that are well settled; that you can make the record that would put to the Court, "We're coming back, because we think we are within our powers in reaching these substantive results. Here's another way of looking at it." I think that challenges the Court without declaring war, and that's—I think it's Professor Ely who talks about a dialog between the Congress and the courts. I think that's likely to result more quickly in protection for religious liberty than an unvarnished attack on the Court, because an unvarnished attack on the Court, I think, given the language in *Boerne* is going to result in another invalidation. It will be two, three, four, five years down the road; we still don't have protection for religious liberty; we may still not know exactly where Congress and the Court stand.

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

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

Mr. SCOTT. Thank you, Mr. Chairman.

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

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

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

Mr. THOMAS. Well, that's another good reason to seriously consider the Spending Clause, which I think is perhaps your best alternative.

Mr. COLSON. The State solution, though, Mr. Scott, I don't believe is one that would be satisfactory to the religious community,

because you'd have a patchwork quilt of different laws and different exemptions. In many States, prisoners—the group that I think need protection the most—would likely be excluded. So that for Congress to leave it now to the States would be a terrible admission that the Court was right. I mean, I don't think the Congress can turn away from the challenge.

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

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

Mr. SCOTT. Was he the only Justice—

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

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

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

Mr. CHOPKO. If I can add just a word. To a lesser extent than any other panelist, I am an agnostic, maybe an opponent, of moving quickly into a patchwork of State religious legislation. We have asked our State people to go slowly on that question to allow an opportunity for the Congress to act. State laws would create study this to avoid a patchwork quilt of protection with unequal application. Your idea's intriguing, but you would have to then figure out how it would fit within the framework of State law. Many States have Blaine amendments which restrict benefits from government

to religion that have been interpreted in a way that is especially hostile to religion. So there are separate State law problems that might actually be made worse in a State regime than in a Federal regime.

Finally, I would not, if I were in your position, want to abdicate the important role of the Congress in protecting religious liberty. In a sense, you would be throwing up your hands and saying, "We'll let the States do it. In fact, we'll give them the schematic to do it, but we'll let the States do it." I don't think we're there yet. I think there are numerous avenues that need to be explored.

Mr. SCOTT. One of the things that the Supreme Court pointed out in their decision was that there was a lack of a legislative record of what the problem is. Could the witnesses, for the record, cite cases where the discrimination is a problem that needs to be remedied?

Mr. CHOPKO. There are examples, Mr. Scott, in every religious community. The *City of Boerne* case is a good example, and, again, it's not one where I think that regulators and zoning and housing administrators are going out of their way to specifically discriminate intentionally against religion, but there are numerous discriminatory effects that occur.

There are parking cases or building cases involving the Catholic diocese in Palm Beach, Florida and Buffalo, New York. There was the problem in which the earthquake damaged unusable the cathedral in Los Angeles. It was attempted to be preserved on account of its historic significance when no one could use it. The city and the county of Los Angeles were on record as hoping the Archdiocese of Los Angeles would build a new cathedral and center so that they could attract private money to rebuild parts of the city of Los Angeles.

Mr. SCOTT. Are there some general themes, overall themes, of where the problem is, so that next time this comes to the Supreme Court we'll have a record of exactly what we're aiming at?

Mr. STERN. Yes. I think there are some. They could have looked at their own opinions. In *Larsen v. Valente*, they invalidated a charitable solicitation ordinance, because, as they found, the exemptions in the act had been drafted to exclude one particular church. In *Church of the Babalu Aye v. City of Hialeah*, which Professor Laycock—disregarding my sage advice—took to the Supreme Court, because I thought he couldn't persuade the Court that this was an ordinance directed at the church—managed to persuade nine Justices unanimously that it was discriminatory. But if you look at the record and the trial below, a very able trial judge and three very able circuit court judges found no evidence of religious discrimination.

The city of Starkville, Mississippi had given zoning variances to every church from parking requirements until a mosque came along, and asked for the same variance. They get turned get down. The Fifth Circuit doesn't quite say that it's discriminatory. They stopped just short of that, and found a more polite way of ordering that the variance be granted.

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

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

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

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

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

Mr. THOMAS. Mr. Scott, one resource that members of the subcommittee might want to consult and make part of this record is the very thorough brief that was filed by the Church of Jesus Christ of Latter Day Saints in the *Flores* decision documenting repeated instances in which neutral zoning laws were used to keep Mormon congregations and temples out of communities in the United States. So, that is one resource that has not just anecdotal evidence, but well documented.

And if I might, Mr. Scott, also, I don't want to be too sanguine in suggesting that these State RFRA's are going to be smooth sailing. Mr. Stern is right about the establishment problems under some State constitutions because of Blain amendments and more strict establishment clauses. I saw within the last month an opinion by one State attorney general suggesting that RFRA-type legislation might be a violation of their State constitution. So, it will be a patchwork, and it will not suffice for Federal legislation.

Mr. COLSON. Just one thing, Mr. Scott, to add to your focus upon the question of whether there has been a history of this: Certainly there has in the prison field with which I'm most familiar, and we work in 1,200 prisons. It's a lot of negotiating in every single prison to get free religious access, because of the authority that the warden must have. I've been in litigation pre-RFRA, post-RFRA; many cases where Jewish prisoners were not allowed to wear yarmulkes during that interim period between the *Smith* decision and the passage of RFRA; where communion was canceled for Catholic prisoners in a Los Angeles jail and restored by RFRA. But the argument is specious on its face that there has to be a pattern of discrimination before Congress could act. It's like saying that we didn't need the ballistic missiles because none were ever fired. The existence of RFRA protects a religious liberty, and it isn't necessary that there has to be a long train of grievances before you can justify Congress acting in this area. The very act itself prevents those grievances.

Mr. CANADY. Mr. Hyde.

Mr. HYDE. Well, thank you, Mr. Chairman, and I thank you for having these hearings, and this is only the beginning of—despite the expressions of expeditious action, I think it's important that we do this thoughtfully, and we do it well, with as wide a scope of advice as we can get, because agreeing with Mr. Colson, I think this is one of the most important questions that I've ever encountered too, because it will involve the debate on judicial supremacy we never had in this country. It involves a reevaluation of the separation of church and States nuances as it is applied. No one disagrees with the principle, but implementing the principle gives us problems. It will involve prayer in school; it will involve the whole relationship of the State and churches and the principle of neutrality as against hostility. There is a plethora of issues that are really important, and once in a generation, or once in 200 years, you get the opportunity to debate these in a thoughtful way, and hopefully, prayerfully, resolve them.

So, I couldn't agree more about the significance of this, and Mr. Canady is the right person to chair this subcommittee and to deal with it, and we have some very thoughtful members on this: Mr. Scott, Mr. Nadler, and others, and so I think something good will come of this, but it may not be as fast as you want, but it will be, I think, a good product.

Mr. Chopko, our mutual friend, Judge John Noonan of the Ninth Circuit, in his dissent in *EEOC v. Townly Engineering*, noted that religious claimants haven't fared particularly well under the compelling interest standard of review, losing 65 out of 72 times by Judge Noonan's count. I wonder if we should consider a means other than the compelling interest standard to protect religious freedom. Have you any thoughts on that?

Mr. CHOPKO. Well, I have two things to say about that: First is that I think if there were a way that we could find that would actually strengthen, make stronger a test like compelling interest, than Congress should adopt it. I've made suggestions before about ways in which we can either strengthen the scope of review or strengthen the litigation requirement, on Government to make sure that if a burden is imposed on religion, it is only for the most stringently

and exigent reasons, affecting something like public health and safety, and not just throwing it into a general calculus about public welfare.

The second thing is an observation. The courts have interpreted the Religious Freedom Restoration Act in a way stronger than initially I thought it would. The courts—and I must confess to my surprise—took seriously the words of Justice Scalia in *Smith*, that if Congress passed a compelling interest test, and applied it, and really signified that that was the test that should be applied, it would be a very difficult burden for government litigants on the other side to sustain. To my surprise, in a sense, the Religious Freedom Restoration Act has actually worked more favorably towards religion.

