# FEDERALISM AS A STRUCTURAL THREAT TO LIBERTY

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Let me start by telling you something that you cannot possibly have known if you live more than one hundred miles from San Antonio. The name of the city of Boerne is pronounced "Bernie." We melded a lot of languages in Central Texas, and we sometimes pronounce things in ways that are not recognizable in any of them.

## I. BOERNE AND RFRA

The result in *City of Boerne v. Flores*[1] surprised me. I thought the Religious Freedom Restoration Act[2] ("RFRA") was clearly constitutional, because Congress had repeatedly passed similar legislation. Our brief listed seventeen other statutes, some of which had been upheld and some of which had never been challenged, in which Congress went well beyond the judicial interpretation of the constitutional provision being enforced.[3] Many of these statutes are laws that we take for granted, familiar sections of the employment discrimination laws as applied to state and local governments, of the voting rights acts, and of other civil rights laws.

The hearing record of the 1982 Voting Rights Act[4] is indistinguishable from the hearing record of RFRA. For hundreds of pages, congressmen and witnesses argue that *City of Mobile v. Bolden*[5] was a terrible decision. The final Senate

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1. 117 S. Ct. 2157 (1997).

2. 42 U.S.C. § 2000bb (1994).

3. For a more accessible listing of these statutes, see Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 747 n.19 (1998). For a more fully developed statement of the argument in part I of this article, see *id.* at 747-58.

4. 42 U.S.C. § 1973 (1994).

5. 446 U.S. 55 (1980) (holding that proof of violation of Fifteenth Amendment

report identifies two problems. The first is that motive is hard to prove.[6] The second problem–more important according to the Senate Committee–is that the Court asked the wrong question.[7] The Pregnancy Discrimination Act[8] has a similar history, denouncing *Gilbert v. General Electric*[9] and *Geduldig v. Aiello*.[10] As to state and local employment, Title VII[11] and the Pregnancy Discrimination Act are Enforcement Clause statutes.[12] The conflict between Title VII and *Washington v. Davis*[13] is just as direct as the conflict between RFRA and *Employment Division v. Smith*,[14] but the chronology was reversed; the duty to justify disparate impact under Title VII was in place before the Court held that there is no such duty under the Constitution.

For twenty years, Congress passed statutes that went beyond judicial interpretation of the Constitution. The most common form of these statutes dispensed with proof of bad motive or facial discrimination, exactly as RFRA did. The Court upheld these statutes when they were challenged,[15] and the States eventually gave up challenging them.[16] Six appellate courts upheld RFRA, including four opinions by well-respected

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requires proof of racial motive).

6. *See* S. Rep. No. 97-417, at 36 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214.

7. *See id.*

8. 42 U.S.C. § 2000e(k) (1994) (defining sex discrimination to include discrimination based on pregnancy). *See* H. Rep. No. 95-948 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749.

9. 429 U.S. 125 (1976) (holding that pregnancy discrimination is not sex discrimination within meaning of Title VII).

10. 417 U.S. 484 (1974) (holding that excluding pregnancy from state-sponsored health insurance is not sex discrimination within meaning of Fourteenth Amendment).

11. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994) (codifying liability for racially neutral practices with disparate racial impact).

12. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976).

13. 426 U.S. 229, 238-48 (1976) (holding that proof of violation of Equal Protection Clause requires proof of racial motive or explicit racial classification).

14. 494 U.S. 872 (1990).

15. *See* Mississippi Republican Executive Comm. v. Brooks, 469 U.S. 1002 (1984) (mem.) (upholding Voting Rights Act of 1982); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding nationwide ban on literacy tests in Voting Rights Act of 1970); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-44 (1968) (upholding Civil Rights Act of 1866 as applied to private discrimination); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding ban on English language literacy tests for voters educated in Spanish); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding ban on literacy tests in jurisdictions covered by Voting Rights Act of 1965).

16. All of this is in the hearing record and in the Congressional Reference Service report. *See* David M. Ackerman, *CRS Report for Congress: The Religious Freedom Restoration Act and the Religious Freedom Act: A Legal Analysis* (Cong. Research Serv. Doc. 92-366A) (1992).

