

Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act

MARCI A. HAMILTON*

I. INTRODUCTION	311
II. WHY STATE AND LOCAL GOVERNANCE IS PREFERABLE TO FEDERAL GOVERNANCE	320
III. THE TRUE STORY BEHIND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (“RLUIPA”).....	323
A. <i>Interaction Between (and Reaction to) Congress and the Court After RFRA Was Found Unconstitutional</i>	324
1. RFRA Triggered the Court to Clarify that Prophylactic Legislation Must Be Justified by Widespread and Persisting State Constitutional Abuses	324
2. Fact Finding, the Court and the Congress	326
3. A Counterproductive Paradigm: Congress Is Good, the States Are Bad....	328
B. <i>Precursors to RLUIPA</i>	332
1. The Religious Freedom Restoration Act (“RFRA”).....	332
2. The Religious Liberty Protection Act Bills (“RLPA”).....	333
C. <i>The Legal Landscape of Land Use and Prisons Before RLUIPA</i>	335
1. Land Use: A Tradition of Deference to State and Local Governments	335
2. Prisons: Deference to Prisons Authorities	341
D. <i>The Legislative History Behind RLUIPA</i>	341
1. The Procedure	342
2. The Legislative History and Record	342
3. Land Use Evidence Available but Not in the RLUIPA Record.....	351
E. <i>RLUIPA in the Courts</i>	352
IV. AN ACTION PLAN FOR CONGRESS: HOW FEDERALISM ENCOURAGES CONGRESS TO SERVE THE PUBLIC GOOD.....	353
A. <i>The Questions Congress Should Have Asked Before Enacting RLUIPA to Avoid Invalidation on Federalism Grounds</i>	354
B. <i>The List of Questions for Every Enactment Affecting State and Local Interests</i>	356
V. CONCLUSION	359
APPENDIX.....	361

I. INTRODUCTION

This Symposium was designed as a call to action.¹ For the vast majority of

* Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law, Yeshiva University. Copyright 2002 Marci A. Hamilton. Email: hamilton02@aol.com. I would like to thank David Schoenbrod, Stewart Sterk, and the participants of the Indiana University School of Law’s Symposium, *Congressional Power in the Shadow of the Rehnquist Court: Strategies for the Future*, for their stimulating discussion of these issues and their comments, especially Sandy Levinson. I would also like to thank Adam Aprigliano, Michelle Bogre, and Mary Lynne Frey of the Benjamin N. Cardozo School of Law for their excellent research assistance.

constitutional law scholars, and this Symposium is no exception, it is a call to find ways to *limit* the Supreme Court's reintroduction of the values of federalism.² The balance against the Court in the academy is hardly surprising; liberals (who tend to be fond of centralized, federal power) vastly outnumber conservatives (who tend to be fond of decentralization) in the universities and the law schools.³ Thus, it would be a mistake to count heads in the academy—or at this Symposium—and thereby conclude that objectively the Court must be headed down the wrong path. There are many reasons to think that it is leading the country to a better congressional lawmaking process and ultimately a better path to the national public good.

As of 2002, there is no arena Congress believes it is disabled from entering, whether it be guns near schools,⁴ or violence against women,⁵ or land use for religious landowners.⁶ Alexander Hamilton mistakenly believed that Congress would not have the desire to encroach on the arenas controlled by the states, but rather would only be attracted to the new powers given to the federal legislature:

It may be said that [the constitutional design] would tend to render the government of the Union too powerful, and to enable it to absorb those residuary authorities, which it might be judged proper to leave with the States for local purposes. Allowing the utmost latitude to the love of power which any reasonable man can

1. Charles G. Geyh, in his article for this Symposium, summarizes as follows:

What distinguishes this Symposium from its predecessors is its orientation toward action. We are gathered for the purpose of looking beyond descriptions of the diminished state of congressional power, predictions of future Supreme Court decisions, and pronouncements on whether recent developments are better characterized as devastating or salutary, to explore what, if anything, Congress can or should do to alter or arrest our current course.

Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts, 78 IND. L.J. 153, 156 (2003).