So, if in the first analysis some more extreme protection for religion could occur, that would be my preferred alternative, but if it couldn't, I think confirming the compelling interest analysis with Justice Scalia's warning in mind, would be not a bad way to go.

Mr. HYDE. Thank you, and—

Mr. STERN. May I address that?

Mr. HYDE. Surely.

Mr. STERN. There's a tendency to count impacts of legislation by court decisions, and particularly appellate court decisions that tend to get reported, but in the real world laws have larger impacts.

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

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

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

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

Thank you, Mr. Chairman.

Mr. CANADY. Thank you. Mr. Nadler.

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

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

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

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

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

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

Mr. NADLER. Let me ask a different question: The *Flores* decision talks about a legislative record. I, for one, thought the testimony

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

Mr. STERN. Pictures.

Mr. NADLER. Pictures.

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

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

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

Mr. CHOPKO. I'm used to being blamed for whatever the problem is. [Laughter.]

I'm trying to restore, but that's just been the problem—

Mr. STERN. Your colleagues told me I should say that.

But if you look at that, just that list, and then you compare it to the demographics of the United States, it makes fairly compelling evidence that there's something going on here beyond just the neutral application of zoning laws.

I think what the Supreme Court wants is facts and figures. They want that shown. They want cases. They want some—I think they want some approximation of, is this a common problem; is it an aberration? They want—can you smoke it out? Can you show it? I think you can do that in the way that—and the model here, the model referred to was really the 1982 Voting Rights Act. But the model here really is not the 1982 Voting Rights Act hearings, but the 1964 and 1965 both voting rights, public accommodation, and employment discrimination hearings, where there was far broader, real testimony, as Reverend Thomas said, by people who'd actually been the victims and what its statistical impact was.

Mr. CHOPKO. I think you can also look, Mr. Nadler, at the record that's been alluded to before in the Equal Access Act and those debates in 1983 and 1984. I went back and looked at the record, along with some of the case law preparing for these hearings. It struck me that, this is anecdotal evidence. At the outset the Congress said it was trying to protect the First Amendment rights of students. The record is replete with examples from every corner of the country as to where students' rights have been suppressed.

Mr. NADLER. Thank you. Mr. Chairman. I ask unanimous consent to put this in the record. And I simply want to add—

Mr. CANADY. Without objection.

Mr. NADLER. Thank you.

I simply—I noticed the rabbi isn't going to—I haven't any further questions. I want to add one piece of anecdotal evidence that, 25 years ago, I was a member of the local community planning board on the West Side of Manhattan. And the Mormon Church came in and wanted a zoning variance to the building that now stands across the street from Lincoln Center. And the subcommittee, the committee, the zoning committee, on the community board unanimously recommended no problem with the zoning variance. When it came to the full board, someone got up and said, "You know, the Church of Jesus Christ of Latter Day Saints doesn't allow blacks to become priests." And on the basis of that objection to their religious doctrine, the board then voted down the zoning variance, with mine being the only dissenting vote.

It was reversed by the City Board of Estimate, but the whole debate was, "We don't like their religious doctrine, and we're not going to allow them to have the zoning variance."

Mr. CANADY. Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I want to commend you for holding these hearings on this very important matter and very disappointing decision on the part of the Supreme Court. And I agree with Chairman Hyde that this may well be one of the most fundamental issues that we have dealt with, certainly in my short tenure on this committee, and maybe in many decades.

This is a very serious problem from the standpoint of free exercise of religion in this country. But it goes beyond that. The *Smith* case was one of a long, long chain of cases, not just related to religious freedom, but related to a great many other areas where I

think the Supreme Court has, without changing a word in the document, rewritten the United States Constitution.

And it troubles me, because I don't think our Founding Fathers intended that. I think they intended, quite frankly, that the Congress would be the principal decider of what the rights of individuals were under the Constitution. Along came Justice Marshall and the *Marbury v. Madison* decision and bestowed upon the Court, taking unto itself the role of being that final arbiter, and now I think they've taken it to an even higher standard by effectively saying that the Congress is cut out of that process, much less having a secondary role, which we clearly have had for a good, long time.

You know, the only alternative that the Congress ultimately had, and it always surprised me that we thought we had a great alternative here, was to pass a statute that was narrowly tailored to reverse the *Smith* case. We did have dicta in the case from Justice Scalia that suggested that, if we were specific enough, we could pass such a statute, but if we weren't specific than we couldn't do that. But, effectively, we wanted to reverse *Smith*. We wanted to say that there was a higher standard that had to be imposed by any arbiter before an individual's right of religious freedom could be taken away from them. And so doing that by statute seemed to be a very desirable thing. It passed this Congress overwhelmingly. I think we had two dissenting votes here in the House, and a comparable margin of passage in the Senate. But in the end, I can't say that I am overwhelmingly surprised that, notwithstanding some of the language in the *Smith* case, that the Court did reverse it.

But for us to overturn that now, and to change it, requires holding together that same consensus. And maybe we can do that with a constitutional amendment, but it's always proven very historically difficult to do, and perhaps should be difficult to do. A three-quarters—a two-thirds in both the House and the Senate, and three-quarters of State legislatures ratifying it.

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

So we're faced with a narrow number of alternatives here. Certainly one of those is to push a constitutional amendment. There are those on this panel who advocate another statutory attempt with a different alternative. There are those here in the Congress who say, well, perhaps we ought to go back to what President Jackson said many, many years ago: "Justice Marshall has made his decision, now let him enforce it." By attempting to point some leverage in this, by saying, well, if you deny people their rights under our interpretation of the Constitution, we're not going to give your community, your State, whatever, any money, you know, that's certainly one way to go about it through the back door.

Are any of you interested in a broader approach to this, which has been the subject of a great deal of debate in this Congress for the first time in a long time—that perhaps the Court needs to be reined in, in other respects, not just on the narrow decision of this

case, but in terms of whether or not we need to make sure that the people, through their elected representatives, have the authority to act in ways that I think the Founding Fathers intended?

Mr. Colson.

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

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

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

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

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

Mr. GOODLATTE. Mr. Chopko.

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

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

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

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

who have themselves urged doctrines of interpretation on the Court—

Mr. GOODLATTE. Mr. Stern, that's all the more alarming, not consoling that—

Mr. STERN. I would have been happy if we had other people on the Court. We might have had a better result. But the fact is, it illustrates my point, which is that the Supreme Court works on a vision of federalism and separation of powers, and the substantive meaning of constitutional liberties, individual liberties, which we can disagree with or not disagree with in a particular case.

But if we are to take the Court out of that role, which I think, contrary to what Mr. Colson said, was in fact intended by the Founding Fathers, then we have again altered the separation of powers in ways that I don't think the Founders intended. The Founders were not populists. They created a divided government; they created a republican government; they were afraid of mob rule, and they thought the Court was going to stand in the breach in large measure. And as unpalatable as it is to me to accept this decision, I think it would be far less palatable if we were not to have the Court as an institution that said "no" and "yes" sometimes.

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

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

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

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

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

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

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

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

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Goodlatte.

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

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

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

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

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

Professor Laycock.

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

Mr. LAYCOCK. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I've elaborated this point at somewhat greater length in my written testimony. I cite an article by an international law scholar who is the real expert here, but the important point I wanted to make orally is that the treaty power proposal is not a proposal that any international organization can tell Congress what to do. It is a proposal that Congress has the power to decide what religious liberty requires.

Just as we turn to the Commerce Clause and the Spending Clause to implement Congress' view of religious liberty because the Court says that view can't be implemented directly, so one more option is to turn to the treaty power to implement Congress' view of what religious liberty requires because the Court says you can't do it directly.

