CONCEPTUAL GULFS IN CITY OF BOERNE V. FLORES

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It is chancy business for a lawyer who has lost a case to offer scholarly commentary on that case. The line between criticism and whining may be thin. Yet that lawyer also has the advantage of having spent much time investigating and thinking about the issues. I can at least record in the published scholarly record that “Boerne” is pronounced “Berne.”

I confidently expected to win the Flores case. Marci Hamilton and others who doubted the validity of the Religious Freedom Restoration Act1 plainly had a much better sense than I of the Court’s political mood. The city’s brief contained twenty-nine citations to dissenting opinions, most of them for key points.2 I naively thought that this revealed the weakness of the city’s arguments. But Professor Hamilton’s judgment was exactly right; the former dissenters now had the votes to change the law. Moreover, something about the facts or politics of RFRA provoked at least the acquiescence of Justices who I suspect would not have joined the earlier dissents on which she relied. The City of Boerne did not get all nine votes, but the most striking fact about the case is that Archbishop Flores did not get a dissent on the central issue in the case.3

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3. Justices Souter and Breyer did not reach the issue. See Flores, 117 S. Ct. at 2185 (Souter, J., dissenting); id. at 2186 (Breyer, J., dissenting). Justice O’Connor agreed with much of the Court’s opinion, but dissented on free exercise grounds. See
My view of the matter was not entirely the self-delusion of an advocate: six appellate courts considered the constitutionality of RFRA prior to the Supreme Court’s decision in *Flores*, and all six upheld the Act.\(^4\) Five of these decisions upheld RFRA as applied to state or local law.\(^5\) Four of these decisions came from federal courts of appeals, and each was written by a well-respected, conservative judge appointed by Ronald Reagan—James Buckley, Patrick Higginbotham, John Noonan, and Richard Posner.\(^6\) I think that *Flores* dramatically changed the law, but if it did not, then I am not the only one who was confused.

*Flores* was unusual for the number and magnitude of fundamental disagreements between the two sides. Litigation over disputed questions of law works best when background principles are reasonably established and each side can build its argument from a starting premise that the Court is not likely to question. In *Flores*, the parties disputed everything at the most fundamental level. There were more basic points in dispute than the Court could focus on, and more than either side could adequately brief. Some of these conflicting assumptions were about the enforcement power, some were about RFRA itself, and some were about religious liberty. The Court’s starting assumptions turned out to be much closer to those of RFRA’s opponents, so probably RFRA was doomed from the beginning.

If the assumptions about RFRA and religious liberty dominated the decision, then *Flores* may be a special ticket, good for this day and this train only. It announced an elastic standard that might stretch to uphold anything Congress wants to enact.

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id. at 2176 (O’Connor, J., dissenting).


5. The exception was EEOC v. Catholic University, 83 F.3d at 469-70, which upheld RFRA as applied to federal law.

6. *See* Mockaitis, 104 F.3d at 1522 (Noonan, J.); Sasnett, 91 F.3d at 1018 (Posner, J.); Catholic Univ., 83 F.3d at 455 (Buckley, J.); Flores, 73 F.3d at 1352 (Higginbotham, J.).
cept RFRA. The opinion depended heavily on the Court's assessment of the facts, and in future cases, the Court might find the facts required to uphold any statute that is not RFRA.

If the assumptions about the enforcement power were sufficient to drive the case without assistance from the assumptions about RFRA and religious liberty, then Flores may mean what it says, and the Court may find facts in the future exactly as it found them in Flores. In that event, Flores is by far the most important of the recent round of federalism decisions. Several statutes that were previously uncontroversial are now subject to serious constitutional attack; Congress's power to protect liberty in the states appears to have shrunk dramatically. As in Employment Division v. Smith,7 nothing is overruled, but everything is changed.

I. WHAT THE COURT SAID

Flores held that RFRA is unconstitutional as applied to state and local governments.8 The decision does not affect RFRA's application to federal law, which is based on Congress's Article I powers and in no way depends on the Fourteenth Amendment.

Flores significantly limits Congress's independent power to protect the civil liberties of the American people. How significantly remains to be seen, because the opinion announced a vague standard of uncertain scope. The Court reaffirmed that congressional power to enforce the Fourteenth Amendment includes the power to enforce rights incorporated into that Amendment from elsewhere in the Constitution.9 But the enforcement power is "remedial" and not "substantive." Congress is bound by the Court's determination of the meaning of constitutional rights.10 Even so, the remedial power is "broad,"11 and the Court reaffirmed that Congress may "prohibit[] conduct which is not itself unconstitutional."12 But Congress may prohibit such

8. See Flores, 117 S. Ct. at 2162.
9. See id. at 2163-64.
10. See id. at 2164.
11. Id. at 2163.
12. Id.
conduct only as a means to "deter[] or remed[y] constitutional violations" as defined by the Court,\(^\text{13}\) and "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."\(^\text{14}\) "[T]he line... is not easy to discern, and Congress must have wide latitude in determining where it lies."\(^\text{15}\) But the Court said 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."\(^\text{16}\)

The proportionality part of this standard seems to require an empirical judgment: Congressional enforcement legislation is valid only if violations of the Constitution, as interpreted by the Court, appear in a sufficiently large proportion of all cases presenting violations of the statute. The Court plainly believed that the proportion of constitutional violations to RFRA violations was small, and that this proportion was larger in the case of other enforcement legislation previously upheld.\(^\text{17}\) But the Court had no data on any of these proportions, and it guessed about the number of free exercise violations without resolving serious disputes about what would count as a violation. The congruence and proportionality standard is inherently vague, and the litigation process is probably incapable of producing good data on the proportions the Court seems to require.

Without the prospect of data, we must rely on educated guesses. My own guess is that several important statutes do not satisfy this new standard if *Flores* is any guide to its content. The Court did not claim otherwise. This brings me to the first of the conceptual gulfs between the parties: What was different about RFRA?

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13. *Id.*
14. *Id.* at 2164.
15. *Id.*
16. *Id.* at 2170.
17. *See id.* at 2169-71 (describing the Court’s assessment of the need for RFRA and comparing that to the need for the Voting Rights Act of 1965).
II. WHAT WAS DIFFERENT ABOUT RFRA?

The centerpiece of our brief was a straightforward argument based on judicial and legislative precedent. From 1866 to 1991, Congress repeatedly enacted enforcement legislation that went beyond judicial interpretations of the constitutional right being enforced. Most of these Acts were upheld or accepted into the fabric of the law without serious challenge. RFRA was no different. RFRA excused the plaintiff from the obligation to prove bad motive or overt discrimination, and instead required the state to justify the burdens placed on religions by facially neutral laws. Citing Title VII and the Voting Rights Acts, we argued that no exercise of the enforcement power is better settled than its use to dispense with proof of bad motive or overt discrimination.


RFRA's opponents believed that it was a unique statute, an unprecedented congressional grab for power. The Court at least agreed with them that RFRA went further than statutes it had previously upheld. The Court interpreted most of the judicial precedent, and some of the legislative precedent, as consistent with its decision. As to the rest, the Court was silent. The Court conspicuously did not say that the Voting Rights Act of 1982, or Title VII as applied to state and local governments, or congressional definitions of badges and incidents of slavery, are congruent with and proportional to judicial definitions of the underlying constitutional rights.

The Court did explain how the Voting Rights Act of 1965 met its new standard. The core provisions of the 1965 Act were based on a voluminous congressional record showing widespread and persistent use of facially neutral devices to prevent African Americans from voting. But this record is unique among modern legislation under the Enforcement Clauses.

The Court also attempted to explain how Katzenbach v. Morgan fit its new theory of the enforcement power. The Court suggested that voting rights for Puerto Ricans in New York might have been intended as a remedy for discrimination in public services. Acceptance of a voting rights remedy for a public services violation suggests that the requirement of congruence does not add anything to the requirement of proportionality. In addition, the Court seemed not to care that the congressional record said nothing about discrimination in public services in New York. Maybe the Court assumed it could take judicial notice of widespread ethnic discrimination in the delivery of

29. See Flores, 117 S. Ct. at 2168.
public services. Or maybe the Court reaffirmed Morgan under an implicit grandfather clause, and Flores's new standard is, in practice, prospective only.

The Court also had trouble explaining Section 201 of the Voting Rights Act of 1970, which banned literacy tests in the states not subject to the 1965 Act. The Court unanimously upheld this provision in Oregon v. Mitchell, despite the lack of evidence that literacy tests had been misused in the newly covered states. The Court in Flores cited speculation in several opinions in Oregon v. Mitchell about what Congress might have believed when it passed Section 201, but even if the Court accurately attributed these speculations to Congress, they add up to a very thin record of occasional effects in most of the northern and western states. Flores did not comment on how the test of congruence and proportionality might have applied in either Katzenbach v. Morgan or Oregon v. Mitchell. The Court simply said that in each case, the statute could be explained as remedial.