2. In this Symposium, see Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73 (2003) (advocating supermajority requirement before Supreme Court can invalidate congressional enactment); Geyh, *supra* note 1 (advocating use of the appointments process for Congress to regain lost power); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section 5 Power*, 78 IND. L.J. 1 (2003) (advocating extreme deference to Congress when it enacts laws affecting state sovereignty); see also Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4, 11-32 (2001) [hereinafter Kramer, *We the Court*] (arguing that the Rehnquist Court's Section 5 jurisprudence embraces "judicial sovereignty" to serve political ends and further what he labels "popular constitutionalism"); Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 DUKE L.J. 1395 (2001); Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11 (2000); Mark Tushnet, *What is the Supreme Court's New Federalism?*, 25 OKLA. CITY U. L. REV. 927 (2000).

3. See Arthur Waldron & Hillel Fradkin, *The Twisted Academy*, AM. ENTERPRISE. MAG., Sept. 2002.

4. See *United States v. Lopez*, 514 U.S. 549 (1995).

5. See *United States v. Morrison*, 529 U.S. 598 (2000).

6. See Religious Land Use and Institutionalized Persons Act ("RLUIPA") of 2000, 42 U.S.C.A. § 2000cc (2001).

require, I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought in the first instance to be lodged in the national depository. The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and that possession of them, for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.⁷

How wrong he was. The innate pride in national issues in which Hamilton placed his faith has not been a check on the “love of power.” To the contrary, there is no local arena into which Congress has been unwilling to venture. Indeed, the situation is so bad that the debate has become whether there is *any* identifiable arena of local control left.⁸

7. THE FEDERALIST NO. 17, at 41-42 (Alexander Hamilton) (Roy P. Fairfield, ed., John Hopkins Univ. Press 1981) (2d ed. 1966).

8. The dissenters in the federalism cases have gone to extremes to argue that naturally local issues are properly under federal control. *See, e.g.,*

Rules for interpreting § 5 that would provide States with special protection...run counter to the very object of the Fourteenth Amendment [T]hat Amendment prohibits *States* from denying their citizens equal protection of the laws. U.S. Const., Amdt. 14 § 1. Hence “principles of federalism that might otherwise be an obstacle to Congressional authority are necessarily overridden by the power to enforce the Civil War Amendments by appropriate legislation. Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.”

Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 388 (2001) (Breyer, J., dissenting) (emphasis in original) (internal quotations omitted) (quoting *City of Rome v. United States*, 446 U.S. 156, 179 (1980));

From the fact that Art. I, § 8, cl. 3 grants an authority limited to regulating commerce, it follows only that Congress may claim no authority under that section to address any subject that does not affect commerce. It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific character of the activity, or the authority of a State to regulate it along with Congress [C]ategorical exclusions have proven as unworkable in practice as they are unsupportable in theory.

United States v. Morrison, 529 U.S. 598, 639-40 (2000) (Souter, J., dissenting);

[T]he majority’s holding illustrates the difficulty of finding a workable judicial Commerce Clause touchstone—a set of comprehensive interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to

Congress.

id. at 656 (Breyer, J., dissenting);

[I]f Congress has the power to create the federal rights that these petitioners are asserting, it must also have the power to give the federal courts jurisdiction to remedy violations of those rights, even if it is necessary to “abrogate” the Court’s “Eleventh Amendment” version of the common-law defense of sovereign immunity to do so.

Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 97 (2000) (Stevens, J., dissenting);

There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I.

Printz v. United States, 521 U.S. 898, 944 (1997) (Stevens, J., dissenting);

Nor is there force to the assumption undergirding the Court’s entire opinion that if this trivial burden on state sovereignty is permissible, the entire structure of federalism will soon collapse . . . [T]his case, unlike any precedent in which the Court has held that Congress exceeded its powers, merely involves the imposition of modest duties on individual officers.

id. at 961;

If Congress believes that such a statute will benefit the people of the Nation, and serve the interests of cooperative federalism better than an enlarged federal bureaucracy, we should respect both its policy judgment and its appraisal of its constitutional power.

id. at 970;

Lopez, 514 U.S. at 603 (Stevens, J., dissenting) (“In my judgment, Congress’ power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets.”);