I believe it would be wise to reaffirm re-enact RFRA as applied to the Federal Government to eliminate any issue about severability or implied repeal. There will be litigation over whether RFRA is constitutional as applied to Federal activity; we may be back in the Supreme Court on that issue, but I expect to win on that issue. The rhetoric of the *Boerne* case is hostile to RFRA, but the reasoning and the source of authority is completely different.

Section 5 of the 14th Amendment has nothing to do with applying RFRA to Federal power. I think we'll eventually win on the constitutionality of federal applications. Congress could shorten that litigation by eliminating any issues about severability and implied repeal.

Thank you, Mr. Chairman. I'll wait for questions.

[The prepared statement of Mr. Laycock follows:]

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

PROTECTING RELIGIOUS FREEDOM AFTER *BOERNE V. FLORES* SUMMARY OF STATEMENT
OF DOUGLAS LAYCOCK

City of Boerne v. Flores deprives Congress of much of its constitutional role in protecting the civil liberties of the American people. The remaining Congressional power to enforce the Fourteenth Amendment is ill-defined; it apparently depends on the Court's assessment of the problem to be solved.

The remaining constitutional protection for the free exercise of religion is also ill-defined. Religious practices are often burdened by laws that are not generally applicable, and under *Employment Division v. Smith*, this discrimination is subject to the compelling interest test. It remains to be seen whether the courts will vigorously enforce this part of *Smith*.

Congress can help with a series of partial solutions:

1. Congress could enact legislation to implement Article 18 of the International Covenant on Civil and Political Rights, which requires more protection for religious exercise than *Smith* provides. Such legislation could have RFRA's universal scope, but the standard of protection would be less stringent than the compelling interest test. Such legislation would recognize that the Covenant is not self-executing and that enforceable rights are created only by normal legislation passed by both Houses of Congress.

2. Congress could enact RFRA's compelling interest standard with respect to all religious practices that affect commerce. Congress could enact presumptions to simplify the litigation of whether commerce is affected.

3. Congress could enact RFRA's compelling interest test with respect to all federally assisted programs.

4. Congress could enact RFRA's compelling interest test with respect to any field of regulation where Congress finds that religion is often burdened by laws of less than general applicability. It is important for Congress and the religious and civil liberties communities to document the problems addressed.

5. Congress should state explicitly that RFRA has not been repealed and that it still applies to federal law.

6. For all this legislation, Congress should enact enforcement provisions such as those in RFRA.

BIOGRAPHICAL SKETCH DOUGLAS LAYCOCK

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

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

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

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

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

I. THE SHRINKING OF CONGRESSIONAL POWER

City of Boerne v. Flores holds that the Religious Freedom Restoration Act is 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. I am informed that the Administration shares my view that federal applications of RFRA are unaffected.

When the Supreme Court announces a limit on the powers of Congress or of the states, it is central to our system of government that the Court's decision is entitled to obedience. 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.¹ Five of these decisions upheld RFRA as applied to state or local law. Four of these decisions came from federal courts of appeals, and each of these was written by a well-respected conservative judge appointed by Ronald Reagan—Patrick Higginbotham, Richard Posner, John Noonan, and James Buckley. I think that *Boerne* has dramatically changed the law, but if not, I am not the only one who was confused.

Boerne significantly limits Congress's independent power to protect the civil 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, 65 U.S.L.W. at 4615, and it reaffirms that Congress may "prohibit[] conduct which is not itself unconstitutional." *Id.* at 4614. But Congress may prohibit such conduct only as a means to "deter[] or remed[y] constitutional violations" as defined by the Court, *id.*, and "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end." *Id.* at 4615. "[T]he line is not easy to discern, and Congress must have wide latitude in determining where it lies." *Id.* But here, the Court determined that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 4618.

This standard seems to require an empirical judgment: Congressional enforcement legislation is valid if the number of violations of the Constitution as interpreted by the Court is sufficiently large in proportion to the number of violations of the 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 and 1991 as they apply to state and local employment, to the Pregnancy Discrimination Act as it applies to state and local government, and generally to all other enforcement legislation that has not already been upheld by the Supreme Court. I have no better data than the Court, but reading in the 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

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

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 a month ago under RFRA. But it is not obvious just how much protection has been removed. The meaning of *Smith* is disputed, and under *Boerne*, that dispute is relevant to the scope of 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 to religious practices were being held neutral and generally applicable.² And RFRA's advocates naturally emphasized this worst case scenario, which maximized the need for legislative remedies.

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

But in the meantime, the Court decided *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), and gave real content to the requirements of 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

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

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. 65 U.S.L.W. 4613. But when it considered whether RFRA was a proportionate response to violations of *Smith*, it used the phrase “religious bigotry” as a shorthand for what *Smith* required. *Id.* at 4619. This shorthand made it easier to argue that RFRA was a disproportionate 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. Members 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 Treaty Power. Congress has power to enact legislation to implement treaties, even if the treaty deals with matters that would otherwise be left to state regulation. *Missouri v. Holland*, 252 U.S. 416 (1920), citing cases dating back to the 1790s. Congress could enact a universally applicable law, requiring something like intermediate scrutiny for burdens on religious practice, to bring the United States into compliance with the International Covenant on Civil and Political Rights.

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

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

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

Congress has ample basis to find that the United States is not in compliance with the Covenant's guarantee of religious liberty and that implementing legislation is necessary. The explanation is set out in full in a recent article by an international law specialist, which I am not, Gerald L. Neuman, *The Global Dimension of RFRA*, 14 Const. Comm. 33 (1997). Article 18 of the Covenant expressly protects not only religious belief, but also the "freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." Art. 18, § 1. This "freedom to manifest one's religion or 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." Art. 18, § 3. It is necessary but not sufficient that the limitation on religious practice be "prescribed by law." The requirement of necessity is independent, and must mean something more than necessary to any legitimate public purpose prescribed by law. Congress can properly find that the English text, the original French text, and the negotiating history all indicate that limitations on religious practice must be necessary to some state interest sufficiently important to justify the limitation. This is something less than the compelling interest test, but it is certainly more than rational basis. Perhaps the best translation into American legal traditions is intermediate scrutiny—substantially related to an important governmental objective. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

I think it would be a mistake to simply re-enact RFRA and declare it to be an implementation of the Covenant. We would then get into arguments about whether the implementing legislation went further than the Covenant and whether the power to implement treaties includes the power to go further—the same arguments we had over RFRA. It would be better to closely track the standard of the Covenant.

Legislation to implement the Covenant would be a partial solution in that it would provide less protection than RFRA provided, but it could have the same universal scope as RFRA. That is, Congress can use the treaty power to provide a base of partial protection for all religious practice. It could then use other powers to provide compelling interest protection for those religious practices within the reach of other powers.

2. The Commerce Power. Congress could enact RFRA's level of protection for religious practices affecting commerce. The statute would provide that any religious practice affecting commerce is exempt from burdens imposed by state and local 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 pursu-

ant to the commerce power. This Act was upheld in *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

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

After *United States v. Lopez*, 514 U.S. 549 (1995), I doubt that the commerce power can reach religious practices that do not affect a commercial transaction. But many religious practices do affect commercial transactions. When burdensome 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,³ that individual transactions are within the commerce power if all such transactions cumulatively affect commerce,⁴ and that Congress can regulate commerce for moral or other non-economic motives.⁵ 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 provide that if burdensome regulation of a religious practice causes or prevents the production, purchase, sale, lease, or employment of goods or services, commerce is affected. Or Congress could provide that the person seeking to justify a burden on religious practice bears the burden of persuasion on the affecting-commerce issue.

3. The Spending Power. Congress could enact RFRA's level of protection for 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 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. Congressional power to attach conditions federal spending has been recognized since *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

Conditions on federal grants must be "[r]elated 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.

³*United States v. Robertson* (1995) (mining); *Hodel v. Virginia Surface Mining Ass'n*, 452 U.S. 264 (1981) (mining); *Wickard v. Filburn*, 317 U.S. 111 (1942) (agricultural production); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (manufacturing).