The Court said nothing at all about the Voting Rights Act of 1982, which bars any voting practice with discriminatory results. The political history of the 1982 Act, and the structural relationship of the statutory and constitutional standards, are indistinguishable from RFRA. RFRA was a direct congressional response to Smith; the 1982 Voting Rights Act was a direct congressional response to City of Mobile v. Bolden. The legisla-

32. See id. at 131-34 (Black, J., announcing the judgment of the Court) (upholding the ban without proof of discriminatory purpose); id. at 144-47 (separate opinion of Douglas, J.) (upholding the ban, noting that Congress "need not make findings as to the incidence of literacy"); id. at 216-17 (Harlan, J., concurring in part and dissenting in part) (upholding the ban, relying on Congress's power to enforce the Fifteenth Amendment, "[d]espite the lack of evidence of specific instances of discriminatory application or effect"); id. at 231-36 (Brennan, White, & Marshall, JJ., concurring in part and dissenting in part) (upholding the ban, relying on the power to ban practices with discriminatory effects); id. at 282-84 (Stewart, J., concurring in part and dissenting in part, joined by Burger, C.J. & Blackmun, J.) (joining Justice Black's position on this issue).
33. See Flores, 117 S. Ct. at 2167.
34. See id. at 2167-68.
tive history of the 1982 Act denounced *Bolden* as often and as vigorously as the legislative history of RFRA denounced *Smith*.\(^{37}\) RFRA covered nearly the whole scope of the Free Exercise Clause, and the 1982 Act covers the whole scope of the Fifteenth Amendment. Both RFRA and the 1982 Act enacted a broad standard drawn from prior constitutional interpretation. In each case, the Court's new constitutional standard required discrimination that was either deliberate (in the sense of unconstitutional motive) or overt (in the sense of disparate treatment, whatever the motive) and the statutory standard that Congress enacted in response dispensed with that requirement.\(^{38}\) In each case, there was some evidence that the new statutory standard simplified proof of constitutional violations,\(^{39}\) and substantial evidence that Congress disagreed with the new court-defined constitutional standard. The Senate Report on the 1982 Act was explicit about which consideration was more important: “During the hearings, there was considerable discussion of the difficulty often encountered in meeting the intent test, but that is not the


\(^{39}\) Congress found that without RFRA, the government could use neutral and generally applicable laws to deliberately discriminate against religion, and that sometimes it would do so. Both committees found that facially neutral laws had been used to burden religion through all or much of American history. See S. Rep. No. 103-111, at 5 & n.3, reprinted in 1993 U.S.C.C.A.N. 1892, 1894-95; H.R. Rep. No. 103-88, at 2. The committees cited testimony that three of the greatest religious persecutions in American history—that against the Mormons in the nineteenth century, that against the Jehovah's Witnesses in the 1930s and 40s, and the Ku Klux Klan's attempt to close Catholic schools in the 1920s—had been based on facially neutral, generally applicable laws.

principal reason why we have rejected it. The main reason is that, simply put, the test asks the wrong question.\textsuperscript{40}

The 1982 Voting Rights Act was not aimed at efforts to prevent blacks from voting; those efforts had largely ended by 1982. Instead, it was aimed at second and third generation voting rights problems, especially the inability of minority groups to elect representatives either in at-large elections or in elections in which the minority vote was dispersed across a number of single-member districts.\textsuperscript{41} The 1982 Act requires the creation of minority-controlled districts where there is a history of racially polarized voting and where such districts can be drawn without gross racial gerrymandering.\textsuperscript{42} Neither element of this threshold showing is plausibly a violation of the Constitution as the Court interprets it. Plaintiffs seem to be able to prove racially polarized voting almost everywhere, but it is hard to imagine the Court holding that the electoral choices of individual voters are unconstitutional, even when cumulated into racial patterns.

The failure to draw minority-controlled districts is not unconstitutional either, nor is it sufficient evidence of likely unconstitutional motive. The Constitution permits any districting scheme not deliberately designed to reduce minority voting strength.\textsuperscript{43} State and local governments have myriad legitimate reasons, and also a range of dubious, but clearly nonracial reasons—especially party gerrymanders and incumbent protection—for at-large elections and for drawing single-member districts one way instead of another.\textsuperscript{44} It seems unlikely that color-blind districting would reliably create minority-controlled seats outside the largest concentrations of minority population. As with RFRA, the number of statutory violations appears disproportionately large in relation to the number of constitu-


\textsuperscript{43} \textit{See} City of Mobile v. Bolden, 446 U.S. 55, 66-69 (1980) (plurality opinion).

\textsuperscript{44} \textit{See, e.g.}, Shaw v. Reno, 509 U.S. 630, 673 n.10 (1993) (White, J., dissenting) (noting that the reason for the racial gerrymander was that a more compact minority district elsewhere in the state would have displaced the incumbent).
tional violations. The Court summarily upheld the 1982 Act in 1984, but *Flores* implied the opposite result.

Many provisions of Title VII of the Civil Rights Act of 1964 go beyond the Court's interpretation of the Constitution. As applied to state and local governments, all of these provisions depend on the 1972 Amendments, which extended Title VII to government employment. Congress expressly rested this extension on the enforcement power, and the Court upheld the extension based on the enforcement power.

The Constitution forbids only deliberate or overt discrimination in employment. But Title VII requires employers to justify practices with disparate impact on women or minorities by showing "job related[ness]" and "business necessity." The extension of disparate impact provisions to state and local employment required government justification for many facially neutral employment practices adopted with no hint of bad motive, including civil service examinations and size and strength requirements. Perhaps there are jurisdictions that designed civil service requirements to exclude minority employees, but the dominant history is quite different: merit appointment emerged as part of a great reform designed to eliminate serious abuses in patronage appointments. There was much lengthy litigation over the disparate impact of governmental employment systems, but I do not know that any state or local government ever found it worthwhile to challenge Congress's power to require governmental employers to justify that disparate impact. Congressional power to go beyond the Constitution was not a serious

45. See Mississippi Republican Executive Comm. v. Brooks, 469 U.S. 1002 (1984); see also *Vera*, 116 S. Ct. at 1968-69 (O'Connor, J., concurring) (arguing that the 1982 Amendments are entitled to a presumption of constitutionality).
47. See 42 U.S.C. § 2000e(a), (b), (h).
issue in the 1970s, but it is after *Flores*.

Disparate impact rules in government employment might be upheld, not as a remedy for discrimination in employment, but as a remedy for discrimination in public education. As in its explanation of *Morgan*, this would require the Court to say that a remedy in one area of state activity is congruent with a violation in another, to take judicial notice of the education violations, and to ignore what Congress actually said, which was that employment requirements have disparate racial impact "because of low incomes, substandard housing, poor education, and other 'atypical' environmental experiences"—the whole range of social disadvantage, and not just the part attributable to unconstitutional discrimination by government agencies.

The Court has held that pregnancy discrimination is not sex discrimination and that it violates neither the Constitution nor Title VII. Congress promptly responded with corrective legislation, the Pregnancy Discrimination Act, that redefined sex discrimination to include pregnancy discrimination. The Act expands on the Court's constitutional definition of sex discrimination, and it applies to state and local governments, in their capacity as employers, a rule that goes well beyond the constitutional rule in *Geduldig v. Aiello*.

There is not the slightest reason to believe that the Pregnancy Discrimination Act is congruent with and proportionate to any constitutional violations as the Court defines them. Congress did not purport to find that discrimination based on pregnancy is widely used as a pretext to exclude women. Rather, it found that pregnancy discrimination unnecessarily burdens women. But so far as I am aware no state or local government ever challenged the Pregnancy Discrimination Act. By 1978, congres-

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57. The Court reasoned that pregnancy discrimination distinguishes between "pregnant women and non-pregnant persons," and that the second group "includes members of both sexes." *Geduldig*, 417 U.S. at 496 n.20.
sional power to go beyond judicial interpretation of the Constitution seemed so settled that such a challenge must have looked futile.

The disparate treatment provisions of Title VII\(^5\) require employers to use sexually integrated actuarial tables.\(^6\) The Court has never held that the Constitution requires that result, and the current Court seems unlikely to do so. Few critics of traditional insurance practice have claimed that employers acted out of a bad motive in these cases, or that the ban on sex-segregated actuarial tables was a prophylactic rule to avoid some other violation. Instead, the statute strikes a different balance than the Constitution as judicially interpreted between competing interests in sexual equality and in traditional insurance practice.

Requiring the use of sexually integrated actuarial tables was a far more substantive exercise of Section 5 power than RFRA. It produced fierce litigation by government insurance plans, including a trip to the Supreme Court on whether employers could escape the civil rights laws by providing insurance benefits through a third party contractor.\(^7\) But the economic interests that found it worthwhile to make that argument did not find it worthwhile to challenge congressional use of the enforcement power to go beyond judicially defined constitutional rights.

The Civil Rights Act of 1866\(^8\) forbids private discrimination in the making of contracts and transfer of property. In Jones v. Alfred H. Mayer Co.,\(^9\) the Court upheld this provision as an exercise of Congress's power to enforce the Thirteenth Amendment, recognizing that Congress has the power “rationally to determine what are the badges and incidents of slavery.”\(^10\)

61. See Norris, 463 U.S. at 1074-75.
Here Congress explicitly redefined the substantive scope of protection—"determining" for itself the badges and incidents of slavery. The Court has held unanimously that congressional power to enforce the Thirteenth Amendment "extend[s] far beyond the actual imposition of slavery or involuntary servitude." But judicial interpretation of the Thirteenth Amendment does not go at all beyond actual imposition of involuntary servitude. The Court has said that the amendment "does not in other matters protect the individual rights of persons of the negro race." If congressional power to enforce constitutional rights is merely remedial in the sense in which *Flores* used the word, then Congress cannot have power to define the badges and incidents of slavery.

The Civil Rights Act of 1991 forbids private discrimination in the enforcement and administration of contracts. This provision amended the Civil Rights Act of 1866 and presumably is based on the same constitutional power. This provision goes as far beyond the Court's interpretation of the Thirteenth Amendment as did the 1866 Act, and the 1991 Act's constitutionality apparently has been assumed on the basis of decisions upholding the 1866 Act.

There are other examples of enforcement statutes that exceed the scope of judicially defined constitutional rights, but these are the most important. There seems to be a widespread impression that RFRA is somehow uniquely different from these statutes. But no one has ever explained the difference—not the Court in its opinion and not the City of Boerne in its brief. RFRA is condemned as broad, intrusive, dis-

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(1971); The Civil Rights Cases, 109 U.S. 3, 20 (1883) (holding that Congress has the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery"); see also Patterson v. McLean Credit Union, 491 U.S. 164, 171-75 (1989) (unanimously reaffirming the statutory holding in *Runyon*).


69. See *supra* note 19 and accompanying text.

70. See *City of Boerne* v. *Flores*, 117 S. Ct. 2157, 2171 (1997) ("[RFRA] is broader than is appropriate.").

71. See id. at 2170 ("[S]weeping coverage ensures its intrusion at every level of
proportionate, but no one ever completes the comparison and explains how these other statutes are narrow, unintrusive, proportionate, or remedial under the same criteria.

These other statutes are not narrow or unintrusive. Some apply to all public employment in the country, and others apply to all voting in the country. Unlike RFRA, these statutes do not merely require occasional exemptions from state policies that remain generally enforceable; rather, these statutes fundamentally changed voting and employment systems. These statutes intrude far more deeply than RFRA into the core processes of state and local government. Opponents of RFRA argue that part of RFRA’s problem is that it enacts a broad standard for courts to apply in individual cases. But this is equally true of the Voting Rights Act definition of discriminatory results and the Title VII provisions on disparate impact.