Reagan appointees.[17]

This relationship between constitutional rules and statutory rules reflected a healthy division of labor between the branches. Constitutional rights, often of very general scope, are almost impossible to amend. The Court often interprets these rights narrowly, generally protecting only against facial or intentional violations, because it fears the consequences of triggering constitutional standards with only a showing of impact or burden.[18] Statutes can be more finely tuned and are much easier to amend. Congress can, and has, supplemented the Court's protection for constitutional rights with statutory protections triggered by burden or impact, retaining the power to amend or limit the statutory right in light of experience. These institutional considerations explain why Professor Sager's proposed test[19] is met: a Justice in the *Smith* majority could resign from the Court and vote for RFRA without inconsistency, viewing the statute as a reasonable way to do politically, subject to political revision without regard to any principle of stare decisis, something that he would consider reckless if done by the Court in the name of the Constitution. More fundamentally, the numerous institutional differences between Congress and the Court make Professor Sager's test irrelevant and inappropriate.

Congress took the constitutional issue seriously when it considered RFRA, but the constitutional issue was not difficult in 1992 and 1993. For better or worse, *Boerne* changed the law; Congress did not face the same question before *Boerne* that it faces after *Boerne*. This change in law ties Congress to the Court's understanding of religious liberty, and unless Congress creates a very careful record, to the Court's intuitive view of

17. *See* Mockaitis v. Harcleroad, 104 F.3d 1522, 1529-30 (9th Cir. 1997) (Noonan, J.); Sasnett v. Sullivan, 91 F.3d 101, 1019-22 (7th Cir. 1996) (Posner, J.), *vacated*, 117 S. Ct. 2502 (1997); EEOC v. Catholic Univ., 83 F.3d 455, 469-70 (D.C. Cir. 1996) (Buckley, J.); Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996) (Higginbotham, J.), *rev'd*, 117 S. Ct. 2157 (1997).

18. *See, e.g.*, *Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause requires no justification for neutral and generally applicable laws that burden religious practices); *Bolden*, 446 U.S. 55 (1980) (Fifteenth Amendment); *Davis*, 426 U.S. 229 (1976) (holding that the Equal Protection Clause requires no justification greater than a rational basis for facially neutral laws that have a racially disproportionate impact). The Court explicitly drew the analogy between *Smith* and *Davis*. *See Smith*, 494 U.S. at 886 n.3.

19. *See* Lawrence G. Sager, *Congress as Partner/ Congress as Adversary*, 22 HARV. J. L. & PUB. POL'Y 85, 86-88 (1998).

the facts. Discrimination against and among places of worship is widespread in land use regulation,[20] but those facts were not in the record in *Boerne*. The Court's factual intuitions are a source of deep ambiguity in the opinion, because it is not clear just what facts the Court assumed or just how those assumptions relate to the Court's legal conclusions. *Boerne* may be a special ticket good for this train only. This special rule may apply only to legislation in which Congress really mouths off in the preamble: any threat to judicial power in such legislation may be invalid.[21] Or, the special rule may be limited to cases in which the Court does not perceive the seriousness of the problem Congress is trying to solve. If the Court believes that race and sex discrimination are widespread problems, and that threats to religious liberty are not, it may defer to Congress with respect to race and sex but take a more activist role with respect to religion. It is also possible that the Court is serious about the broad principles announced in *Boerne* and intends to enforce them across the whole range of Congressional enforcement legislation–a possibility considered below.

The Court's focus on its own interpretation of the Free Exercise Clause and on its own intuitive view of the facts fueled another attack on RFRA. The Court sees only small and scattered infringements of religious liberty, but RFRA addressed broad and general problems. The Act's generality became a point of both political and constitutional attack. Properly understood, RFRA's generality was one of its great strengths. Congress cannot protect religious liberty conflict-by-conflict; it cannot examine every government regulation and every religious practice that is burdened. If Congress tried to operate case-by-case, the result would be a series of votes to determine which religious practices could win approval of a Congressional majority.[22] This system would grant religious liberty at majority suffrance.

The most serious abuses of religious liberty at the time RFRA

20. Some of the evidence is gathered in Laycock, *supra* note 3, at 780-81.

21. Contrary to some oral reports, I did not draft the statute, and I had nothing to do with the preamble.

22. This argument was made before RFRA's enactment. For an elaboration of this point, with quotations from the legislative history, see Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 218-21 (1994).

was debated are never mentioned in the legislative history,[23] mainly because if a religion is obnoxious enough to be seriously persecuted, congressmen are likely to think that that religion makes a bad soundbite. If forced to cast an up-or-down vote on the specific religious practice, congressmen are likely to side with the persecutors. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[24] is now accepted by everyone except Lino Graglia[25] as an obvious example of a Free Exercise Clause violation after *Employment Division v. Smith.* But when Representative Steve Solarz tried to organize a Congressional amicus brief in *Lukumi,* not one of his 534 colleagues would consider signing such a brief.[26] The situations in which religious liberty most need protection never made it into the legislative history, because the political process cannot easily deal with them. Faced with these constraints, Congress protected religious liberty the only way it could–by staying out of individual cases, enacting a general standard, and entrusting enforcement of that standard to the branch that is generally charged with enforcing individual liberties in particular cases.