⁴*Perez v. United States*, 402 U.S. 146 (1971) (local loansharking); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurant); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (motel); *Maryland v. Wirtz*, 392 U.S. 183 (1968) (wages of employees of enterprise that affects commerce, whether or not each employee affects commerce); *Wickard v. Filburn*, 317 U.S. 111 (1942) (agricultural production for consumption by producer).

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

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.

4. **The Enforcement Power.** *City of Boerne v. Flores* does not deprive Congress of all power to protect religious exercise under its power to enforce the Fourteenth Amendment. Congress must make a clear record that any statute is directed to 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 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, especially in the case of churches not affiliated with a well-known denomination, that finding a site for a new church is often impossible.⁶ Many of the resulting lawsuits are not about efforts to build new structures, but simply efforts to rent and occupy a storefront. I believe the same problem exists elsewhere, but it is well documented in and around Chicago. If the Committee will call the attorneys for these churches as 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% 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

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

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 Church was added to the historic district by a separate ordinance that applied only to St. Peter and to no other property. These land-use laws are often not neutral and they are almost never generally applicable in any meaningful sense. Thus, the resulting burdens on churches should be subject to strict scrutiny under *Employment Division v. Smith*. There are *Smith* violations here that are difficult to prove, and that is an appropriate case for enforcement 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).

If religious and civil liberties organizations will gather the evidence and bring it to Congress, there are many areas of discretionary decisions where a pattern of widespread but hard-to-prove discrimination against religion can be documented. The first and easiest to document would be the use of land use regulation to exclude churches. Specific legislation addressing these particular problems would likely be more effective than a general standard such as that in RFRA. Churches do not need the right to locate just *anywhere*, without regard to impact on neighbors, but they should have the right to locate *somewhere* within reach of the members of each worshiping community. Congressional investigation would reveal that churches do not have that right today.

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

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

There may also be need for more specific federal legislation directed at particular problems. For example, trustees in bankruptcy persist in filing fraudulent transfer claims against churches to recover 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*, 65 U.S.L.W. 3850 (1997). The general language of RFRA has not been enough to avoid repeated litigation, even though the burden of 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.

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

it is extremely unlikely that any federal grant will be revoked because of one or a few incidents of suppressing religious practice.

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

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

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

The first point—vague standards and discretionary decisions—is the source of the religious liberty problem, and these conditions are quite common in governmental organizations. In nearly all the cases in which schools penalize the religious 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 % of Americans admitted to "mostly unfavorable" or "very unfavorable" opinions of "religious fundamentalists," and 86% admitted to mostly or very unfavorable opinions of "members of religious cults or sects." George Gallup, Jr., *The Gallup Poll: Public Opinion 1993* at 75-76, 78 (1994).

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

It is a reasonable inference that at least a comparable percentage of government administrators hold these hostile views toward religious fundamentalists and 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% 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% 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 the answer to your question is that 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, and that land use regulation is just the most visible and best documented example. Religious liberty groups get many such complaints, and if some of those groups have maintained good files, they could document examples outside the land use context.

Another set of decisionmakers entrusted with effectively unreviewable discretion is juries. Civil juries review religions and religious practices in a wide range of cases, including suits by disaffected members objecting to religious teaching or 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.

One other response to your question is a category of cases mentioned in my original written testimony—cases in which the legislature exempts influential secular interests who complain of the regulatory burden but does not exempt religious practices burdened by the same law. I believe that this is discrimination within the meaning of the Supreme Court's free exercise cases. But in any individual case, there will be an argument about whether the secular exemption is sufficiently analogous to the religious exemption, and if the court defers to the legislature whenever it is uncertain, many violations will not be identified as such.

Each of these fact patterns produces numerous difficult-to-prove violations of the Free Exercise Clause as interpreted by the courts. Representatives of religious and civil liberties groups are aware of these problems from personal experience. I believe that these groups and the Subcommittee, working together, will be able to document the significance of these problems.

Very truly yours,

DOUGLAS LAYCOCK.

Mr. CANADY. Mr. Sutton.

STATEMENT OF JEFF SUTTON, SOLICITOR, STATE OF OHIO

Mr. SUTTON. Thank you, Mr. Chairman. I'd like to use this opportunity to explain a State employee's perspective on the *Boerne* decision, Ohio's explanation for getting involved in the case initially, and eventually participating in the oral argument at the Supreme Court, and at least our initial instincts about how to respond to the decision.

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman.

[The prepared statement of Mr. Sutton follows:]

PREPARED STATEMENT OF JEFFREY SUTTON, SOLICITOR, STATE OF OHIO

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

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

I. The Impact Of *City Of Boerne*

First and foremost, *City of Boerne* caps the scope of Congress' power under §5 of the Fourteenth Amendment to legislate in areas traditionally regulated by the states. The decision makes it clear that 5 establishes a power to remedy constitutional civil rights violations, not to regulate civil rights generally. It authorizes Congress only to enforce existing constitutional guarantees, as determined by the Supreme Court, not to alter those guarantees. Any power to expand those guarantees for remedial purposes exists only when Congress has established the requisite predicate for doing so—a pattern and practice of State failure to honor their constitutional duties. Finally, any such legislation must be proportional to the underlying violation.

Because the Court relied on the Fourteenth Amendment in reaching its decision, we do not think it limits Congress' authority to enact a new RFRA that applies only to Federal laws, regulations and practices. Nor do we think the decision prevents States from providing greater protection for religious liberties than the Free Exercise Clause already provides.

II. The Problems Caused By RFRA

Ohio wrote an *amicus* brief on behalf of itself and 15 other states and territories challenging the validity of RFRA in the *City of Boerne* case. One primary concern motivated our participation: A proliferation of inmate lawsuits under the law. In the three and one-half years that RFRA was on the books, 254 inmate RFRA cases reached the LEXIS legal database. They represented almost 60% of all suits involving RFRA in that database. Moreover, those figures probably understate the extent of the prisoner litigation caused by RFRA as most cases were never reported and some involved class actions.

The cases included such bizarre claims as demands for recognition of the right to burn bibles, the right to possess and distribute racist literature, the right to engage in animal sacrifices and the right to group martial arts classes. In addition, RFRA forced the re-litigation of many issues previously settled under pre-RFRA standards. RFRA cases were particularly time consuming due to the law's application whenever prison security regulations "substantially burdened" any and all religious practices. Consequently, corrections officials had to spend an inordinate amount of time on discovery and trial related matters.

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

More ominously, inmates exploited the fact that RFRA both shifted and enhanced the burden of proof regarding the validity of prison regulations and practices to insulate illicit, even dangerous, activities from official scrutiny. Corrections officials across the country noticed that white supremacist inmates suddenly converted to obscure or eccentric religions, then demanded that officials recognize their religious gatherings and practices under RFRA. Here in the District of Columbia inmates recruited "religious volunteers" to bring drugs and prostitutes into Lorton prison, intimidating the staff with threats of lawsuits under RFRA. Luciferian inmates in Wyoming invoked RFRA to demand, and receive, the right to unsupervised group services and then burned Christian bibles and hymnals in those services, creating not only a fire safety threat but also causing significant smoke damage to prison facilities. Although most abuses were detected and dealt with eventually, they resulted in tremendous diversions of staff time from other pressing tasks, such as gang suppression and contraband control. In addition to these specific problems, RFRA also provided an effective mechanism for inmates to challenge the general authority of prison officials, authority which must be maintained both to protect weaker inmates from their stronger, predatory counterparts and to facilitate rehabilitation.

Finally, RFRA actually impeded the delivery of religious services to inmates adhering to non-disruptive, mainstream religions. It did so in two ways. Quantitatively, religious services personnel spent so much time dealing with the increased volume of increasingly belligerent demands and lawsuits that they had little time to facilitate the delivery of religious services to sincere, non-disruptive inmates of faith. Qualitatively, the need to constantly investigate and frequently turn down requests under RFRA led inmates to view chaplains more as enforcers than pastors,

and chaplains to become increasingly skeptical of inmates' sincerity, thereby undermining the relationship of mutual respect that is essential to the effective delivery of religious services.