Before Flores, the only enforcement act struck down in modern times was the congressional effort to lower the voting age to eighteen. The Court struck down this act in Oregon v. Mitchell on the grounds that the Constitution expressly leaves voting eligibility to the states except with respect to race, sex, and payment of a poll tax, and that in any event there was no evidence of discrimination against persons aged eighteen to twenty-one. If any statute reached far enough to raise unique prob-

72. See id. ("RFRA is so out of proportion . . . .").
73. See id. ("[RFRA] attempt[s] a substantive change . . . .").
76. See id. at 119-26 (Black, J., announcing judgment of the Court) (relying on Article I, § 2); id. at 293-94 (Stewart, J., concurring in part and dissenting in part, joined by Burger, C.J. & Blackmun, J.) (relying on “the explicit provisions of Article I, Article II, and the Seventeenth Amendment”); id. at 152-213 (Harlan, J., concurring in part and dissenting in part) (reviewing the legislative history at great length to show that the Fourteenth Amendment does not apply to voting qualifications).
77. See id. at 296 (Stewart, J., concurring in part and dissenting in part, joined by Burger, C.J. & Blackmun, J.) (noting that persons aged 18 to 21 are not a “discrete and insular minority”); id. at 212 (Harlan, J., concurring in part and dissenting
lems of congressional power, then it was this one. Even so, it was struck down by only five to four. 78 The five in the majority joined later that same Term in two opinions—one holding and one dictum—recognizing that congressional power may sweep far beyond judicial interpretation of the right being enforced. 79

Those were race cases, and Dan Conkle has suggested that Congress has less power with respect to religion than with respect to African Americans. 80 But Congress has not confined Enforcement Clause legislation to protection of freed slaves and their descendants. These statutes extend to Cubans, 81 Jews, 82 Arabs, 83 and Puerto Ricans 84—even under legislation to enforce the Thirteenth Amendment. They extend to sex discrimination and pregnancy discrimination, even though Congress consciously refused to prohibit sex discrimination in the Fourteenth Amendment. 85 The Court in Flores reaffirmed congressional power to enforce rights incorporated by the Due Process Clause, and it gave no hint that this power is more limited than the power to enforce the Equal Protection Clause. 86 If race or incorporation is the distinction, the Court did not say so.

One possible distinction between RFRA and other enforcement acts is that, except for the Voting Rights Acts, all of these other

78. See id. at 135-44 (separate opinion of Douglas, J.) (dissenting from the decision to invalidate the voting-age statute); id. at 239-81 (Brennan, White, & Marshall, JJ., concurring in part and dissenting in part) (dissenting from the decision to invalidate the voting-age statute).

79. See Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) (holding that Congress may reach private conduct far beyond the actual imposition of slavery in legislation to enforce the Thirteenth Amendment); Palmer v. Thompson, 403 U.S. 217, 227 (1971) (suggesting that Congress could pass a law under the Enforcement Clause of the Thirteenth Amendment to prevent a city from closing its swimming pools to avoid desegregation).

80. See Conkle, supra note 22, at 68-70.


86. See City of Boerne v. Flores, 117 S. Ct. 2157, 2163-64 (1997).
statutes could be reenacted under the Commerce Clause. So they could, at least for now, and so could much of RFRA. But this is only a partial solution practically, and no solution conceptually. It is a partial solution practically because back pay and damages would be unavailable against states and state agencies if any of this legislation were based on the Commerce Clause, and because some applications of RFRA are beyond the likely boundaries of the Commerce Clause.

The Commerce Clause is no solution conceptually because it leaves the enforcement power either shrunken or subject to a welter of conflicting interpretations. If the law now is that Congress can protect liberty pursuant to its power to protect commerce, but not pursuant to its power to enforce constitutional rights, then this conundrum reveals a fundamental error in the Court's approach to the Constitution. How can Congress have more power to regulate the states under the Commerce Clause than under the Fourteenth Amendment? How can Congress have more power to protect commerce in bricks than to protect places of worship, and more power to protect sales of barbecue sauce than to protect racial equality? The answer may lie in the most fundamental of the disagreements between the parties in *Flores*.

III. FEDERALISM AND THE CIVIL WAR

*Flores* was ultimately a case about the meaning of the Civil War. The War and Reconstruction Amendments made a revolution in the most literal sense of that word: fundamental structural and constitutional change imposed by force of arms. The War and the amendments made the federal government responsible for the protection of liberty in the states.

87. See Seminole Tribe v. Florida, 517 U.S. 44, 57-73 (1996) (holding that the Commerce Clause does not confer power to override Eleventh Amendment immunity, but Section 5 of the Fourteenth Amendment does).


In the antebellum view of liberty, liberty meant the relative absence of government, and a strong central government was the greatest threat to liberty. But by the end of the war the federal government had committed itself to end slavery, which nearly half the states still bitterly defended. Given that alignment, it could no longer be denied that the states were the greatest threat to liberty and that liberty required a central government strong enough to protect liberty from the states. The winners insisted on constitutional amendments to protect liberty in the states, and the amendments charged Congress with enforcing the new protections. This was a fundamental structural change; Congress now bore primary responsibility for liberty in the states.

For RFRA's supporters, there is no doubt that this responsibility for liberty included responsibility for freedom of speech and freedom of religion. The slave states had repeatedly violated both freedoms, and congressmen repeatedly cited these violations as examples of the need for federal intervention. The lead sponsor in each house, in the principal speech introducing and explaining the Fourteenth Amendment, said that the privileges and immunities of citizens of the United States began with the Bill of Rights, and that Congress would now have power to enforce those rights. No one denied it at the time, and the great bulk of careful historical work confirms that incorporation went at least far enough to include the First Amendment.

90. See id. at 131-33.
92. See McPherson, supra note 89, at 136-38.
93. See id. at 140-43.
96. See Henry J. Abraham & Barbara A. Perry, Freedom & the Court 42 (6th ed. 1994); Curtis, supra note 91; Horace Edgar Flack, The Adoption of the Fourteenth Amendment 94 (1908); Eric Foner, Reconstruction 258-59 (1990); Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193, 1198-260 (1992). Even Charles Fairman, the premier source for the view that
But revolutions beget counterrevolutions, and vigorous enforcement of the Reconstruction Amendments was short lived. The counterrevolution was in full flower by the middle 1870s after the Democrats swept the congressional elections and the Grant administration quit responding to electoral violence in the South. The Supreme Court held that the Fourteenth Amendment created no new rights except the right to racial equality, and then that none of the new amendments empowered the United States to prosecute members of a private military that massacred black citizens in a fight to control a local government.

Counterrevolutions are always partial. The Freedmen were not reenslaved, and the Reconstruction Amendments were not repealed. The Court often interpreted those amendments narrowly, but sometimes it gave them real content and enforced that content. The Court announced a broad and deferential standard for reviewing congressional legislation under the enforcement clauses, and its narrow applications of that standard mostly involved congressional attempts to dispense with the state action requirement. Whatever the merit of those deci-

incorporation was not intended, accepted selective incorporation, including incorporation of the Free Speech Clause on grounds equally applicable to the religion clauses. See Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5, 138-39 (1949); see also JACOBUS TENBROEK, THE ANISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 223 (1951) (concluding that the Amendment made natural law rights binding on the states, and that only some of these rights were listed in the Bill of Rights); Howard Jay Graham, Our "Declaratory" Fourteenth Amendment, 7 STAN. L. REV. 3, 19-20 n.80 (1954) (arguing that substantial selective incorporation was uncontroversial, but that there was no intent either way on full incorporation). Alfred Avins, a strict originalist who took a minimalist view of what the amendments did for racial equality, nonetheless concluded that the Privileges or Immunities Clause effected full incorporation. See Alfred Avins, Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited, 6 HARV. J. ON LEGIS. 1 (1968).

97. See MCPHERSON, supra note 89, at 145-52.
100. See United States v. Cruikshank, 92 U.S. 542 (1875).
101. See Strader v. West Virginia, 100 U.S. 303, 311-12 (1879); Ex parte Virginia, 100 U.S. 339, 345-46 (1879).
102. See James v. Bowman, 190 U.S. 127 (1903); The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882); Cruikshank, 92 U.S. at 542;
sions, they should not affect RFRA, which was directed only to state action.\textsuperscript{103}

The Civil War had forever changed expectations for the federal government. The American people looked to it for more and more of their governmental needs and repeatedly expanded its powers. Before the Civil War, eleven constitutional amendments restricted federal power,\textsuperscript{104} and none expanded federal power. After the Civil War, nine constitutional amendments expanded federal power or reduced state influence over the federal government.\textsuperscript{105} Only one contracted federal power, and that amendment—the only such amendment since 1798—merely repealed the ill-fated experiment of Prohibition.\textsuperscript{106}

In the era of \textit{Lochner v. New York},\textsuperscript{107} the Supreme Court put the Fourteenth Amendment to the service of industrial capitalism—another big winner in the Civil War, but not the amendment's intended beneficiary. After 1937, the Court led another push to enforce the Reconstruction Amendments with respect to noneconomic liberties.\textsuperscript{108} With respect to racial equality, the executive and legislative branches eventually added their weight to the effort, beginning in 1957, when President Eisenhower sent troops to Little Rock.\textsuperscript{109} The Court reinvigorated the surviving Reconstruction legislation,\textsuperscript{110} and upheld new civil rights legislation under the Commerce Clause and the Enforcement Clauses.\textsuperscript{111} As already noted, congressional en-

\textit{see also} United States v. Reese, 92 U.S. 214 (1875) (holding that power to enforce the Fifteenth Amendment did not extend to voting restrictions unrelated to race).

\textsuperscript{103} RFRA applied only to actions of a "government," defined as any person acting "under color of law." 42 U.S.C. § 2000bb-2(1) (1994).

\textsuperscript{104} See U.S. Const. amends. I-XI.

\textsuperscript{105} See U.S. Const. amends. XIII-XIX, XXIV, XXVI. The Seventeenth Amendment, which provided for direct election of Senators, is the one that reduced state influence without formally expanding federal power.

\textsuperscript{106} See U.S. Const. amend. XXI (repealing U.S. Const. amend. XVIII).

\textsuperscript{107} 198 U.S. 45 (1905).