The question for the courts, as all agree, is not whether as a predicate to legislation Congress in fact found that a particular activity substantially affects interstate commerce. The legislation implies such a finding, and there is no reason to entertain claims that Congress acted *ultra vires* intentionally. Nor is the question whether Congress was correct in so finding. The only question is whether the legislative judgment is within the realm of reason.

id. at 613 (Souter, J., dissenting);

[T]he matter that we review independently (*i.e.*, whether there is a ‘rational basis’) already has considerable leeway built into it. And, the absence of findings, at most, deprives a statute of the benefit of some *extra* leeway. This extra deference, in principle, might change the result in a close case, though, in practice, it has not made a critical difference.

id. at 617 (Breyer, J., dissenting) (emphasis in original). Breyer also stated,

[T]he Court believes the Constitution would distinguish between two local activities, one of which has an identical effect upon interstate commerce, if one, but not the other, is “commercial” in nature. As a general matter, this approach fails to heed this Court’s earlier warning not to turn “questions of the power of Congress” upon “formula[s]” that would give “controlling force to nomenclature such as ‘production’ and ‘indirect’ and foreclose consideration of the actual effects of the activity in question upon interstate commerce.”

id. at 627-628 (quoting *Wickard v. Filburn*, 317 U.S. 111, 120 (1942)) (alteration in original).

With its federalism cases,⁹ the Supreme Court has not cast a shadow onto the Capitol, as the title of this Symposium would suggest, but rather has poured sunshine on a process that has been in the shadows for too long.¹⁰ In what appears to be an infuriating move for many constitutional law scholars, the Court has posed taboo questions, like whether Congress had any reason to believe the states were systematically violating civil rights, or whether Congress noticed the states were inclined to or already protecting such rights.¹¹ It has also asked Congress whether it ever considered the constitutional basis of its enactments that impinge on state authority and autonomy.¹² If Congress were intent on altering state and local laws in every state, one would think common sense and a respect for the constitutional design would demand these questions; however, neither has sufficient purchase in the academy, or the Congress, which is the point of this Article.

This Article supplies an action plan for Congress that is deliberative: it expands the questions asked of proposed legislation affecting the states. Instead of a defensive refusal to adopt the Court's federalism vision, it urges Congress to give full sway to the Court's doctrine to see whether in fact respect for state dual sovereignty works in the people's and even the Congress's best interests. The plan has the potential to educate Congress on state capacity, to reduce needlessly duplicative legislation, and to permit Congress to focus on the truly national needs the Framers assumed would occupy their time. Thus, asking more questions could lighten the load for federal representatives and increase federal legislative efficiency.

This Article's deliberative strategy is only likely to be taken up, of course, where members of Congress actually desire their enactments to pass constitutional muster in the courts. There are strategic advantages in giving lobbyists that which they seek,

9. See, e.g., *Garrett*, 531 U.S. 356 (invalidating private damages remedy for employment discrimination against state employers under the Americans with Disabilities Act); *Morrison*, 529 U.S. 598 (invalidating private right of action under the Violence Against Women Act); *Kimel*, 528 U.S. 62 (invalidating private damages remedy under the Age Discrimination in Employment Act of 1967, as amended in 1974 to apply to the states); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (invalidating private damages remedy under the Trademark Act of 1946, as amended in 1992 to apply to the states); *Alden v. Maine*, 527 U.S. 706 (1999) (invalidating the private damages remedy under the Fair Labor Standards Act of 1938, as amended in 1974 to apply to the states); *Printz*, 521 U.S. 898 (1997) (invalidating provisions of Brady Handgun Violence Prevention Act mandating local law enforcement officers conduct background checks); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act of 1993 because it exceeded Congress's enforcement powers under Section 5 of the Fourteenth Amendment); *Lopez*, 514 U.S. 549 (invalidating Gun-Free School Zones Act of 1990, finding it exceeded Congress's Commerce Clause authority).

10. As the famous quote goes, "If you like laws and sausages, you should never watch either one being made." This is widely attributed to Otto Von Bismark. See RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 190 (Suzy Platt ed., 1989). While unflattering, it is not an inaccurate analogy to the federal law-making process.