The foregoing is just a summary of the problems caused by RFRA in the prison setting. Time does not permit a more thorough discussion that those problems demand. Summaries of the initial and final results of a survey of the impact of RFRA on state prisons conducted by the Florida Attorney General's Office and of a letter from the two chief religious services administrators of the Ohio Department of Rehabilitation and Correction are attached.

III. STATE LAW PROTECTIONS OF RELIGIOUS EXPRESSION

In his opinion for the Court, Justice Kennedy noted that there is little evidence of a wide-spread violation of religious rights in the United States:

In contrast to the record which confronted Congress and the judiciary in the voting rights cases, *RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.* See, e.g., Religious Freedom Restoration Act of 1991, Hearings on H.R. 2797 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 2d Sess., 331-334 (1993) (statement of Douglas Laycock) (House Hearings); The Religious Freedom Restoration Act, Hearing on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess., 30-31 (1993) (statement of Dallin H. Oaks) (Senate Hearing); Senate Hearing 68-76 (statement of Douglas Laycock); Religious Freedom Restoration Act of 1990, Hearing on H.R. 5377 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess., 49 (1991) (statement of John H. Buchanan, Jr.) (1990 House Hearing). *The absence of more recent episodes stems from the fact that, as one witness testified, "deliberate persecution is not the usual problem in this country."* House Hearings 334 (statement of Douglas Laycock). See also House Report 2 ("[L]aws directly targeting religious practices have become increasingly rare"). Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion. Much of the discussion centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs, see e.g., House Hearings 81 (statement of Nadine Strossen); id., at 107-110 (statement of William Yang); id., at 27-28 (statement of Hmong-Lao Unity Assn., Inc.); id., at 50 (statement of Baptist Joint Committee); see also Senate Report 8; House Report 5-6, and n. 14, and on zoning regulations and historic preservation laws (like the one at issue here), which as an incident of their normal operation, have adverse effects on churches and synagogues. See, e.g., House Hearings 17, 57 (statement of Nadine Strossen); id., at 157 (statement of Edward M. Gaffney, Jr.); id., at 327 (statement of Douglas Laycock); Senate Hearing 143-144 (statement of Robert P. Dugan, Jr.); see also Senate Report 8; House Report 5-6, and n. 14. *It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country.*

(Emphasis added).

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

DRAFT**THE OHIO RELIGIOUS LIBERTY ACT****Purposes:**

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

Religion, morality, and knowledge, ... being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, Art. I, section 7;

(2) To ensure that government does not substantially burden a person's free exercise of religion without a legitimate explanation; and

(3) To provide a claim or defense to persons whose religious exercise is substantially burdened.

Statute:

(1) State and local government shall not substantially burden a person's exercise of religion, except as provided in subsections (2) and (3) of this section.

(2) State and local government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden

(a) advances an important governmental interest; and

(b) is no greater than necessary to further the governmental interest.

(3) This statute does not apply to individuals incarcerated in State or local prisons.

Definition:

The term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the State or a subdivision of the State;

Applicability:

(1) This chapter applies to all State and local law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after its effective date; and

(2) All State and local laws adopted after the effective date of this chapter are subject to these provisions unless such laws explicitly exclude such application by reference to this chapter.

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APPENDIX ITEM B

**OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050**

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

MEMORANDUM

TO: Robert A. Butterworth
Attorney General

Harry Singletary
Secretary
Florida Department of Corrections

FROM: Kim Tucker
Deputy General Counsel

DATE: July 19, 1996

RE: Preliminary Results of the RFRA Survey of All
States: The Impact of the Religious Freedom
Restoration Act on State Correctional Systems

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

As you know, RFRA's mandated abandonment of the

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

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

I am pleased to report that of the 56 States and Territories to

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which the survey was sent, we have received responses from the Attorneys General and Department of Corrections in 33, so far, and we have been provided assurances from the others that their responses are in progress.

As discussed more fully below, RFRA has had a very significant, and very adverse, impact upon corrections systems in three major ways. First, RFRA has been utilized by racial hate groups and other inmate gangs to insulate their activities from the oversight and control of corrections officials. Second, there has been a tremendous increase in the number of lawsuits and internal demands for "religiously motivated" alterations of prison practices, creating significant burdens on the resources of corrections systems, state attorneys general, and the courts. The enactment of RFRA has resulted in the proliferation of claims for exemptions from prison security regulations and requests for special privileges, grounded in obscure or previously little-known "religions", including: Wicca, Satanism, Odinism, Asartu, and Luciferianism. Third, the enactment of RFRA has been followed by a reduction in the availability of religious programming in some state correctional systems.

Perhaps the most prevalent and disturbing pattern is the use of RFRA by inmate groups to insulate their activities from regulation by prison officials. Inmate groups and gangs have recognized that RFRA's "least restrictive means" test makes it very difficult for corrections officials to restrict activity allegedly motivated by religion and, consequently, have claimed religious status for their groups and religious motivation for their actions. Where previously prison officials successfully prevented gangs from wearing colors or emblems, these-same groups now assert the right to wear special clothing or medallions as expressions of religious freedom. Since the federal courts are loathe to challenge the sincerity of religious claims and because it is difficult to

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overcome the "least restrictive means" test in the assertion of this type of claim, this is providing inmates an avenue for circumventing the legitimate security concerns of correctional institutions and encouraging the proliferation of gangs in prisons. Like Florida, most states responding to the survey have indicated that this pattern is being employed by racial hate groups, such as the Aryan Nation, as well as street gangs.

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

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

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

Finally, and most ironically, the survey indicates that RFRA has actually resulted in a decrease in religious programming for most inmates in some States. The increased demands on staff time, described above, means that prison chaplains have less time to actually deliver religious services. In addition, increased demands for time and space by adherents to such previously obscure "religions" as Satanism, Wicca, Asatru, and Odinism² has resulted in less time and space being available for adherents of wide-spread, mainstream religions. Moreover, the increased stridency of inmate demands and doctrinal conflicts between inmates and potential volunteers

² Prior to enactment of RFRA, these "religions" were rare or unheard of in the prison context. The survey indicates, however, that inmate claims of conversion to these "religions" has proliferated since enactment of RFRA. Similarly, RFRA has spawned a surfeit of inmate claims for special privileges and exemptions, allegedly grounded in the Native American religion; however, overwhelming these claims are asserted by inmates with no previous or legitimate claim to tribal affiliation. (e.g. claims of Virginia inmates Randall "Lone Wolf" Mullins and William "Two Eagles" Martin to the right to possess feathers from endangered eagles, despite federal law prohibitions against possession of such feathers by individuals who do not have an identification number from the Bureau of Indian Affairs. Ironically, the Justice Department has intervened in this case on the inmates' behalf.)

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has resulted in less programming being available from outside groups, who had previously serviced the inmate populations. Finally, some States have become so frustrated with the difficulties resulting from RFRA that they have eliminated all State-funded religious programming in their prisons.³

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

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

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APPENDIX ITEM C

July 17, 1996

**Ms. Betty D. Montgomery
Attorney General of Ohio
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0581**

**Re: The Effect of the Religious
Freedom Restoration Act of
1993 on the Delivery of
Religious Services in Ohio's
Prisons**

Dear Attorney General Montgomery,

We are writing as the Directors of Religious Services of the Ohio Department of Rehabilitation and Correction to describe the effect of the Religious Freedom Restoration Act of 1993 ("RFRA") on the delivery of religious services in Ohio's prisons. Ironically, RFRA has adversely affected the delivery of such services by limiting both the quantity and quality of staff time that can be devoted to religious matters.