## II. THE STRUCTURAL PROBLEM OF PROTECTING LIBERTY

Let me back up from *Boerne,* and RFRA in particular, in order to lay out structurally why RFRA fits squarely into Section 5 of the Fourteenth Amendment and why I think that *Boerne* is a serious structural mistake. The Constitution protects liberty against government and against concentrations of power within government. The separation of powers creates three branches, each with some power to protect liberty. If any one branch wants to protect liberty against the other two, it has some power to do so.

If the general rule were the other way around–if the rule were that if any one branch wants to suppress a claim to liberty, that claim is suppressed–then the effect of separation of powers would be very different. Instead of claims to

23. *See* Laycock, *supra* note 3, at 775-77.

24. 508 U.S. 520 (1993).

25. *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 government may ban a worship service if a "secularized, sensitized" community finds it "incongruous and offensive").

26. Interview with David Lachman, Staff to Rep. Solarz, in Washington, D.C. (May 14, 1992).

constitutional liberty getting three chances to succeed, they would get three chances to lose. A claim to liberty would have to win in all three branches; it would never be enough to win in only one branch.

That is not our system. If Congress thinks a bill is a bad idea, unfair, a threat to liberty, or unconstitutional, then Congress can refrain from passing the bill–whatever the Court might think about constitutionality. The President has comparable discretion about whether to sign it. The Department of Justice can (and sometimes does) refrain from oppressive forms of enforcement. If the law as enacted and enforced violates a constitutional liberty, an injured party can bring suit or raise a constitutional defense and the judiciary can strike the law down. At the federal level, it is often the case that all three branches must at least acquiesce for a serious violation of constitutional liberty to proceed.

But all three branches are ultimately selected through majoritarian processes. The process is longer and more indirect in the case of the Judiciary, but the President and Senators are elected, so over the long term the Judiciary reflects the strongly felt views of the people. As Madison recognized, the greatest threat to liberty lies where the greatest power lies, and in a republic, that power is ultimately with the people.[27] The three branches empowered to protect liberty are ultimately selected by a majority of the community, and that majority may at times be the greatest threat to the liberty of unpopular minorities. The structural problem for protecting liberty through the Constitution therefore comes to this–how can you maximize the odds that at any given time, at least one of the branches will act effectively to protect liberty?

In 1866, Congress faced an especially severe manifestation of this problem–who could be trusted to enforce the new amendments against determined opposition in the South? The fruits of the Civil War were at stake in the enforcement of these amendments, both at the level of highest principle–liberty for the freedmen–and at the level of raw politics–a continuing national majority for the Republican party. Congressional motives were mixed, but these amendments were so important

27. *See* 1 ANNALS OF CONG. 454-55 (Joseph Gales ed., 1834) (remarks of James Madison, June 8, 1789).

that the South was coerced into ratifying them.[28] The question was how to make them work.

The States clearly could not be trusted to enforce the amendments; the States were the source of the problem. The President could not be trusted to enforce them; Andrew Johnson opposed the whole Congressional program of Reconstruction.[29] The House eventually impeached him, and a majority of the Senate, although not the necessary two-thirds, voted to remove him from office.[30]

Congress had some hopes for the federal judiciary, and it enacted four great expansions of federal jurisdiction in this period[31] before the Republicans lost their majority. But the federal judiciary could not be fully trusted either. The landmark case symbolizing the federal judiciary was not *Brown v. Board of Education*,[32] but rather it was *Dred Scott v. Sanford*.[33] The judges were appointed by the same President who opposed the whole congressional program of Reconstruction– Congress could hope for judicial enforcement and provide for the possibility, but it could not fully trust the federal judiciary.

Congress could not even trust itself. There were great fears that when the Southern States were readmitted, northern Democrats and southern whites would have a majority, and any civil rights legislation would be repealed. The legislative history of the Fourteenth Amendment explicitly states that

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28. *See* Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 429 (1867) (denying seceded states representation in Congress until they ratified Fourteenth Amendment); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 500-07 (1989).

29. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 228-345 (1988) (describing the failure of Presidential Reconstruction and the conflict over Congressional Reconstruction).

30. *See id.* at 333-36; WILLIAM H. REHNQUIST, GRAND INQUESTS, 199-248 (1992).