\textsuperscript{111} See Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach,
forcement legislation that reached beyond judicial interpretation of the amendment to be enforced was frequent and apparently uncontroversial by the 1970s.

This push to redeem the revolution of the 1860s of course produced its own reaction, partially redeeming the counterrevolution of the 1870s. Both the revolutionary and counterrevolutionary waves were shallower this time; perhaps because of that, they were also longer lived. Conflicting forces coexist, creating uncertainty and shifts of direction. Since 1971, the Supreme Court has been divided. It has generally slowed the expansion of federal rights, and sometimes rolled back those rights, but it has also dropped such bombshells as Roe v. Wade and Romer v. Evans, creating new federal rights and expanding them far beyond anything imagined by the most radical member of the Thirty-ninth Congress.

No one wants to go back to the 1870s on race, but powerful forces want to go back very far indeed on federalism. The more outspoken opponents of RFRA were committed to a sweeping counterrevolution. Their model of federalism is from 1787, or 1791. It is as if the Civil War never happened. Professor Hamilton argued that Congress is the great threat to religious liberty, and that the constitutional evidence for this proposition is the First Amendment. Questions of religious liberty, she asserts, should be left to the states, because the Framers of the First Amendment saw Congress as the threat. The unspoken premise, essential for the argument to make any sense, is that nothing has happened since 1791 to change that perception.

Jeffrey Sutton, appearing for Ohio, put it even more succinctly at the oral argument, urging the Court to "respect the Jeffersonian vision for this country. Let the States be the principal bul-

112. 410 U.S. 113 (1973) (finding a federal constitutional right to abortion).
113. 116 S. Ct. 1620 (1996) (invalidating a state provision preventing state or local laws against discrimination on the basis of sexual orientation).
115. See id.
wark when it comes to protecting civil liberties.” This in a case about the meaning of the Fourteenth Amendment! One could scarcely imagine a “vision” more alien to the Fourteenth Amendment than “the [s]tates [a]s the principal bulwark when it comes to protecting civil liberties.”

Speaking across this conceptual chasm, the two sides found each other incomprehensible. One side thought the Civil War and the amendments fundamentally changed the structure of federalism; the other side interpreted the amendments in a way that was faithful to 1787. The rapid succession of revolution and counterrevolution in the 1860s and 1870s left both sides with talking points from history. The debate over the meaning of the Civil War, or from another perspective, the struggle to secure the fruits of the Civil War, can continue forever.

IV. CONGRESS AND THE COURT

Supposing that the Reconstruction Amendments did make the federal government responsible for liberty in the states, the parties also fundamentally disagreed over how the Constitution distributed that power among the branches. But on this issue, the two sides reversed the customary political polarity: the defenders of states’ rights became the defenders of judicial supremacy. The anti-RFRA forces said that the primary federal power under the Fourteenth Amendment is vested in the Court, and that the congressional power is merely derivative. Congress’s power to enforce the Constitution, under this argument, is only the power to enforce judicial interpretation of the Constitution. The Constitution is what the judges say it is—no more and no less. The anti-RFRA position combines an antebellum version of federalism with a 1960s version of judicial supremacy.

The reversal of positions on judicial supremacy is not so surprising, because these positions answered a question that had also been reversed from its usual formulation. The judicial pow-

117. Id.
118. See Flores, 117 S. Ct. at 2166.
er asserted in *Flores* is not the *Marbury v. Madison*\textsuperscript{119} power to decide cases and controversies,\textsuperscript{120} but rather, the claim of *Cooper v. Aaron*\textsuperscript{121} that "the federal judiciary is supreme in the exposition of the law of the Constitution."\textsuperscript{122} *Cooper* was right on its facts, but it does not entirely capture what *Flores* asserts. In both *Marbury* and *Cooper*, the Court restricted the discretion of the states or political branches.\textsuperscript{123} Of course, the target of these restrictions must be bound if there is to be judicial review at all. *Employment Division v. Smith*\textsuperscript{124} presented the opposite scenario; it expanded the discretion of the states and political branches. It does not undercut the Court's role to say that the states and political branches need not use the whole range of this expanded discretion or that they need not go as far in burdening constitutional interests as the Court allows them to go. But *Flores* says that when the Court expands the discretion of the states and the political branches, the political branches of the federal government are bound by the expansion of state power. *Marbury* and *Cooper* imply that the Court sets a floor under the liberties of the American people that no political official can violate. With respect to federal protections of liberty in the states, *Flores* holds that the Court sets both the floor and the ceiling.

This was another chasm separating opponents who could barely comprehend each other's position. The issue first received widespread attention in *Katzenbach v. Morgan*\textsuperscript{125} in which the Court said that Congress's power to expand on judicial interpretation of constitutional rights did not imply any power to "restrict, abrogate, or dilute" those rights.\textsuperscript{126} For RFRA's oppo-

\begin{itemize}
\item \textsuperscript{119} 5 U.S. (1 Cranch) 137 (1803).
\item \textsuperscript{120} See *id.* at 178.
\item \textsuperscript{121} 358 U.S. 1 (1958).
\item \textsuperscript{122} *Id.* at 18.
\item \textsuperscript{123} See *Cooper*, 358 U.S. at 12-16 (enforcing the rule that states cannot operate racially segregated schools); *Marbury*, 5 U.S. (1 Cranch) at 173-80 (holding that Congress cannot vest original mandamus jurisdiction in the Supreme Court). *Marbury* did not protect individual liberty, but it did restrict congressional power, which is the relevant structural distinction.
\item \textsuperscript{124} 494 U.S. 872 (1990).
\item \textsuperscript{125} 384 U.S. 641 (1966).
\item \textsuperscript{126} *Id.* at 651 n.10.
\end{itemize}
nents, this was an ipse dixit, an incomprehensible one-time anomaly—Justice Brennan at his worst.\textsuperscript{127} For RFRA's supporters, this was an uncontroversial corollary of \textit{Marbury v. Madison}, affirming the power of judicial review. Whether the enforcement power gave Congress authority to go further than the Court in protecting constitutional rights had no implications for whether the enforcement power gave Congress the power to roll back the Court's interpretation of constitutional rights. Congress could not violate judicially announced rights pursuant to the Enforcement Clause any more than it could do so pursuant to the Commerce Clause or the Patent Clause. What was obvious to RFRA's supporters was incomprehensible to the Chief Justice, who, when offered this explanation at oral argument, said simply, "I don't understand that at all."\textsuperscript{128}

Judicial supremacy to set both the floor and the ceiling on federal rights in the states does not reflect the original meaning of the Fourteenth Amendment. Congress did not entrust the fruits of the Civil War to the unchecked discretion of the Court that decided \textit{Dred Scott v. Sanford},\textsuperscript{129} whose Justices were appointed by Andrew Johnson. It is the worst sort of anachronism to read an expansion of \textit{Cooper v. Aaron}\textsuperscript{130} into the judicial and political climate of 1866. The amendments vested independent responsibility for enforcing the new rights in both Congress and the courts. The grant of legislative power was to enforce the new rights "by appropriate legislation," tracking the language of \textit{McCulloch v. Maryland}.\textsuperscript{131} Each enforcement clause is a necessary and proper clause to the underlying right, and, if it matters, each enforcement clause is itself augmented by the Necessary and Proper Clause of Article I.\textsuperscript{132}

\textsuperscript{129} 60 U.S. (19 How.) 393 (1857).
\textsuperscript{130} 358 U.S. 1 (1958).
\textsuperscript{131} 17 U.S. (4 Wheat.) 316 (1819).
\textsuperscript{132} U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution the forego-
Senators and representatives argued that Congress needed the enforcement power because judges might not enforce the new Amendments. They argued that the courts had not enforced the Privileges and Immunities Clause of Article IV. They also argued that the enforcement power would add nothing if it were confined to the judicially enforceable meaning of the Amendment. They urged in strong terms that Congress must be the judge of what legislation was "appropriate" to enforce the Amendments. They emphasized that Congress had power to do whatever was necessary and proper to enforce the end, object, spirit, or principles of the Amendments.

Congress repeatedly acted on these views. Throughout Reconstruction, Congress enacted legislation that went well beyond the literal language of the Reconstruction Amendments and beyond any judicial interpretation ever offered, then or later. Most obviously, Congress repeatedly dispensed with proof of state action.
Ultimately, it was impossible to protect against the risk that the Court would eviscerate the amendments by hostile interpretation. Short of explicitly precluding judicial review of Enforcement Clause measures, the drafters of the amendments could not prevent the Court from interpreting the enforcement clauses as narrowly as the Court interpreted the underlying rights. The most Congress could do was put an additional check on such interpretation by forcing the Court to make two separate decisions. Congress could force the Court to hold, first, that the Constitution of its own force does not protect a claimed right, and second, that it is beyond the power of Congress to create the claimed right by appropriate legislation. To an extent that remains to be determined, *Flores* collapsed the two questions: a decision limiting a constitutional right automatically limits the enforcement power.

V. SUBSTANCE, REMEDY, AND PROPORTIONALITY

RFRA's opponents, and now the Court, say that the enforcement power is remedial and not substantive. On this theory, the Court defines the substance of constitutional rights. Congress provides only remedies, and only for violations of the rights defined by the Court. This distinction was barely mentioned in prior opinions of the Court. Instead, prior dissenting Justices drew this distinction, repeatedly complaining that the Court's decisions erroneously recognized congressional enforcement power as substantive.

I am not sure what the bulk of RFRA's supporters thought of this distinction. My own view may have been idiosyncratic; I have written two books on Remedies, and I have taught violate federal rights); Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (sections 1 and 2 declared unconstitutional as applied in the states by the *Civil Rights Cases*, 109 U.S. 3 (1883) and its application in places under the exclusive control of the federal government held not severable in *Butts v. Merchants & Miners Trans. Co.*, 230 U.S. 126 (1913) (forbidding private discrimination in places of public accommodation).

140. *See id.* at 2164.
142. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS
Remedies for more than twenty years. I found the distinction incoherent.