Quantitatively, RFRA has forced religious services personnel to be diverted from tasks necessary to meet the spiritual needs of Ohio's inmates in order to respond to the significant legal and operational problems that have followed its enactment. Prior to RFRA, the Ohio Department of Rehabilitation and Correction ("ODRC") took a proactive approach to meeting the religious needs of inmates and we spent the vast majority of our time developing programming, recruiting and working with paid and volunteer providers of

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religious services and working with the religious community at large regarding the needs of inmates. We were seldom involved in litigation or problems of statutory compliance.

Unfortunately, that changed dramatically after the enactment of RFRA. We now spend approximately 75 to 90 percent of our time dealing with legal and operational problems directly related to RFRA. More specifically, we spend between 15 to 25 percent of our time working with attorneys from your office on lawsuits arising under RFRA. In addition, we spend between 60 to 70 percent of our time consulting with institutional staff regarding compliance with RFRA. The cumulative result of those developments has been that we are now forced to take a reactive approach to religious matters, as opposed to our traditionally proactive approach.

That dramatic change has two interrelated causes. The first is that RFRA's least restrictive means test requires us to effectively "set up and shoot down" all possible alternatives for dealing with "religiously motivated" requests for alterations of normal prison operations. Considering and evaluating those mostly unworkable alternatives is tremendously time consuming. Time spent on those matters cannot be spent on facilitating the delivery of religious services of a non-disruptive nature.

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

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

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

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

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

As the foregoing makes clear, RFRA has had a very significant and very adverse effect on the delivery of religious services in Ohio's prisons.

Sincerely,

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Mr. CANADY. Thank you, Mr. Sutton.
Professor Berg.

**STATEMENT OF THOMAS C. BERG, ASSOCIATE PROFESSOR OF
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Mr. BERG. Thank you, Mr. Chairman. I have just a few comments to make, all of which are set forth at greater length, obviously, in my written submission.

Obviously, the need for religious freedom legislation is as great now as it was in 1993. Religious practice is still subject to widespread suppression by general laws under the Smith standard. You look at the long list of free exercise claims that were denied after Smith, before RFRA was enacted, and you get worried about what we might be returning to. As Professor Laycock pointed out, Smith contains exceptions and limitations that could be used to preserve and advance free exercise, but their scope is uncertain.

RFRA clearly, in my view, does remain valid as applied to the Federal Government. I agree with Professor Laycock that we will ultimately win that argument. The decision in *Boerne* is based on section 5 of the 14th Amendment which says, "Congress shall have the power to enforce the Constitution." The Supreme Court said that enforcing the Constitution means our understanding of the Constitution—*Marbury v. Madison*. Whatever you think of that position, it has nothing to do with the proposition that Congress can act under other powers that are not powers enforcing the Constitution. So *Boerne* has nothing to do with that. And I wouldn't make much of the remand in the Crystal Church case as far as the Court's view on this, because they do things like that all the time to clear their docket after they decide a major case. Nevertheless, it would be, I think, prudent for Congress, in legislating, to make it clear that RFRA does, indeed, apply to the Federal Government.

Now, as to State and local laws, which are the major issue, we know that the options of working for State mini-RFRA laws and for a constitutional amendment have significant problems with them. So Congress does have a role to play, and I believe that it should seriously consider and enact a revised version of RFRA that would be based on several sources of power. Because each of these sources will not support, or at least most of these sources will not support, the across-the-board coverage that the original RFRA had, you should rely on them together as complementary, and provide that RFRA is triggered whenever the situation fits under any one of them.

Now, these possible bases include the Spending and Commerce power, as we've talked about today. The revised RFRA could provide that the compelling interest test is triggered when the religious activity in question affects interstate commerce or when the burdensome State program in question is a recipient of Federal funds. It's not ideal to base protection of a civil right, a fundamental human right, on the Commerce power, but Congress did it in 1964 in the Civil Rights Act and it can do it again.

The use of the Spending and Commerce powers may raise some legitimate concerns for some Members about federalism and State autonomy. So let me take a moment to respond to some of those concerns. First, there are some basic rights that we all agree

should be protected across the Nation. Whatever our views about federalism, we agree that there is some set of basic rights that should be protected nationally, and free exercise of religion, which is an explicit constitutional right, should be among those.

Second, it's important to realize, I think, that RFRA differs substantially from many other Federal mandates that attempt to impose a uniform, national solution to some complex social problem. The ultimate goals of federalism are to decentralize power and to allow a variety of approaches to problems. And RFRA doesn't cut against those goals; it serves them. It allows religious organizations to follow their tenets and fashion distinctive approaches to social needs, free from unnecessary regulation. There's much interest now in relying on religious charities to attack the problems of poverty and crime. RFRA is an important part of that strategy. In the reported cases alone, it's permitted homeless shelters and soup kitchens to operate in the face of exclusionary zoning rules, churches to expand their buildings to pursue new ministries in the face of landmarking laws, and prisoners to practice peacefully their religious beliefs which studies have shown can have powerful rehabilitative effects.

Both the Spending and Commerce powers are probably available, but they will be limited in their coverage because of the Supreme Court's recent concern to protect federalism. The model for the spending power component, as Professor Laycock said, would be Title VI and the other civil rights laws that prohibit discrimination in any program or activity receiving Federal funds—the Equal Access Act, as well. The Court has upheld those conditions. Even if you believe that the Spending Power should not generally be used to pressure States into enacting Congress's preferred social policy, you can still defend the anti-discrimination statutes as means simply to ensure that Federal money is not used to support discrimination. The same reasoning could support RFRA.

And in this regard, I think it's important to note that the latest case on the Spending Power, *South Dakota against Dole*, was written by the Chief Justice and joined by Justice Scalia. So a major part of the so-called "States' rights wing" of the Court takes a position on that Congress has considerable authority to act under the Spending power.

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

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

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

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

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

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

[The prepared statement of Mr. Berg follows:]

PREPARED STATEMENT OF THOMAS C. BERG, ASSOCIATE PROFESSOR OF LAW,
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My name is Thomas C. Berg, and I am an associate professor of law at Cumberland Law School, Samford University, in Birmingham, Alabama, where my main scholarly interest is in the law of religious liberty. I also have written briefs in a number of religious liberty cases, often on behalf of the Center for Law and Religious Freedom of the Christian Legal Society, but also on behalf of other groups of varying faiths.

We are here today to explore ways of protecting religious freedom in America in the wake of the Supreme Court’s decision in *City of Boerne v. Flores*,¹ which struck down the Religious Freedom Restoration Act of 1993 (RFRA) as applied to state and local laws. In striking down RFRA, the Court adhered to its ruling in *Employment Division v. Smith*² that the Constitution gives religious practice almost no protection from a law that is formally neutral and generally applicable. Only in the few cases where religious practice is singled out for suppression can we be confident that the federal courts will intervene. *Smith* set out some exceptions to this rule, and careful litigation may expand their scope. But there is no denying that in our heavily regulated society, *Smith* allows religious exercise to be heavily regulated too. Congress recognized this and, through RFRA, tried to restore the requirement that government show a compelling need in order to override the demands of religious conscience. But the Court held in *Boerne* that when Congress enforces the provisions of the Fourteenth Amendment under section 5 of the Amendment, it cannot adopt an interpretation of rights under the Amendment that is broader than what the Court would recognize.

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

¹ 117 S. Ct. _____, 65 U.S.L.W. 4612 (1997).

² 494 U.S. 872 (1990).

³ 117 S. Ct. at _____.

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

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

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

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

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

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

A third concern is that basing RFRA on the spending and commerce powers, whether or not it is constitutional, raises legitimate questions about federalism and state autonomy. I will address some of those questions in discussing each clause. But it is important to note two points at the outset. First, there is almost universal agreement that some fundamental rights should be protected at the national level. Free exercise of religion, set forth in the Constitution, certainly fits in that category.