31. *See* An Act to Determine the Jurisdiction of Circuit Courts of the United States and to Regulate the Removal of Causes from State Courts, and for Other Purposes, ch. 137, § 1, 18 Stat. 470, 470 (1875) (codified as amended at 28 U.S.C. §1331 (1994)) (granting general federal question jurisdiction); An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 2, 17 Stat. 13, 13-14 (1871) (codified as amended at 28 U.S.C. § 1343 (1994)) (granting original civil rights jurisdiction); An Act Amendatory of "An Act to Amend an Act Entitled 'An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases,'" approved May 11, 1866, ch. 27, 14 Stat. 385 (1867) (codified as amended at 28 U.S.C. § 2241(c) (1994)) (granting habeas corpus jurisdiction); An Act to Protect All Persons in the United States in Their Civil Rights, and furnish the Means of their Vindication, ch. 31, § 3, 14 Stat. 27, 27 (1866) (codified as amended at 28 U.S.C. § 1443 (1994)) (granting civil rights removal jurisdiction).

32. 347 U.S. 483 (1954).

33. 60 U.S. (19 How.) 393 (1857).

neither Congress,[34] nor the Judiciary, could be trusted to enforce the new rights.[35]

Congress was proposing liberties that would be deeply unpopular in the places where they were most needed and that no one could be trusted to enforce. How could Congress address that problem? The best it could do was to create multiple means of enforcement, of which the most important are Section 1 and Section 5 of the Fourteenth Amendment.[36] Section 1 creates self-executing constitutional rights whose enforcement is entrusted primarily, but not exclusively, to the federal judiciary. Congress had even less confidence in state courts than in the federal ones, but it did not provide for exclusive federal jurisdiction. Congress left an option to file in state courts, and now, one hundred thirty years later, many civil rights lawyers would rather file in state court than in federal.

Section 5 grants power to Congress "to enforce" these amendments by appropriate legislation. In dictionaries of the time, the first definition of "enforce" was "to give strength to; to strengthen; to invigorate."[37] Over and over, supporters said that the power to enforce means the power to make these rights effective and that it is for Congress to decide what is needed to make these rights effective. The phrase "appropriate" legislation was taken from *McCulloch v. Maryland*,[38] and had long been understood to grant broad discretion to Congress.[39]

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34. On the fear of a Southern and Democratic majority in Congress, see CONG. GLOBE, 39th Cong., 1st Sess. 168 (Rep. Howe); *id.* at 1095 (Rep. Hotchkiss); *id.* at 2459 (Rep. Stevens); *id.* at 2462 (Rep. Garfield); *id.* at 2540 (Rep. Farnsworth).

35. *See* Laycock, *supra* note 3, at 766 (collecting congressional statements).

36. U.S. CONST. amend. XIV, §§ 1, 5.

37. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1852); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755). *See also* ROBERT GORDON LATHAM, A DICTIONARY OF THE ENGLISH LANGUAGE (1882) ("give strength to; strengthen; invigorate; make or gain by force"); JOSEPH E. WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE (1890) ("to give vigor or strength to; to animate; to instigate; to provoke; to incite; to force"); WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1891) (revised and enlarged from edition of 1864) ("4. to give force to; to strengthen; to invigorate; to urge with energy; as to enforce arguments or requests; 5. to put in force; to cause to take effect; to give effect to; to execute with vigor; as to enforce the laws"); THE CENTURY DICTIONARY (1899) ("to increase the force or strength of; make strong; fortify").

38. 17 U.S. (4 Wheat.) 316, 421 (1819).

39. *See, e.g.*, Ex parte Virginia, 100 U.S. 339, 345-46 (1879) (applying the *McCulloch* test to the Congressional enforcement power); CONG. GLOBE, 41st Cong., 2d Sess. 602 (1870) (Sen. Thurman, reminding Senators that the phrase came from *McCulloch*).

These multiple enforcement mechanisms meant that if the supporters of the new liberties could control any branch of government, they had a chance to enforce the amendment. If the judiciary would do its job and enforce Section 1, or if Congress would do its job and enforce through Section 5, the Fourteenth Amendment would be safe. If miracles happened and States began to enforce, the Amendment would be safe. The executive could help enforce the new rights, so long as they were not repealed. The Freedmen's Bureau was an executive branch initiative subsequently authorized and extended by Congress;[40] the army sometimes acted as an enforcement organization;[41] and some federal prosecutors also made vigorous enforcement efforts.[42] But none of this lasted long, and the Thirty-Ninth Congress's worst fears came to pass. From about 1875 to about 1950, all three branches acquiesced in wholesale violations of the Fourteenth and Fifteenth Amendments. Multiple means of enforcement were the best that Congress could do, but they were not enough.