11. See *Garrett*, 531 U.S. 356; *Morrison*, 529 U.S. 598; *Kimel*, 528 U.S. 62; *Boerne*, 521 U.S. 507.

12. See *supra* note 11; *Lopez*, 514 U.S. 549.

while not having to worry about the actual impact of the law because the courts will likely invalidate it. Where those conditions persist, there is no reason for Congress to alter its ways; nor is there any reason for Congress to adopt the anti-Court tactics proposed by those opposed to the Court's federalism jurisprudence.¹³ Despite this reality, lobbyists interested in obtaining legislation and steering it through the courts will pressure Congress not only to pass desired legislation, but to pass it in a way that gives it a fighting chance in the courts. For purposes of this Article, I will assume that Congress (1) is cognizant of constitutional limitations, (2) cares about those constitutional limitations, and (3) wants its enactments to pass muster.

This Article suggests that everyone else watch and wait. Too much of the response to the Court's new federalism strictures is overreaction. Instead of defensively reacting with plans to disempower the Court through supermajority voting requirements, to delay the appointments process, or to concoct Court-packing schemes, it is worth waiting to see if this change in congressional procedures might actually serve good public policy. When power centers like the Supreme Court and Congress shift and then readjust, it is best to adopt a healthy respect for the unexpected, as Hamilton would have learned were he alive today. The Supreme Court's intentions are pure, the constitutional basis for their federalism decisions sound, and the upshot may not be a falling sky, but rather a set of principles better suited to serve citizen interests than the previous regime.

As the Framers made quite clear, keeping the legislative branch focused on the public good is no easy task.¹⁴ Their distrust of the legislature, a fear they learned through hard experience with the state legislatures following the Revolution, led them to place multiple limits on Congress, even as they delineated certain powers. Federalism is one of the key structural means of keeping Congress tethered to the national public good. Like the separation of powers and the enumerated powers, federalism reduces the sphere of congressional power for the purpose of maximizing its strengths, focusing its attention, and minimizing the temptation to overreach. The Supreme Court has in recent years attempted to revive the constraints of federalism, which had been permitted to lie fallow for over sixty years.

Congress's powers are explicitly enumerated, and its powers are further limited through the separation of powers into three federal branches. The power over lawmaking is further split between state legislatures and the federal legislature. While the separation of powers can be traced to Montesquieu, the decision to subject citizens to two rulers simultaneously was more innovative as a governing principle. It was not innovative for the culture, however, as the majority of Christian denominations

13. See, e.g., Caminker, *supra* note 2; Geyh, *supra* note 1; Post & Siegel, *supra* note 2.

14.

Experience had proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in little more than Cyphers; the legislatures omnipotent. If not effectual check be devised for restraining the instability & encroachments of the latter, a revolution of some kind or other will be inevitable.

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 52 (Max Farrand ed., 3d ed. 1966); see also Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 93 (2001); Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069 (2001) [hereinafter Hamilton, *Federalism Enforced*].

believed in the two-worlds concept: “Render to Caesar the things that are Caesar’s, and to God the things that are God’s.”¹⁵ This worldview placed the believer simultaneously under two sovereigns, each with the power to command, and each with a separate sphere of authority, and it naturally supplied a framework within which to place the coexistence of the states and a necessary federal government that had evolved following the Revolution.

There was little question at the time that the states would maintain their sphere of authority.¹⁶ Rather, the more pressing concern was whether the national legislature could be launched as a successful addition to the states. Nevertheless, there have been forces since ratification of the Constitution that have worked to increase Congress’s power at the expense of the states’, from a generous reading of the specific enumerated powers, to a refusal to enforce the limits of federalism.

With Congress’s sphere of apparent power inflated to mammoth proportions, it has become the object for lobbying on any issue a lobbyist can conjure. Lobbyists have come to embrace this central forum for its efficiency and economy; they can work in one city rather than fifty capitals, and learn the dynamics of one political body rather than fifty. The result is that one of the practical problems Congress faces today is the sheer magnitude of the requests laid before it. Pressure is on Congress not only to shoulder responsibility for the issues of a large national polity—the economy, security, and administrative oversight—but also issues capable of being addressed by local and state governments or the courts, including guns near public schools,¹⁷ violence against women,¹⁸ educational testing,¹⁹ religious liberty,²⁰ rights for the disabled despite existing state legislation,²¹ and the regulation of local land use for churches.²² This

15. *Matthew 22:21*. See also Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J. L. & POL. (forthcoming 2003).