Second, RFRA differs great from many federal mandates that attempt to impose a uniform national solution to complex social problems. The ultimate goals of federalism are to decentralize power and allow a variety of solutions to problems, and RFRA in fact serves those goals. It allows religious organizations like schools and social service agencies to follow their own tenets and fashion their own distinctive approaches to social needs, free from unnecessary state regulation. There is much interest now in relying on religious charities to attack the problems of poverty and crime. RFRA is an important part of such a strategy.

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

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

⁵ *Salvation Army v. Dept. of Community Affairs*, 919 F.2d 183 (3d Cir. 1990) (upholding regulations under *Smith*).

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

I. THE VALIDITY OF RFRA AS APPLIED TO FEDERAL ACTIVITIES

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

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

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

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

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

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

⁶ *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991) (upholding exclusionary zoning ordinance under *Smith* analysis).

⁷ *Rector of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991) (upholding landmark restrictions on church building).

⁸ *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990).

⁹ See, e.g., 139 Cong. Rec. S14462 (daily ed. Oct. 27, 1993) (Sen. Lieberman) (summarizing evidence); id. at 14464-65 (Sen. Coats) (same).

¹⁰ See, e.g., *Jesus Center v. Farmington Hills Zoning Bd.*, 215 Mich. App. 54, 544 N.W.2d 698 (1996) (denial of permit to operate homeless shelter substantially burdened church's religious exercise even though shelter could be located elsewhere); *Western Presbyterian Church v. Bd. of Zoning Adjustment*, 849 F. Supp. 77 (D.D.C. 1994) (issuing preliminary injunction against zoning board's exclusion of a soup kitchen that had operated safely for 10 years); *Alameen v. Coughlin*, 892 F. Supp. 440 (E.D.N.Y. 1995) (granting preliminary injunction against rule forbidding Sufi Muslim prisoners from possessing and displaying beads important to their faith).

¹¹ U.S. Const. art. I, § 8, cl. 12, 13.

¹² *Welsh v. United States*, 398 U.S. 333, 371 (1970) (White, J., dissenting on other grounds).

¹³ RFRA § 6(b), 42 U.S.C. § 2000bb-3.

¹⁴ 117 S. Ct. at _____ (Stevens, J., concurring).

¹⁵ *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Smith*, 494 U.S. at 890; Board of Education, *Kiryas Joel School Dist. v. Grumet*, 114 S. Ct. 2481, 2492 (1994); *Texas Monthly v. Bullock*, 489 U.S. 1, 18 (1989). The last two cases rejected particular accommodations as going too far but affirmed that there is no per se rule against accommodations.

Court held that discrimination on the basis of pregnancy is not sex discrimination under the Fourteenth Amendment or Title VII,¹⁶ Congress used the Commerce Power to prohibit both states and private entities from discriminating because of pregnancy.¹⁷ And the 1964 Civil Rights Act itself relied on the Commerce Power to make private businesses follow standards of racial equality when the Court had earlier held they were not bound to do so by the Fourteenth Amendment.¹⁸

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

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

II. OPTIONS FOR PROTECTING RELIGIOUS FREEDOM

A. State Provisions

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

B. Constitutional Amendment

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

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

C. Federal Legislation

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

1. TREATY POWER

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

¹⁶ *Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1977).

¹⁷ Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

¹⁸ Civil Rights Cases, 109 U.S. 3 (1883).

¹⁹ *Christians v. Crystal Evangelical Church*, 117 S. Ct. _____, 65 U.S.L.W. 3205 (1997) (vacating and remanding *In re Young*, 82 F.3d 1407 (8th Cir. 1996)).

²⁰ See Gerald L. Neuman, *The Global Dimension of RFRA*, 14 Const. Comm. 33 (1997).

2. SPENDING POWER

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

The existing case law gives Congress great leeway in putting conditions on federal funds to state and local governments; it is even more favorable to congressional power than the section 5 law was. The Court has not struck down such a condition since before the New Deal "revolution" of 1937, and even that decision said Congress can exercise the Spending Power for purposes that are not within the other enumerated powers.²² Ten years ago, *South Dakota v. Dole*²³ held that even if Congress could not impose a 21-year minimum drinking age itself, it could require states to do so as a condition of receiving federal highway funds. *Dole* was written by Chief Justice Rehnquist and joined by Justice Scalia. In other words, even a part of the current state's rights majority on the Court is inclined to allow conditions on funding to state governments, even if Congress could not impose the same rule by direct regulation. The theory, apparently, is that Congress can do what it likes with federal money and states are free to reject the money if they do not like the accompanying conditions.²⁴

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

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

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

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

²¹ U.S. Const. art. I, § 8, cl. 1.

²² *United States v. Butler*, 297 U.S. 1 (1936).

²³ 483 U.S. 203 (1987).

²⁴ *Dole*, 483 U.S. at 210.

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

²⁶ *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974).

²⁷ 483 U.S. at 208-09.

²⁸ *Id.* at 216 (O'Connor, J., dissenting).

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

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

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

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

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

3. COMMERCE POWER

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

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

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

³⁰ Thomas R. McCoy and Barry Friedman, *Conditional Federal Spending: Federalism's Trojan Horse*, 1988 Sup. Ct. Rev. 85, 114.

³¹ Pub. L. No. 100-259 (1988), amending the statutes cited in note 25.

³² 483 U.S. at 217 (O'Connor, J., dissenting) (citing *Lau*, 414 U.S. 563).

³³ See *Guardians Assn. v. Civil Service Comm.*, 463 U.S. 582 (1983) (upholding such regulations under Title VI); *Lau*, 414 U.S. 563 (upholding regulations requiring schools to correct English language deficiencies of students); *Kelley v. Board of Trustees*, 35 F.2d 265, 268 (7th Cir. 1994), cert. denied, 115 S. Ct. 938 (1995) (regulations under Title IX).

³⁴ *Washington v. Davis*, 426 U.S. 229 (1976) (race); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979) (sex).

³⁵ 117 S. Ct. _____, 65 U.S.L.W. 4731 (1997).

³⁶ 505 U.S. 144 (1992).

³⁷ *Id.* at 173.

states in their regulation of commerce, and also that a law whose "whole object" is "to direct the functioning of the state executive" is per se unconstitutional.³⁸

However, the enforcement of civil rights such as religious freedom against states is very different from the regulatory programs the Court has struck down. RFRA does not affirmatively compel states to carry out a regulatory program; it negatively prohibits them from interfering with individuals' rights. RFRA ultimately acts upon individuals by protecting their religious exercise; it happens that the force against which such protection is needed is state and local government. RFRA does not single out the states for regulation; the whole federal government is subject to the same rule. Moreover, one of the main concerns of *Printz* and *New York* is that state officials will be held accountable for unpopular regulations actually attributable to Congress;³⁹ this blurring of accountability does not seem likely to happen when state officials do not take affirmative steps but merely leave religious practice alone. If RFRA were struck down, then the Tenth Amendment would potentially bar a great many civil rights laws not premised on the Fourteenth Amendment enforcement power. The Court might stretch federalism that far, but it seems less than likely.

However, the scope of RFRA's coverage under the Commerce Power would be limited. The reach of the Commerce Power is now defined by *United States v. Lopez*,⁴⁰ which struck down the Gun-Free School Zones Act of 1990 because the activity of carrying a gun in a school did not bear a substantial relation to interstate commerce. Lopez sets out three categories of permissible regulation. Since a revised RFRA would not directly regulate or protect the channels or instrumentalities of interstate commerce, it probably would have to rest on the power to regulate activities that "substantially affect" interstate commerce.⁴¹ Lopez suggests two possible ways to meet the "substantially affecting" test.

The first way is to ensure, through an explicit jurisdictional element in the statute, that the activity in any given case affects interstate commerce. The Gun-Free School Zones Act contained no such jurisdictional element.⁴² More important, the Court indicated that it would not just accept speculation about how a particular activity is connected to interstate commerce.