The central point of *Boerne* is to reduce or eliminate the Constitution's multiple mechanisms of enforcement and to confine Congressional enforcement power under Section 5 to the scope of judicial enforcement under Section 1. This is wildly anachronistic in two senses. First, it entrusts the fruits of the Civil War to an unchecked veto by the Court that decided *Dred Scott*. It is unimaginable that Congress or northern legislatures intended this in 1866. If the Court were to interpret the whole Fourteenth Amendment as adding nothing to the Constitution–precisely as it nullified the Privileges or Immunities Clause in the Slaughterhouse Cases[43]–the decision in *Boerne* would leave Congress powerless to respond. That cannot have been the original understanding.

Second, the Court's view is anachronistic because it

40. *See* Foner, *supra* note 29, at 68-70. *See generally* GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU (1970); CLAUDE F. OUBRE, FORTY ACRES AND A MULE: THE FREEDMEN'S BUREAU AND BLACK LAND OWNERSHIP (1978).

41. *See, e.g.*, Foner, *supra* note 29, at 70-71 (describing how General Sherman set aside large tracts of Georgia land for black farmers); *id.* at 276-77 (describing how the Reconstruction Act of 1867 divided seceded states into five military districts, and charged the Army with managing Reconstruction).

42. *See* Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L. J. 15 (1995).

43. 83 U.S. (16 Wall.) 36, 73-80 (1873) (holding that the clause protects only those rights that were already protected before its adoption).

combines an antebellum view of federalism with a 1960s view of judicial supremacy. *Boerne* does not make a merely formalistic or incidental claim to judicial supremacy; it makes a claim that goes beyond *Cooper v. Aaron*.[44] *Boerne* claims not only that the political branches must obey when the Court decides there is a constitutional right that binds them, but also that they must obey when the Court says there is not a constitutional right that binds them. *Boerne* holds that the Court sets not just the floor under the liberties of the American people but also important parts of the ceiling.

Congress can raise the ceiling with respect to federal law, and each state can raise the ceiling with respect to its own state law. Each state can grant more liberty within its own jurisdiction than the Court says it has to, and Congress can grant more liberty with respect to federal law than the Court says it has to, but all of that lies outside the scope of the Fourteenth Amendment. The Fourteenth Amendment is precisely about federal protection of liberty against the States, and, with respect to that, the Court now asserts the power to set both the floor and the ceiling. That assertion produces an extraordinary concentration of power in a single branch.

Much puzzlement has surrounded the so-called ratchet footnote in *Katzenbach v. Morgan*,[45] in which Justice Brennan says that Section 5 includes the power to expand judicial protection of constitutional rights but not the power to restrict judicial protection for constitutional rights.[46] Conceptually, the ratchet footnote contains nothing puzzling. Congress certainly does not have power to violate judicially announced rights. It is the essence of judicial review that these rights place binding limits on the power of the States and the other branches. Congress cannot violate judicially announced rights under the Commerce Clause, the Patent Clause, or the Enforcement Clause. The fact that Congress cannot use its enforcement power to violate a judicially announced right is not mysterious at all.

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44. 358 U.S. 1, 18 (1958) (holding that state officials must obey judicial orders enforcing constitutional rights, and stating that "the federal judiciary is supreme in the exposition of the law of the Constitution").

45. 384 U.S. 641 (1966).

46. *See id.* at 651 n.10 ("§ 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.").

But Congress can provide greater protection for judicially announced rights, or at least it could before *Boerne*. To be sure, two rights sometimes conflict, and raising the level of protection for one right may appear to reduce the level of protection for another right. Affirmative action is an example. Even in such cases, the result is clear: a law that violates a judicially declared right is invalid, even if it purports to enforce some other right. Congress acts unconstitutionally when it violates judicially declared rights but not when it protects liberty in ways that go beyond judicially declared rights. When Congress grants more liberty than the Court requires in *federal* law, it does not invite judicial review, and the Court has not suggested otherwise.

Professor Sager may disagree even with this; he suggests[47] that RFRA poses a problem under *United States v. Klein*.[48] He views RFRA as requiring a "constitutional charade," which he reads *Klein* as forbidding.[49] This argument badly over-reads both RFRA and *Klein*. RFRA would not have required a constitutional charade; the difference between enforcing the statutory right and the constitutional right was always clear, just as it has been clear in employment discrimination cases and voting rights cases. In *Boerne*, there was a RFRA count and a free exercise count,[50] and no one on any side at any point was ever confused by the difference between them. In any event, *Klein* has nothing to do with Professor Sager's conception of a "constitutional charade".