The ordinary meaning of "remedial" would be legislation that provides a remedy for a judicially determined violation. Some enforcement legislation is of this sort; it authorizes causes of action, damages, injunctions, and criminal penalties.\footnote{See, e.g., 18 U.S.C. § 242 (1994) (providing for criminal punishment for deprivation of federal rights under color of state law); 42 U.S.C. § 1983 (1994) (providing civil liability for deprivation of federal rights under color of state law).} No plaintiff can obtain one of these statutory remedies without proving a substantive violation as defined by the Court. But the past statutes on which we relied are not of this type. These statutes enable plaintiffs to prove a \textit{statutory} violation without ever showing anything that the Court would recognize as a \textit{constitutional} violation. If there be any sense in which these statutes are remedial, then it seemed to me that RFRA was remedial in the same sense. I thought it was settled that Congress could dispense with proof of bad motive or overt discrimination,\footnote{See infra note 147 and accompanying text.} and I did not care whether the Court called that substantive or remedial.

The ordinary meaning of "substantive" would be legislation that defines a statutory violation in some way different from the Court’s definition of a constitutional violation. But a vast range of possible legislation is substantive in this sense, from dispensing with proof of defendant’s state of mind to dispensing with every element of the judicial conception of the constitutional right and substituting a wholly different and unrelated set of elements. RFRA’s opponents seemed to assume that all substantive uses of the enforcement power would be indistinguishable—that if Congress could enact any one substantive provision, then it could enact any imaginable substantive provision. That was the fallacy of the excluded middle. But it was also the consequence of trying to analyze the problem with two such ill-fitting categories.

There are many more plausible ways to limit the enforcement power. Michael McConnell has suggested asking whether the
congressional interpretation of the right is fairly arguable.\textsuperscript{145} That Congress has adopted an interpretation once adopted by the Court would be powerful evidence that the interpretation is at least arguable.

In Archbishop Flores's brief, we suggested conceptual and categorical limits.\textsuperscript{146} I thought the Court should ask which elements of the judicially defined right Congress could change, and, secondarily, ask how far each element could be changed. For example, it seemed settled that Congress could dispense with proof of motive,\textsuperscript{147} and nearly settled that Congress could not dispense with proof of state action\textsuperscript{148} in legislation not based

\begin{itemize}
\item \textsuperscript{146} See Brief of Respondent Flores, City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (No. 95-2074), available in 1997 WL 10293, at *23-29.
\item \textsuperscript{148} See United Bhd. of Carpenters v. Scott, 463 U.S. 825, 830-33 (1983) (holding that 42 U.S.C. § 1985 protects First Amendment rights only against action under color of law); James v. Bowman, 190 U.S. 127, 135-39 (1903) (holding that an act to enforce the Fifteenth Amendment cannot reach private action); The Civil Rights Cases, 109 U.S. 3, 10-19 (1883) (holding that an act to enforce the Fourteenth Amendment can reach only state action); United States v. Cruikshank, 92 U.S. 542, 554-55 (1876) (holding that the Fourteenth Amendment guarantees rights only as against the state). But see District of Columbia v. Carter, 409 U.S. 418, 424 n.8 (1973) (stating in dictum that Congress may “proscribe purely private conduct under § 5”); Griffin v. Breckenridge, 403 U.S. 88, 107 (1971) (reserving the issue of state action); United States v. Guest, 383 U.S. 745, 762 (1966) (Clark, J., concurring,}

\end{itemize}
on the Thirteenth Amendment. There is much to be said for and against this distinction between the motive and state action requirements. But once the distinction is drawn, it produces two clear rules. If *Flores* had announced and followed these apparent rules, then everybody would know that Congress could dispense with proof of motive and that it could not dispense with proof of state action. Similar rules could then be developed for other elements of a constitutional violation.

Instead, *Flores* gave us a test of congruence and proportionality, based on the Court’s view of whether the statute was necessary. Under this rule, sometimes Congress can dispense with proof of motive or overt discrimination, and sometimes it cannot. A statute that dispenses with proof of a substantive element of a constitutional violation is sometimes substantive and sometimes remedial. The difference apparently depends on whether the Court thinks there are enough cases of unconstitutionality to justify dispensing with complete proof of unconstitutionality. If there are enough such cases, then dispensing with proof is remedial—a way of getting at real cases of unconstitutionality. If there are not enough such cases, then dispensing with proof is substantive; it changes the rules to reach other cases. Deciding how many cases of unconstitutionality are enough would seem to be a legislative judgment, but *Flores* makes it a judicial question. For the first time since 1937, the Court is second-guessing Congress on questions of degree in the interpretation of delegated powers.

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joined by Black & Fortas, JJ.; id. at 781-84 (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J., & Douglas, J.) (stating that Congress can enact legislation aimed at private conspiracies to interfere with Fourteenth Amendment rights); *Ex parte Yarbrough*, 110 U.S. 651, 664-66 (1884) (upholding Fifteenth Amendment power to punish private violence to prevent voting in federal election).

149. Motive is often hard to prove but state action is not. The state action requirement is textually explicit, and motive requirements are implied judicially. The state action requirement is structurally central to the purpose of the amendments and to the division of authority between states and the federal government; it is hard to make the same claims about motive. But holding that Congress cannot dispense with proof of state action is almost certainly inconsistent with the original understanding.


151. *See id.* at 2169 (stating that “RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry”).

152. *See id.*
United States v. Lopez moved in that direction, but Flores makes the move much more definitively. Arguably, Lopez simply defined a limit to Congress’s power: a criminal offense defined under the Commerce Clause, that has no economic or commercial transaction as an element of the offense, is either invalid per se or faces an unusual burden of justification. No such limited explanation is possible for Flores. “Proportionality” is inherently a question of degree.

VI. CONSTITUTIONAL VIOLATIONS UNDER SMITH

Even if one accepts the Court’s view that the Constitution confines the enforcement power to remedies that are proportionate to judicially defined violations of the Constitution, that should not end the inquiry. Whether RFRA was remedially proportionate depended on how many constitutional violations existed to be remedied. That, in turn, depended on facts not in the record and on what counts as a constitutional violation. I think that there are many constitutional violations, even under Smith; RFRA’s opponents think that there are very few. This disagreement is partly due to disagreement about the frequency of religious bias. But it is mostly due to an unresolved ambiguity about the meaning of Employment Division v. Smith.

Smith allows neutral and generally applicable laws to interfere with the free exercise of religion; laws that are not neutral and generally applicable are subject to strict scrutiny. This is not a motive test; it is a test of objectively differential treatment. Smith says that if a regulation allows individualized exceptions for secular hardship, there must be a compelling reason to refuse exceptions for religious hardship. The religious claimant need not prove an antireligious motive for refusing religious exceptions.

154. See id. at 565-68.
155. See Flores, 117 S. Ct. at 2169.
157. See id. at 875-90; see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-46 (1993) (applying and elaborating the rule).
158. See Smith, 494 U.S. at 884; Lukumi, 508 U.S. at 537.
In Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,\textsuperscript{159} the Court applied the same reasoning to broad categorical exceptions such as fishing and pest control.\textsuperscript{160} "Categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."\textsuperscript{161} Part of the Lukumi opinion was based on the City's motive, but that part received only two votes.\textsuperscript{162} The ordinances in Lukumi were invalid because they gave less favorable treatment to religious killings of animals than to secular killings of animals and to other secular activities that caused similar harms, not because a majority of the Court found an antireligious motive.\textsuperscript{163} Lack of general applicability need not be nearly so egregious as in Lukumi to be unconstitutional. The Court said that "these ordinances fall well below the minimum standard necessary to protect First Amendment rights."\textsuperscript{164}

If the standard is lack of general applicability, then many statutes violate Smith and Lukumi. 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 a reasonable interpretation of Smith and Lukumi.\textsuperscript{165}

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 law-making and exemption process is really individualized. Only probing discovery can reveal the discretionary exemptions informally granted by enforcement personnel. In

\textsuperscript{159} 508 U.S. 520 (1993).
\textsuperscript{160} Id. at 543-44.
\textsuperscript{161} Id. at 542.
\textsuperscript{162} See id. at 540-42. Only Justice Stevens joined Justice Kennedy in Part II-A-2 of the opinion. See id. at 522 (syllabus).
\textsuperscript{163} See id. at 533-40, 542-46.
\textsuperscript{164} Id. at 543.
\textsuperscript{165} See Lukumi, 508 U.S. at 537, 543-45; Smith, 494 U.S. at 884.
the very best case, future 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 violations will ever be adjudicated.

In the view of RFRA’s opponents, objective differences in treatment do not require compelling justification unless they are motivated by hostility to the burdened religion or to religion in general. If the Smith-Lukumi standard requires an antireligious motive, then there are fewer violations, which are even harder to prove, but they still happen in substantial numbers.

Most of the violations with bad motive arise from administrative decisions by bureaucrats, not from the passage of legislation. Much of the population is hostile to high-intensity religious views. 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.” 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.

It is a reasonable inference that at least a comparable percentage of government administrators hold similarly 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 about religious fundamentalists and members of minority sects, and if these administrators have broad discretion to deal with persons subject to their authority, then it follows that half or more of discretionary administrative decisions about the religious practices of these minori-

168. Id. at 67.
ties 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 even under the narrowest reading of Smith.

Of course RFRA's supporters did not testify to Congress that Smith still covered large numbers of free exercise violations. They said that nearly all laws are neutral and generally applicable and that Smith had all but repealed the Free Exercise Clause. My own testimony in those hearings avoided the worst of this rhetoric, but I did not contradict the general impression. I pointed to a range of motivations for government burdens on religion, some of which would violate Smith and some of which would not. But I did not talk about objectively differential treatment, or less-than-general applicability, without regard to motive. I had already written that "the requirement that religious conduct get the benefit of secular exemptions is a requirement of broad potential application." But I did not tell Congress that.

The Court used this legislative record against RFRA. It inferred that Congress believed that few statutes violate Smith in America today. In the Court's view, the hearing record showed that even Congress believed that the proportion of constitutional violations to RFRA violations would be small. In the Court's view, it followed that Congress was not interested in facilitating the proof of Smith violations but rather in reaching conduct that even Congress did not believe violated the Constitution as interpreted in Smith.