The second possible way is to show that the activity would substantially affect interstate commerce through repetition—that is, viewed "in the aggregate"—even if not in every particular instance.⁴³ For example, a farmer growing wheat on his land for his family's consumption would not himself affect interstate commerce, but the class of all such activity nationwide would.⁴⁴ One of the key steps in Lopez is to limit sharply this "aggregation" argument—perhaps confining it to cases where the regulated activity is economic in nature, and at least viewing that as a very important factor. (Gun possession, the Court concluded, was not economic.) Without some such limit, the Court said, the Commerce Power would become a general police power.

The Court also said that the asserted connection between gun possession in schools and national productivity was too attenuated and required "pil[ing] inference upon inference."⁴⁵ Some lower courts cases have read Lopez as still allowing regulation of intrastate noneconomic activity—for example, domestic violence against women—if, when aggregated nationally, it has a close and substantial effect on interstate commerce.⁴⁶

In my judgment, the effect of these rules would be to limit the Commerce Power basis for a revised RFRA mostly to cases of free exercise rights asserted by institutions: churches, religious schools, religious social service agencies such as homeless shelters or child care centers. Many of these institutions could meet a jurisdictional element of "affecting interstate commerce." Congress would have to make findings that such institutions purchase materials or supplies in interstate commerce or have other connections to it (on the model of the Civil Rights Act provisions upheld as applied to local restaurants in *Katzenbach v. McClung*⁴⁷). The aggregation argument also could be available for many classes of religious institutions, since they could be said to engage in economic activity: hiring employees, purchasing materials

³⁸ 117 S. Ct. at _____.

³⁹ *Printz*, 117 S. Ct. at _____; *New York*, 505 U.S. at 168–69.

⁴⁰ 514 U.S. 549, 115 S. Ct. 1624 (1995).

⁴¹ *Lopez*, 115 S. Ct. at 1629–30.

⁴² *Id.* at 1632.

⁴³ *Id.*

⁴⁴ See *Wickard v. Filburn*, 317 U.S. 111 (1942) (approved in *Lopez*, 115 S. Ct. at 1630).

⁴⁵ 115 S. Ct. at 1633–34.

⁴⁶ See, e.g., *Doe v. Hartz*, 1997 WL 354832 (N.D. Iowa 1997) (upholding the Violence Against Women Act); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996) (same); *United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995) (upholding the Freedom of Access to Clinic Entrances Act).

⁴⁷ 379 U.S. 294 (1966).

and supplies, and so forth. Congress then could and should make explicit findings, wherever possible, that the effect of burdensome general laws on religious institutions in the aggregate affects interstate commerce.

But these rationales would not likely extend to most cases of individual free exercise. Some individual cases could be covered, where the conflict arises out of the individual believer's commercial activity: for example, those where landlords have religious objections to renting to unmarried couples.⁴⁸ But most would not be, including some of the most compelling situations for protecting conscience. That is the cost of having to protect human rights under a commercial provision. Many but not all of the individual claims could be reached under the Spending Power rationale.

4. TARGETED EXEMPTIONS

Finally, there is the option of enacting exemptions targeted at particular areas of religious exercise based on specific congressional findings. This is clearly a second-best alternative to a general statute. One of the prime political and philosophical advantages of RFRA to date has been that it has covered all religious freedom claims and has not embroiled Congress in explicitly choosing which forms of religious practice deserve protection.

However, exemptions targeted at specific areas could fill in some of the gaps in coverage left by other bases for the statute. Congress could continue to rely on the section 5 power and find that religious practices in certain areas implicate one of the "hybrid rights" preserved in *Smith*: religion combined with rights of speech, association, parental control over education, and presumably other constitutional interests such as property rights. One good model here is the historic preservation area, where courts have accepted the argument that restrictions on church architecture interfere with expressive interests as well as religious ones.⁴⁹ Congress could explicitly find that speech or other interests are implicated in other areas as well. Congress could also find that some laws, though formally neutral, are implemented in discriminatory ways. Again, historic preservation laws provide a good example: churches are subjected to such ordinances at a much higher rate than other buildings.⁵⁰

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

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

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

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

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

⁴⁸ See, e.g., *Smith v. Fair Employment and Housing Comm.*, 12 Cal. 4th 1143, 913 P.2d 909 (1996).

⁴⁹ See, e.g., *First Covenant Church v. City of Seattle*, 120 Wash. 2d 203, 840 P.2d 174 (1992).

⁵⁰ See Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 49 & n.203.

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

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

Mr. CANADY. But the bulk of the cases that you've talked about don't involve circumstances such as that. They would fall into the frivolous claim category. Right? I mean, when you're talking about the chaplains having to go and testify and the drain on the resources of the system and everybody's attention being diverted by the lawsuits, that's not by suits that you consider to have some merit, even though you may disagree with the relief being sought. I mean, those are the run-of-the-mill lawsuits that we've heard about that are recreational.

Mr. SUTTON. I want to be fair about my answer. The truth of it is we haven't broken it down. I cannot cite in Ohio or a national study that breaks down the RFRA filings and categorizes some as fairly serious and others as recreational or eccentric.

The example I've just given you, however, would be one that would divert a substantial amount of chaplain time, corrections officials' time, and even more time if the resolution of the case is as I think it should come out. If strict scrutiny means anything, it means the courts would not resolve the issue once and for all time. They'd litigate it over and over with each individual.

Mr. CANADY. Let me ask you this: What religious rights do you think that inmates should have?

Mr. SUTTON. Let me start by explaining the rights that the U.S. Supreme Court has said they should have. What the U.S. Supreme Court has said is that just because you have broken State or Federal laws and are incarcerated doesn't mean that you check your constitutional rights at the prison door. You do have constitutional rights. By and large, what the Court has said in cases like *Turner v. Safley* or *Lonnie v. Shabazz* is that the State defense to those allegations merely has to meet a reasonableness test; that the courts defer substantially to prison officials in these areas, even when constitutional rights are involved, because of the difficulty States have in running prison systems and the substantial local interest involved in managing a corrections system.

I would say in Ohio we go beyond that. As I said in my opening testimony, we have State-paid chaplains; that's not something that's required. I assume there are even some people that are

strong proponents of the Establishment Clause who would say that it's not even allowed. So we go well beyond what's required. In Ohio we're sensitive to the notion that if we take seriously our duty to rehabilitate inmates, spiritual issues are a great tool when it comes to this mission. The problems we have are when those interests confront security concerns or the development of a series of eccentric religions, each with claims of their own and each with demands of their own, on State time.

Mr. CANADY. OK, thank you. Let me——

Mr. LAYCOCK. Mr. Chairman, could I speak briefly to this prison question?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. BERG. I'd do the same.

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

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

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

Mr. LAYCOCK. Absolutely nothing.

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

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

Mr. BERG. Well, you've got to be mindful primarily of the *Lopez* decision, the *Gun-Free Schools Act* decision and the kind of rules that it sets down. One element that *Lopez* focuses on is putting some kind of jurisdictional element in the statute affecting interstate commerce. So that would be important. In addition, the record would have to be of an institution purchasing materials in interstate commerce or hiring people engaging in commerce and then a record that across-the-board, if you add up all those situations, and churches are, for example, prevented from opening new buildings, from locating in certain neighborhoods—that has a burdensome effect on commerce across the Nation. That's why I think the Commerce Clause is most likely to reach institutional claims where there is some kind of activity like that that you can point to.

There's a few individual cases that you could also reach. For example, the case of the landlord who doesn't want to rent to a couple that's not married, because that is inconsistent with his or her tenets, that's a kind of commercial activity where, again, across-the-board, you could probably make findings—I would think that people are deterred from renting, from going into that business, if they know that the State is going to force them to rent in the kinds of circumstances that violates their faith.

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

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

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

Mr. LAYCOCK. Yes, sir.

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

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

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

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

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

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

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

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

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

The subcommittee is adjourned.

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