*Klein* involved an appropriations rider barring claims by pardoned rebels to recover property seized during the Civil War.[51] The rider's "great and controlling purpose [was] to deny to pardons granted by the President the effect which [the Supreme] court had adjudged them to have."[52] The essence of *Klein* is that "the legislature cannot change the effect of such a

47. *See* Lawrence G. Sager, Klein's *First Principle: A Proposed Solution*, 86 GEO. L.J. 2325, 2532-34 (1998).

48. 80 U.S. (13 Wall.) 128 (1871).

49. *See* Sager, *supra* note 47, at 2532-34.

50. Joint Appendix 10-14, in City of Boerne v. Flores, 117 S. Ct. 2157 (1997). The RFRA claim alleged a substantial burden on religious exercise. The Free Exercise claim alleged, among other things, individualized assessment of properties and the absence of any neutral, generally applicable law.

51. *See Klein*, 80 U.S. at 133-34.

52. *Id.* at 145.

pardon."[53] The Court invalidated the rider because it interfered with the pardon power.

*Klein* also said that the rider was invalid because it required the Court to decide specific cases in favor of the government and in ways contrary to the Court's own judgment.[54] However, the Court distinguished and reaffirmed *Pennsylvania v. Wheeling & Belmont Bridge Co.*,[55] in which Congress had changed the result in a particular case by passing new legislation applicable only to that case. The Court had held a bridge to be a nuisance, and Congress passed a statute providing that the bridge was "lawful" in its "present positions and elevations . . . anything in the law or laws of the United States to the contrary notwithstanding."[56] The Court enforced the new statute with no talk of charades.[57]

The *Klein* Court said of *Wheeling Bridge* that "no *arbitrary* rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act."[58] In *Klein*, however, "no new circumstances [had] been created by the legislation."[59] The difference may have been partly a matter of form; the rider in *Klein* could be read as instructing the courts about specific cases rather than as a change in applicable substantive law. More fundamentally, Congress could not change the applicable substantive law, because it had no power to limit the President's pardon power. An attempt to change the legal effect of a pardon interfered with the President's pardon power; an attempt to tell the judges to ignore what Congress could not change interfered with the judicial power to decide cases. This is the best reading, and perhaps the only plausible reading, of *Klein*.

The modern cases make clear that *Wheeling Bridge* is the general rule and that *Klein* is the narrow exception. Although the Court has not explained what *Klein* means, it has clearly indicated what *Klein* does not mean. In 1992 and again in 1995, the Court explained that Congress can enact rules of decision

53. *Id.* at 148.
54. *See id.* at 146-47.
55. 59 U.S. (18 How.) 421 (1855).
56. *Id.* at 429.
57. *See id.* at 430-32.
58. 80 U.S. at 146-47 (emphasis added).
59. *Id.* at 147.

for cases in the courts–that is what statutes do, despite *Klein*'s odd use of the phrase[60]–so long as it does so by amending applicable law and not by instructing the courts on how to interpret existing law. "Whatever the precise scope of *Klein* . . . later decisions have made clear that its prohibition does not take hold when Congress 'amends applicable law.'"[61]

Following this interpretation, five out of six Courts of Appeals–all but the Ninth Circuit in a decision since vacated by the court en banc[62]–have rejected *Klein*-based attacks on the Prison Litigation Reform Act.[63] In any event, the only disagreement is about the reopening of final judgments, which RFRA would never require. Whether or not the Ninth Circuit

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60. *See Klein*, 80 U.S. at 146.

61. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) (citing Robertson v. Seattle Audubon Society, 503 U.S. 429, 441 (1992)). *See also* Pope v. United States, 323 U.S. 1, 9 (1944) (congressional statute did not violate *Klein* because "the Act's purpose and effect seem to have been to create a new obligation"). The Court went furthest to limit *Klein* in *United States v. Sioux Nation*, 448 U.S. 371 (1980), upholding a statute that authorized relitigation of a money claim based on past events, without regard to claim or issue preclusion. *Id.* at 389. The Court emphasized that in *Klein*, "Congress was attempting to decide the controversy at issue in the Government's own favor," and that it required "decision of a cause in a particular way." *Id.* at 405.