169. See, e.g., Senate Hearing, supra note 39, at 155 (attachment to statement of Michael P. Farris, President, Home School Legal Defense Association) (stating that Smith "virtually eliminated the opportunity for religious persons to claim that any government action violates their right to freely exercise their religion"); id. at 176-77 (statement of Nadine Strossen, President, and Robert S. Peck, Legislative Council, American Civil Liberties Union) (stating that Smith "wrote the First Amendment's guarantee of the 'free exercise of religion' out of the Constitution").
170. See id. at 68-76 (statement of Douglas Laycock, Professor of Law, University of Texas).
173. See id.
174. See id.
RFRA's supporters largely shaped this legislative record; we are partly to blame for our own difficulties. There are many reasons why RFRA's supporters made the arguments in the way we did. Most obviously, we were engaged in the familiar practice of all causes seeking legislative relief—we portrayed the problem in its worst possible light to maximize the need for legislative action. For reasons stated below, this portrayal was accurate at the time, it was also politically expedient. No one foresaw that this portrayal would have constitutional significance because the Court had yet to decide Flores or any case like it. For two decades, Congress had passed unchallenged statutes to expand on the Supreme Court's narrow interpretations of constitutional rights. It had routinely acted both on the ground that the Court's rules made violations difficult to prove and that they were the wrong rules anyway. I am not sure the political process is capable of consistently distinguishing these two grounds, but, at any rate, the Court had never suggested that Congress had to distinguish them. So no one did.

Another reason the legislative record understates Smith violations is that the proponents of RFRA could not mention the most egregious violations. Genuine contemporary persecutions make bad examples politically, because, almost by definition, seriously persecuted religions are highly unpopular. Too many Congressmen would have intuitively sided with the persecutors.

In a 1990 article, I described two contemporary cases of persecution motivated by deep-seated religious hostility, limited only by the amount of energy the persecutors were willing to invest in the enterprise. One case involved the so-called cults, such as the Hare Krishnas, the Unification Church, and the Scientologists. The other involved the Santeria in South Florida. I did not mention either of these cases in my testimony to Congress.

All sides in this debate, except for Lino Graglia, now offer

175. See infra notes 188-89 and accompanying text.
176. See Laycock, supra note 171, at 64-68.
177. See Lino A. Graglia, Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution, 85 GEO. L.J. 1, 1 (1996) (arguing that the ordinances were generally applicable because sacrifice is "incongruous and offensive in secularized, sensitized contemporary America," and thus distinguishable from other killings of animals).
Lukumi as the prototype of a Smith violation. Lukumi was a unanimous decision. The opinion suggested that Hialeah violated the Court’s “fundamental nonpersecution principle.” Once the Court’s attention was focused on the discrimination in the ordinances, it became an easy case. But Congress did not view it that way. Stephen Solarz, the lead sponsor of RFRA in the House, wanted to file a congressional amicus brief in Lukumi, but he could not get a single Representative or Senator to even consider signing such a brief. The Santeria religion was too unpopular to touch.

This case illustrates a systemic problem. How can a majoritarian political process ever enact rights for unpopular minorities? Creation of constitutional rights is a precommitment strategy; the majority, or at least its elected leadership, disables itself from violating rights that it may want to violate.

History suggests only two ways to enact such rights. The most effective way is to focus attention on a violator of rights that is not the body enacting the protections. In the early national period, bills of rights were aimed at the King and Parliament, or at the memory of the King and Parliament, and then at the new federal government, which the antifederalists found much more fearsome and untrustworthy than the state governments. Much of the rights talk of the time was in terms of protecting the whole people against their agents. Madison saw that in a republic the greatest threat to liberty was in the majority of the people, but few others saw so far. During Reconstruction,

181. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131 (1991) (emphasizing that the Bill of Rights was designed more to protect the people from their agents than to protect minorities from majorities).
the southern states were the obvious and egregious threat to liberty, and the northern states were voting on the new protections and coercing the South to ratify. In the great civil rights legislation of the 1960s, the North and West reached consensus that there was much injustice in the South.

The other way to enact minority rights is to focus attention on the broad principle and to avoid focusing attention on the examples that tempt majorities to violate the principle—i.e., to avoid the examples that most make it necessary to enact special protections for the principle. RFRA's supporters were quite open about this. Representative Solarz testified that the worst possible outcome would be for Congress to vote for specific rules, protecting the religions it liked and excluding the religions it did not like. I testified that "[r]eligious liberty is popular in principle, but in specific applications it quickly gets entangled in other issues." This was another barely comprehended disagreement between the parties in *Flores*. The opponents said that RFRA's scope showed that it was disproportionate and not a response to any real problem; we said that RFRA's scope was an act of the highest principle, the only way Congress could avoid discriminating against smaller and less popular faiths.

Another important reason *Smith* is viewed so narrowly in the legislative record is that we were describing reality accurately at the time. The RFRA hearings were held in 1991 and 1992, when the few lower court decisions under *Smith* had in fact given it the worst possible interpretation. Neither *Smith*'s exceptions nor its neutrality requirement appeared to have any content.

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185. *Senate Hearing*, supra note 39, at 77 (statement of Douglas Laycock, Professor of Law, University of Texas).
188. *See* Salvation Army v. Department of Community Affairs, 919 F.2d 183, 199-200 (3d Cir. 1990) (holding that hybrid freedom of association claim adds nothing to free exercise claim); Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354-55 (2d Cir. 1990) (holding that landmark ordinance is neutral and generally applicable because it potentially applies to all buildings, even though it is applied in fact only in individualized processes and only to a tiny fraction of all
Courts were upholding, or subjecting to rational basis review, laws that expressly applied only to churches or only to religious practices.\(^{189}\) RFRA’s advocates could not reasonably have ignored this worst case scenario emerging from the cases, or given equal prominence to the theoretical possibility of a more protective interpretation.

After completion of the hearings, the Court decided *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,\(^{190}\) which appears to have given 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.\(^{191}\) As part of its holding, *Lukumi* incorporated and expanded on *Smith*’s dictum that if a state permits exceptions for secular conduct, then it must have a compelling reason for refusing exceptions for analogous religious conduct.\(^{192}\)

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.\(^{193}\) The Free Exercise Clause—not RFRA—therefore required an exception for a freshman who wanted to live in a religious group house.\(^{194}\) Another district court held that a landmarking law was not neutral and generally applicable, because it contained three exceptions for various secular situations.\(^{195}\) The Free Exercise Clause—not

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\(^{189}\) See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 936 F.2d 586 (11th Cir. 1991) (upholding ban on “sacrifice” of animals, defined to exclude any secular killing of animals), rev’d, 508 U.S. 520 (1993); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991) (holding that exclusion of churches from commercial zones, by ordinance that expressly listed permitted uses, was neutral and generally applicable law).

\(^{190}\) 508 U.S. 520 (1993); see supra notes 159-64 and accompanying text.

\(^{191}\) See *Lukumi*, 508 U.S. at 537, 539, 543-45.

\(^{192}\) See *id.* at 537.


\(^{194}\) See *id.* at 1549-58.

\(^{195}\) See *Keeler v. Mayor and City Council of Cumberland*, 940 F. Supp. 879, 886
RFRA—therefore required an exception for a church stuck with a useless landmark. If these decisions are good law, and I think they are, then violations of *Smith* are common, but difficult to litigate. Simplifying the litigation of these constitutional violations would be a remedial measure even under *Flores*.

Whatever the Court may say when the meaning of *Smith* is squarely before it and fully briefed, *Flores* did not take seriously the possibility that *Smith* violations might be common or even that there might be more than one way to prove a *Smith* violation. In its discussion of *Smith*, the Court reaffirmed the hybrid rights exception, and it reaffirmed the rule that exemptions for secular hardship require exemptions for religious hardship. But the Court did not mention these rules when it considered whether RFRA was a proportionate response to violations of *Smith*. In that part of the opinion, it used the phrase "religious bigotry" as a shorthand for what *Smith* required. This shorthand made it easier to argue that RFRA was a disproportionate response to a small number of actual violations, but for the reasons already stated, it is not an accurate summary of *Smith*. Indeed, the word "bigotry" never appears in either the *Smith* or *Lukumi* opinions.

Religious bigotry may be an accurate statement of Justice Kennedy's view of *Smith*. He wrote *Flores*, and he wrote *Lukumi*, including the passage on motive that attracted only one vote besides his own. He spent some time at oral argument in *Lukumi* trying to get me to admit that discriminatory treatment is relevant only as evidence of bad motive. Maybe he would confine *Smith* to bad motive, but the Court has not done so.

It is impossible to know how the Court will ultimately resolve this argument over the meaning of *Smith*. But in *Flores*, it was


196. See id. at 883-87.
198. See id. at 2171.
200. See supra note 162 and accompanying text.
one more enormous disagreement that got far less space in the briefs than it deserved given its complexity and the importance it turned out to have under the Court’s new test.

VII. LAND-USE REGULATION OF CHURCHES

Finally, the two sides fundamentally disagreed about land-use regulation of churches in general, and about the City of Boerne’s ordinance in particular. The Court treated land-use regulation as an obvious example of neutral and generally applicable law.202 RFRA’s supporters believe that land-use regulation is an unusually clear example of a regulatory process that violates Smith.

Land-use regulation often targets churches, because churches tend to build distinctive properties. One study shows that in the city of New York, churches are landmarked at a rate forty-two times higher than secular properties.203 With or without targeting, land-use regulation has an enormous disparate impact on churches. It is administered through highly discretionary and individualized processes that leave ample room for deliberate, but hidden, discrimination. There is substantial evidence of widespread hostility to locating or expanding nonmainstream churches, and some evidence of hostility to all churches. In the city of Chicago and some of its suburbs, churches allege that the cities administer zoning regulation in such a way that it is nearly impossible to start a new church without consent of surrounding owners, and that this consent is so often withheld that finding a site for a new church is often impossible.204 Many of these cases are not about efforts to build new structures but simply efforts to rent and occupy an existing building. Journalists have reported that new suburbs on the fringe of urban growth often exclude churches, even from mainstream denominations.205 Denominations that account for only nine percent of

202. See Flores, 117 S. Ct. at 2169.
205. See R. Gustav Neibuhr, Here is the Church; As for the People, They're Pick-
the population account for about half the reported church zoning cases; these denominations plus unaffiliated churches account for less than a quarter of the population but more than two-thirds of reported church zoning cases. Jews account for about two percent of the population but twenty percent of 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.

The processes of administering zoning laws and designating landmarks are highly individualized. Standards tend to be vague and manipulable; zoning for a parcel is easily changed if those in power desire to change it. Many key decisions are made at the level of individual parcels in applications for special permits or variances or in votes on zoning changes or in landmark designations. These land-use laws are often not neutral, and they are almost never generally applicable in any meaningful sense. The courts should subject resulting burdens on churches to strict scrutiny under Employment Division v. Smith. 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.

Boerne fit this pattern, although the city is too small for statistical analysis. The historic district is centered in the downtown area and originally extended south as a strip down either side of

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206. These data are gathered in the Brief of the Church of Jesus Christ of Latter-Day Saints as Amicus Curiae in Support of Respondent, Flores (No. 95-2074), available in 1997 WL 10290, at *30, *4a [hereinafter Mormon Brief]. Professors Cole Durham and Frederick Gedicks supervised this research at Brigham Young University, inspired by Rebecca Beynon, Regulation of Church Land Use and Discrimination Against Minority Faiths (unpublished paper on file with author).

207. Mormon Brief, supra note 206, at *4a.

208. See, e.g., Abierto, 949 F. Supp. at 640.

209. See, e.g., id.; L’Heureux, Jr., supra note 203, at 169-71 (describing the impact of a New York landmarking law).

Main Street. The boundary bisected the church, including the front entryway and the two large bell towers on either side, but excluding the sanctuary. St. Peter’s did not oppose the historic district as thus defined, and it designed a new church that preserved the bell towers. The city refused a permit for that design, and the historic commission indicated that no part of the existing church could be removed or modified.

Eventually the city passed a new ordinance, adding the rest of St. Peter’s Church to the historic district. The boundary change in this ordinance applied only to St. Peter’s and to no other property. The historic commission made other decisions about individual parcels, deciding not to extend the district to include certain property owners who would object, but overriding the church’s objections to the inclusion of the sanctuary. The historic district included only a tiny fraction of all the properties in Boerne, and a larger fraction of all the older buildings in Boerne. I have never alleged anti-religious or anti-Catholic motive in Boerne, but there was objectively unequal treatment—some older buildings were included, and some were not, and the church was in the disadvantaged group. The one-

211. Interview with Thomas Drought, attorney for St. Peter’s Church, in Austin, Texas (on or about Mar. 17, 1995) [hereinafter Drought Austin Interview].
212. Id.; see also Stipulated Facts, in Joint Appendix at 68, City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (stipulating that boundary had bifurcated the church).
213. See Second Amended Complaint ¶12, in Joint Appendix, supra note 212, at 7.
215. See City of Boerne, Tex. Ordinance 94-17; see also Stipulation of Facts, in Joint Appendix, supra note 212, at 70-71 (describing effect of this ordinance).
216. See City of Boerne, Tex. Ordinance 94-17.
217. See, e.g., Historic Landmark Comm’n Minutes, City of Boerne (July 6, 1995) (discussing whether to extend historic district to include the Walker House, which was in danger of demolition); Historic Landmark Comm’n Minutes, City of Boerne (Jan. 23, 1996) (discussing whether the Walker House was sufficiently linked to the rest of the district to support the power to include it); Historic Landmark Comm’n Minutes, City of Boerne (Feb. 20, 1996) (discussing “whether it is a wise idea, because of the present litigation, at this time to add more property to the district,” to which one commissioner responded that “the only one they may have a problem with is the Walker House”). The Walker House was not added to the district. Telephone Interview with Thomas Drought, attorney for St. Peter’s Church (on or about July 15, 1997).
property ordinance adding the sanctuary to the historic district was not generally applicable if words have any meaning. This departure from general applicability should have required compelling justification under Smith\textsuperscript{219} and Lukumi.\textsuperscript{220}

In addition, the ordinance defined a tract of land, and so far as I can tell, it took all economic value out of that tract. This is a lawyer's opinion, not an appraiser's or developer's, but I find it hard to imagine any viable economic use for an empty church in a small town. St. Peter's retained the right to use the church as a place of worship for half the congregation, but that right had no economic value—St. Peter's would have had to abandon the property and build elsewhere rather than continue permanently with the old church. St. Peter's could realize economic value from the old church only if there were another congregation of just the right size but without a church of its own. Regulation that removes all economically viable use from a parcel is a taking.\textsuperscript{221}

Almost none of this was in the record. In retrospect, we should have declined the offer of an immediate appeal and tried the case on our free exercise, takings, hybrid (free exercise and takings), and state-law claims. Win or lose, the RFRA issue could then have been argued with some flesh on the skeletal concept of neutral and generally applicable laws. But the case went up on the abstract question of RFRA's constitutionality, without a factual record, and the Court acted on uninformed assumptions about the substance and process of land use regulation.

The church's free exercise, takings, hybrid, and state-law claims were never tested in court, because after the remand and before the trial, the parties entered into a settlement.\textsuperscript{222} The settlement is not substantially different from earlier near settlements, including one that both sides had agreed to before the city had second thoughts.\textsuperscript{223} Where the actual settlement differs from the earlier

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\item \textsuperscript{219} 494 U.S. 872 (1990).
\item \textsuperscript{220} 508 U.S. 520 (1993).
\item \textsuperscript{221} See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014-19 (1992).
\item \textsuperscript{222} See Church and Town Settle Dispute on Building, N.Y. TIMES, Aug. 14, 1997, at A21. The preliminary settlement reported in that story has since become final.
\item \textsuperscript{223} Telephone Interview with Thomas Drought, attorney for St. Peter's Church (on or about October 1, 1997) [hereinafter Drought Telephone Interview].
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failed settlements, both sides gave a little more.\textsuperscript{224}

The changes that made settlement possible appear to be more political than legal. The church and the city council have long been open to settlement. The historic commission, a single-issue regulatory body, was opposed to all previous settlements, and it is opposed to this one.\textsuperscript{225} But it does not have a veto, and this time the city council overrode the commission’s advice.\textsuperscript{226}

Like all settlements, this one avoids the risk and expense of further litigation. It gives both sides what they wanted most. It will enable the church to build a place of worship large enough to seat the congregation, and it will preserve most of the old church.\textsuperscript{227} A small portion at the rear will be torn down, and that is why the historic commission is opposed.\textsuperscript{228}

The key to the settlement is the church’s willingness and ability to spend very large sums on historic preservation. The immediate cost is not yet known, but it will exceed the $500,000 estimated cost of earlier proposals,\textsuperscript{229} and the church will assume the permanent burden of maintaining both the old and new churches. Ability and willingness to spend such large sums has been imposed on St. Peter’s as a precondition for worship in Boerne. For a poorer church, or for a smaller church that had outgrown its old building but not by so large a margin, this settlement would have been impossible. And the settlement seems to concede in principle that the city has the right to control places of worship.

I believe that the ordinance in \textit{Flores} was not generally applicable, but that does not go to the heart of the problem. The facts underlying the dispute and the settlement illustrate why constitutional rights should be protected against burdens and not just against discrimination or lack of general applicability. From the

\textsuperscript{224} \textit{Id.}

\textsuperscript{225} \textit{Id.}

\textsuperscript{226} \textit{Id.}

\textsuperscript{227} \textit{Id.}

\textsuperscript{228} \textit{Id.}

\textsuperscript{229} For the earlier cost estimate, see Affidavit of Gregory M. Davis, the architect for the church, in Joint Appendix, \textit{supra} note 212, at 42. The settlement requires substantially all the structural repairs required by the earlier settlement proposals, plus the cost of demolishing and replacing part of the parish hall. Drought Telephone Interview, \textit{supra} note 223.
viewpoint of RFRA's supporters, this dispute was an example of government imposing immense burdens on the free exercise of religion to serve an insignificant interest of doubtful legitimacy.

St. Peter's has voluntarily preserved the oldest church on the site, built in 1867.\textsuperscript{230} From the beginning of the controversy, it had voluntarily agreed to preserve the front facade and bell towers of the current church, built in 1923.\textsuperscript{231} I do not believe the church should have to do either of these things, but it had agreed to do them. The dispute was over whether it also had to preserve the sanctuary of the 1923 church. Under the settlement, it will preserve most but not all of that sanctuary.\textsuperscript{232}

Preserving the 1923 sanctuary is a deadweight loss to the church. It will be used for services with small attendance,\textsuperscript{233} but there is nothing the church can do in the 1923 sanctuary that it would not be able to do in the new sanctuary that it will have to build anyway. Preservation of the 1923 sanctuary is expensive; it will require a large upfront investment for structural repairs, and then the building will be a white elephant in perpetuity.\textsuperscript{234} Building a new church behind the 1923 sanctuary requires partial demolition of the parish hall, which then must be rebuilt elsewhere on the property.\textsuperscript{235}

The bottom line is that St. Peter's first priority must be to preserve two pet churches for the pleasure of architecture buffs; if it does that, then the city will let it build a third church to actually worship in. There appears to be no limiting principle; if the city and county continue their growth patterns, the grandchildren of the current generation may fight over whether St. Peter's has to preserve three pet churches and build a fourth for worship.

All this burden on the church produces little benefit to the city. The description in the city's brief, of a "highly visible church set on a hill,"\textsuperscript{236} was misleading at best. Only the bell

\textsuperscript{230} Drought Austin Interview, supra note 211.
\textsuperscript{231} See supra note 213 and accompanying text.
\textsuperscript{232} See supra note 227 and accompanying text.
\textsuperscript{233} Drought Telephone Interview, supra note 223.
\textsuperscript{234} See supra note 229 and accompanying text.
\textsuperscript{235} Drought Telephone Interview, supra note 223.
towers and front facade are highly visible, and then only if you are standing right in front of them, in the park across Main Street.237 The sanctuary, which was the subject of the litigation, is mostly hidden from view from any point outside the church property. Approaching the church on Main Street, the sanctuary is completely hidden from the north.238 Approaching from the south, one can see parts of the south facade through the trees for the last half block.239

The downtown area at the center of the historic district has an eclectic mix of buildings from almost every period of the city's history, from well-restored nineteenth century landmarks to thoroughly modern gas stations.240 Most of these buildings line either side of U.S. 87, a heavily traveled four-lane highway.241 The highway, the traffic, and the mix of new and nondescript buildings sharply limit any sense of history about the district as a district.