62. Taylor v. United States, 143 F.3d 1178 (9th Cir. 1998), *vacated en banc*, 158 F.3d 1059 (9th Cir. 1998).

63. *See* Tyler v. Murphy, 135 F.3d 594, 597 (8th Cir. 1998) (rejecting claim that PLRA violates separation of powers "by reopening final judgments and prescribing rules of decision for pending cases"); Hadix v. Johnson, 133 F.3d 940, 943 (6th Cir. 1998) (rejecting claim that PLRA is invalid because it "prescribes a rule of decision," because application of the statutory standard to individual cases will "remain at all times with the judiciary"), *cert. denied sub nom.* Hadix v. McGinnis, 118 S. Ct. 2368 (1998); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 657-58 (1st Cir. 1997) (rejecting *Klein*-based attack because "equity requires, and the separation of powers principle permits, legislatures to direct that courts respond to changes in substantive law by revising forward-looking decrees"), *cert. denied*, 118 S. Ct. 2366 (1998); Benjamin v. Johnson, 124 F.3d 162, 173-74 (2d Cir. 1997) (holding that "if legislation can be characterized as changing the underlying law rather than as prescribing a different outcome under the pre-existing law, it will not violate the separation of powers principle formulated in *Klein*"); Gavin v. Branstad, 122 F.3d 1081, 1089 (8th Cir. 1997) (holding that "*Klein* does not apply here because this is not a case in which Congress has prescribed a rule of decision and has 'left the court no adjudicatory function to perform,'" quoting United States v. Sioux Nation, 448 U.S. 371, 392 (1980)), *cert. denied*, 118 S. Ct. 2374 (1998); Plyler v. Moore, 100 F.3d 365, 372 (4th Cir. 1996) (rejecting *Klein* argument on ground that Congress "does not [unconstitutionally] mandate a rule of decision when it amends the law underlying a pending case"), *cert. denied*, 117 S. Ct. 2460 (1997). *See also* Dougan v. Singletary, 129 F.3d 1424, 1426 n.10 (11th Cir. 1997) (noting that inmates there had not made the *Klein* argument), *cert. denied*, 118 S. Ct. 2375 (1998); *cf.* SBC Communications, Inc. v. FCC, 154 F.3d 226, 245-46 (5th Cir. 1998) (rejecting *Klein*-based attack on legislation that modified the law created by the Bell Telephone antitrust decree), *cert. filed*, 67 U.S.L.W. 3301 (Oct. 19 & 20, 1998, No. 98-652 and No. 98-653). *But see* Taylor v. United States, 143 F.3d 1178, 1184 (9th Cir. 1998) (relying in part on *Klein* to invalidate the PLRA as applied to reopening of final judgments), *vacated en banc*, 158 F.3d 1059 (9th Cir. 1998).

case ever reaches the Supreme Court, it is quite unlikely that *Klein* will be reinterpreted in a way that has anything to do with RFRA. The prison reform cases show that the disputed boundaries of congressional power to change applicable law are well beyond anything in RFRA. RFRA raised no issue under *Klein*, and *Boerne* does not limit congressional control over federal law or state control over state law. The issue is not really related to separation of powers.

## III. FEDERALISM AS A STRUCTURAL THREAT TO LIBERTY

The real issue is federalism. Congress can certainly provide greater protection than the Court provides on its own, but can it make that greater protection binding on the States? The Court says it cannot, which reveals a more general and less recognized anachronism. The Court still views federalism as a protection for liberty, even though it no longer is.

It is hardly news that there is a conflict between states' rights and federal protections for liberty. If a state violates a citizen's liberty, and if the federal government attempts to protect the citizen's liberty, then any residuum of states' rights may limit the effectiveness of the federal protection. This sort of conflict between federalism and liberty is most pronounced when a rogue state or region is deeply opposed to a liberty to which the nation as a whole is committed. The classic example is the Deep South's resistance to equal rights for blacks.

I am making a different point. Even without rogue states–even assuming an absence of serious disagreement between state and national majorities about the meaning of liberty–federalism has become a structural threat to liberty. That claim is presumably heretical in this audience, but from experience representing churches, I have no doubt that this is how federalism really works. The rise of big government has fundamentally changed the structural consequences of federalism, and declining federal enforcement of individual rights accelerates the change. Federalism probably protected liberty in an era of limited government, and might have protected liberty in the era of big government so long as there was vigorous enforcement of constitutional rights. But in an era of big government without vigorous enforcement of constitutional rights, federalism becomes a serious structural threat to liberty. Federalism no longer divides power in any

meaningful way. Instead, federalism duplicates and multiplies power.

Federalism in conjunction with the administrative state means that there are now many government entities instead of only one. Each government entity has the power to regulate and to restrict liberty, and in an era of big government, each is likely to do so. If we also reduce the overriding limits on what government can do to constitutional liberty, these multiple threats to liberty are less and less constrained. When judicial review shrinks, or when the congressional enforcement power shrinks, these multiple threats to liberty are empowered.

A religious practice, however important to the believer, may be forbidden by each of the following: an act of Congress, a regulation of a federal agency, an act of a state legislature, a regulation of a state agency, an act of a county board or a county agency, an act of a city council or a city agency, an act of a special purpose district, a state court exercising common law powers, or a federal court sitting in diversity and predicting common law developments. We have created thousands of regulatory bodies with overlapping authority, any one of which can suppress liberty. If an interest group fails to pass a bill this month or this year in one of these places, that group can try again next month and next year in all of these places. Without vigorous enforcement of constitutional rights against each of these regulatory bodies, we have created the opposite of our original model of divided government powers; if any one of the many governmental bodies wants to suppress a religious practice, or any other under-enforced liberty, that liberty is suppressed. To say that religious believers ought to lobby for exemptions at every one of these levels–and lobby to maintain their exemptions session after session–is to recommend the impossible.

It is often said that local government is closer to the people and thus more politically responsive. This may be true for those who have easy access to policy makers or who can threaten to move their factory to another jurisdiction. It is sometimes true when an issue captures public attention and arouses a large segment of the populace. But it is rarely true for minority religions or small religious organizations.

The only bodies that can protect constitutional liberty against each of the multiple sources of regulation are at the federal

level. There used to be two such bodies-the federal judiciary and the Congress. The federal judiciary has limited powers and has struggled for a generation in the face of rhetoric about the counter-majoritarian difficulty and the claim that it is not supposed to decide anything that depends on a question of substantive values.[64] The Federalist Society, and the movement of which it is a part, has thus been an important if unwitting element of the conspiracy of big government. The Federalist Society has had some success with its argument that judges should do less, but it has had almost no success in arguing that the legislatures and agencies should do less. As a result, we are left with a massive body of overlapping regulatory power and shriveling, shrinking power of anybody to control it in the name of constitutional liberty. As William Marshall says in this symposium, you cannot have limited government and a weak judiciary.[65] The judicial power to enforce constitutional liberty is one of the essential checks on the rest of government.

The other essential check was Congress, and *Boerne* seems to deny independent Congressional power to protect liberty by making Congress an adjunct to the courts. Pulling Congress out of the balance fundamentally changes the structure of liberty in our country. It fundamentally changes the relation of federalism to liberty, because it leaves all these multiple sources of regulation with no central or unified source of power to protect liberty.

## IV. CONCLUSION

I think *Boerne* was a mistake with regard to the validity of RFRA, and I think it is a mistake with regard to constitutional structure. If the Court means what it said, and if it intends to apply the new principle generally, then *Boerne* is by far the most important of the recent round of federalism decisions. *United States v. Lopez*[66] merely chips around the margins of the commerce power, striking down a possession offense that

64. *See, e.g.*, Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Gerald Gunther, *The Supreme Court, 1971 Term*-Forward: *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

65. *See* William G. Marshall, *Process Federalism and American Political Culture*, 22 HARV. J.L. & PUB. POL'Y 139, 155 (1998).

66. 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act).

required no proof of any commercial transaction, either local or interstate.[67] *Printz v. United States*[68] does not prevent Congress from offering to pay for things it would like states to do, it does not prevent Congress from pre-empting things that it particularly wants states not to do, it does not prevent Congress from asking the states for assistance, and it does not prevent Congress from using federal officials to execute any policy Congress enacts pursuant to constitutional power.[69]

But, *Boerne* goes to the core of an independent congressional enforcement power. Congress and the Court agreed that religiously motivated conduct was an exercise of religion protected by the Fourteenth Amendment.[70] They agreed that the conduct was within the constitutional right, and they agreed that the constitutional right was within the enforcement power.[71] Even so, the Court held that Congress could not increase the degree of protection beyond that acceptable to the Court.[72] *Boerne* cannot be dismissed as marginal to the enforcement power, and if generalized, it takes away a central structural element of the Civil War settlement. It is a mistake at the most fundamental level.

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67. *See id.* at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.").

68. 117 S. Ct. 2365 (1997) (holding that Congress cannot require state officials to execute federal policies).

69. *Printz* holds only that "Congress cannot compel the states to enact or enforce a federal program" or "circumvent that prohibition by conscripting the state's offices directly." *Id.* at 2384. Paying the states is distinguished. *Id.* at 2374, 2375, 2376. Pre-emption is distinguished. *Id.* at 2380. Voluntary cooperation is distinguished. *Id.* at 2372-73. Execution by federal officials is distinguished. *Id.* at 2372, 2382.

70. *See Smith*, 494 U.S. at 877 ("But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts.").

71. *See Boerne*, 117 S. Ct. at 2163-64 (1997).

72. *Id.* at 2162-72 (holding that Congress must accept the Court's interpretation of the Free Exercise Clause and exercising its own judgment to determine that RFRA was not an appropriate means to enforce the clause).