Such unity as exists is commercial and comes from the businesses inside these buildings. Ordinary businesses serving local residents survive, but there is a concentration of antique shops, restaurants, a bed and breakfast, a bakery, an ice cream shop, gift shops, and similar tourist businesses, many of them offering historic ambience of varying degrees of authenticity.242 In short, this district is mostly about bringing in shoppers from San Antonio. Historic preservation is secondary to augmenting the faux-historic theme; old buildings with no connection to Boerne or even to Central Texas have been hauled in and placed on lots in the historic district with the approval of the historic commission.243

237. Personal inspections, supra note 218.
238. Id.
239. Id.
240. Id.
241. Id.
242. Id.
243. See Minutes of Historic Landmark Comm'n (July 6, 1995) (approving proposal to bring in "an old railroad depot building from Encinal, Texas"); Minutes of Historic Landmark Comm'n (Aug. 29, 1995) (approving proposal to bring in "an old house, which is located on IH-10," to the Kendall Inn property); Minutes of Historic Landmark Comm'n (Jan. 23, 1996) (approving proposal to bring in "an old frame church" and "a log structure . . . that, characteristically, would have been used in east Tex-
The church is far removed from the heart of the tourist and shopping area—several blocks beyond the last tourist shop, past the intersection of U.S. 87 and Texas 46, across a bridge over a substantial stream, and without continuous sidewalks connecting the church to the shopping area.\textsuperscript{244} The church is not visible from the shopping area, or from any point between the church and the shopping area.\textsuperscript{245} It is not integral to the rest of the historic district either architecturally or commercially. The church is for all practical purposes an isolated structure.

The church is not very old, not very distinctive, and truth be told, not very attractive.\textsuperscript{246} It is not a Spanish mission, but a twentieth century imitation of a Spanish mission. Behind the bell towers, there is nothing distinctive about it. If government can require preservation of the sanctuary at St. Peter's, it can require preservation of almost any church old enough to need remodeling or expansion. St. Peter's is just an ordinary church, nothing special—but landmark law treats all churches as special, and subjects them to special burdens.

The asserted specialness of churches brings the discussion of St. Peter's back to doctrine: imposing special burdens on churches violates the Free Exercise Clause under \textit{Smith}\textsuperscript{247} and \textit{Lukumi}.\textsuperscript{248} The city's interest in \textit{Flores} was a very modest interest, but more fundamentally, it was an illegitimate interest. The features that made the church even arguably distinctive, and that made the city fight so hard to include it in the district, were features of religious architecture. The interest asserted was precisely the interest in diverting a product and instrumentality

\textsuperscript{as}," to the Kendall Inn property); Minutes of Historic Landmark Comm'n (Feb. 20, 1996) (approving proposal to build two new buildings on the Kendall Inn property); Minutes of Historic Landmark Comm'n (March 5, 1996) (approving proposal to bring in a log cabin from Waco, two buildings connected by a dog run from near Enchanted Rock, and a house from San Antonio, to the Kendall Inn property). The owner of the Kendall Inn property is constructing a private tourist complex around his inn, mostly of buildings from outside Boerne.

\textsuperscript{244} Personal inspections, \textit{supra} note 218.

\textsuperscript{245} \textit{Id}.

\textsuperscript{246} \textit{Id.}; Interview with Father Anthony Cummins, in Boerne, Texas (Feb. 9, 1997) [hereinafter Cummins Interview].

\textsuperscript{247} 494 U.S. 872 (1990).

\textsuperscript{248} 508 U.S. 520 (1993).
of religion—both the church building and the large sums required to maintain it—from religious to secular purposes. The church is no longer needed as a church; in all but name it will become an architectural museum, preserved for its physical appearance.

It is useful to consider whether the secular interest in preserving this church is sufficient to justify the city in paying the costs of preservation. Where secular historic value is real and substantial, as in the case of the eighteenth century Spanish missions in San Antonio, the church and the government have cooperated to provide public access and interpretation at government expense. But even there, the Archdiocese has borne the entire cost of preservation for fear of Establishment Clause problems. Where secular historic value is minimal and religious value is substantially all there is, government financial support for structural repairs would likely violate the Establishment Clause, lacking secular purpose and effect, with the claim of secular historic value dismissed as pretextual. One can only imagine the reaction in an Establishment Clause case if the city described the church as it did in its brief in the court of appeals: "the 1923 Sanctuary that is the Spirit and Image of the City itself." If courts would not find enough secular value to justify government money, they should not find enough secular value to justify government control.

Flores was not a case about preventing the church from harming its neighbors; it was a case about requiring the church to provide something that only a church would ever provide. No one thinks the city could build a church itself, or require St. Peter's to build a church, and no one is likely to build a church-like structure for secular uses. It is clear that neither the city nor the neighbors have any right, as against a church, to the existence of

250. See id. at 719-21.
251. Cf. Tilton v. Richardson, 403 U.S. 672, 682-84 (1971) (holding that government cannot pay for construction of buildings that might be used for sectarian instruction or worship services).
252. Brief of Appellee at 2, Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996).
a church building. Yet once the church is built, the city is allowed to create such a right by fiat, and to make that right so strong that it overrides any countervailing interests of the church itself. If the power to landmark churches is not restricted, the churches of America will be unable to build a place of worship without submitting to the threat and disproportionate risk that they eventually will be required to maintain in perpetuity a building that has become dysfunctional for its religious use.

To RFRA’s opponents, the historic district at issue in Flores was ordinary land-use regulation having nothing to do with religion; the problems at St. Peter’s did not even raise an issue of religious liberty. Everyone has to comply with land-use regulation, and sometimes it is burdensome, but it is only money. St. Peter’s does not have to give up its exercise of religion; it only has to spend more money. That is a commercial burden, not a religious burden. For the supporters of landmarking laws, it is unthinkable that anyone could have a right not to be landmarked. Landmarking law is a product of the post-1937 view that burdensome social and economic regulation requires very little justification, and its supporters believe that First Amendment rights have no more weight than property rights. Once again, the two sides stared across a conceptual chasm, barely able to comprehend each other.

The Court itself stated the most extreme version of the view that landmarking churches is no different from landmarking any other kind of property. It said that land use regulation of churches does not even have disparate impact. The Court was wrong at many levels.

First, there is disparate impact in the application and administration of these laws, as the data cited above show. Churches are far more likely to be landmarked than secular buildings, and minority faiths are far more likely to have serious zoning trouble than mainstream faiths.

Second, there is disparate impact in the economic effect of these laws on church buildings. Property owners in downtown

254. See supra note 203 and accompanying text.
255. See supra note 204-07 and accompanying text.
Boerne appear to be making money from the historic district; at least one entrepreneur is aggressively expanding his tourist complex.\textsuperscript{256} Retail and commercial buildings can be converted to uses that benefit from the historic motif; restaurants and antique shops are replacing other kinds of merchandise, but either way, business goes on and landlords earn rents. The owners of homes in the historic district can still live in their homes. Owners unwilling to tolerate the continuing interference of the historic commission can sell to buyers who like the idea of owning a landmark.

None of these options were open to the church. The church could not use the building for its longstanding purpose because the congregation simply would not fit.\textsuperscript{257} Several hundred people a week who wanted to attend Mass were not able to do so; they suddenly appeared when the church took up temporary quarters in the senior citizens' center.\textsuperscript{258} The church could not sell the building and move elsewhere, because no one else had any use for it either. It was not feasible for the church to split its religious community in half, and no government should force it to take such a step in any event. I do not doubt that it is burdensome to own property in the historic district, but only the church was deprived of its longstanding use of the property and left with no substitute.

Finally, the landmark law created disparate impact simply because the burden fell on an express constitutional right in the case of the church. Indeed, this has been the standard analysis of RFRA's opponents. The Court in \textit{Smith} made the analogy to disparate impact cases:

\begin{quote}
Just as we subject to the most exacting scrutiny laws that make classifications based on race, \ldots so too we strictly scrutinize governmental classifications based on religion. But we have held that race-neutral laws that have the \textit{effect} of disproportionately disadvantaging a particular racial group
\end{quote}

\textsuperscript{256} \textit{See supra} note 243 and accompanying text.
\textsuperscript{257} \textit{See Flores}, 117 S. Ct. at 2160.
\textsuperscript{258} Cummins Interview, \textit{supra} note 246. This fact was not in the record because the church moved its best-attended Masses after the judgment in the trial court. The senior citizens' center graciously provided free space, but the barn-like sheet metal structure was not conducive to Catholic liturgy. \textit{Id.}
do not thereby become subject to compelling-interest analysis under the Equal Protection Clause, see Washington v. Davis, 426 U.S. 229 (1976) . . . Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.259

I have argued that this analysis understates the burden on religion.260 But until Flores, no one ever doubted that these burdens on religion were at least a disparate impact. We argued that Smith's analogy of religious burdens to disparate impact was dispositive of RFRA's constitutionality: that Congress could require states to justify religious burdens just as it required them to justify disparate impact.261 But once again, there was no ground on which to stand; the Court was not constrained by anything it had said in the past.

VIII. CONCLUSION

I began by saying that if Flores means what it says, then it is by far the most important of the recent round of federalism cases. United States v. Lopez262 does not threaten anything at the heart of the commerce power. New York v. United States263 and Printz v. United States264 do not limit the range of policies Congress can enact. They hold only that Congress must implement its policy choices through its own laws and the federal executive, and cannot require states to act for it. Seminole Tribe v. Florida265 will leave many state violations of federal law uncompen-

260. See Laycock, supra note 171, at 15-16 (arguing that this analysis is another consequence of treating the substantive right to free exercise of religion as a mere equality right, and that a direct burden on a religious practice is worse than a statistically disparate impact).
sated, but it does not affect compensation for violation of Fourteenth Amendment rights, and it does not eliminate power to secure state compliance with federal law. Justice Kennedy also tried to roll back Ex parte Young last Term, but he got only two votes. None of these decisions change the core of the constitutional structure.

Flores may. The delegation to Congress of power to protect liberty in the states was an essential part of the structural change wrought by the Civil War. Flores appears to say that that power has no independent content, that it is derivative of judicial interpretation, that there are not three federal branches empowered to protect liberty in the states, but only one. The Court now asserts unchecked power to shrink the Fourteenth Amendment to as small a scope as it chooses. Right or wrong, this decision goes to the core of the constitutional structure for protecting liberty. Needless to say, I think it was wrong.

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