16. THE FEDERALIST NO. 17, at 106 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities.”); see also THE FEDERALIST NO. 81, at 548-49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961):

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

(emphasis in original); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 221 (2000) [hereinafter Kramer, *Political Safeguards*] (“According to [Herbert] Weschler, the Framers designed the federal government’s political departments to give states a say in the national politics and to ensure that national lawmakers would be responsive to ‘local sensitivity to central intervention.’”).

17. *Lopez*, 514 U.S. 549 (invalidating Gun-Free School Zones Act of 1990, finding it exceeded Congress’s Commerce Clause authority).

18. *Morrison*, 529 U.S. 598 (invalidating provisions of the Violence Against Women Act, finding it exceeded Congress’s Commerce Clause authority).

19. No Child Left Behind Act of 2001, 107 Pub. L. No. 107-110, 115 Stat. 1425 (2002).

20. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1988) (codified as amended at 42 U.S.C. § 2000bb (2000)) (Court held unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997), maintaining that Congress had exceeded its enforcement powers).

21. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-69, 368 n.5 (2001) (Court

constant onslaught of multiple agendas muddies the national horizon for the Congress and turns its attention away from the most pressing national needs, including national security. The national public good is harmed through divided attention, and the local public good is harmed through unnecessary intermeddling.

The Supreme Court since 1995 has been attempting to reinstitute some needed limits on Congress under the banner of federalism. While the limits imposed so far are minimal, with little impact on the huge arena of congressional power, they are sufficient to count as a turn in the road from an *uberCongress* to one that operates with some consciousness of its limited and enumerated powers.²³ Yet, rather than applauding the Court for bringing much needed relief into the federal legislative arena, Congress, academics, and the media have instituted a persistent drumbeat of disapproval.²⁴

invalidated private damages remedy for employment discrimination against state employers under the ADA; it found because of Congress's failure to mention the states explicitly, the legislative findings indicated it had not found a pattern of unconstitutional state discrimination).

22. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc (2000).

23. Hearings in Congress on the Court's federalism jurisprudence have tended to err on the side of criticizing the Court, but they also have prompted some increased scrutiny of the constitutional power to enact a law.

24. See *Protecting Religious Freedom After Boerne v. Flores*, *Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1997) [hereinafter *Boerne Hearings*, 1997] (convening to discuss Congress's authority to enact legislation such as RFRA that was struck down as applied to the states); see also *States Rights and Federal Remedies: When Are Employment Laws Constitutional? Hearing Before the Senate Comm. on Health, Educ., Labor and Pensions*, 107th Cong. (2001). In the academy, the title of this Symposium alone illustrates my point. See also JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER* (2002); Caminker, *supra* note 2; Post & Siegel, *supra* note 2; see also Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1052-53 (2001) ("In the past ten years, the Supreme Court of the United States has begun a systematic reappraisal of doctrines concerning federalism, racial equality, and civil rights that, if fully successful, will redraw the constitutional map as we have known it."); Christina Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273, 274 (2002) ("[A]lthough Congress has given individuals federal statutory rights against the states, the Supreme Court's view of the Eleventh Amendment and related sovereign immunity doctrines has foreclosed much of the judicial relief thought to give meaning to those federal rights."); Evan H. Caminker, Symposium, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1129-30 (2001) ("[W]ithin the past decade, the Supreme Court has severely restricted an important enforcement mechanism through which Congress could police state compliance with federal law."); Ruth Colker and James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 87 (2001) ("Since 1995, a new judicial activism has developed in which dis-respecting Congress has become an important theme."); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1734 (2001) (referring to the "vanguard of the 1990s renaissance of constitutional federalism"); Robert C. Post & Reva B. Siegel, Essay, *Equal protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 525 (2000) ("At root, the Court seems to view the enforcement of the Equal Protection Clause as primarily a matter for the judiciary, treating Congress's efforts to implement the Clause as superfluous or even suspect."); Cass R. Sunstein, Symposium, *Order Without Law*, 68

The arguments against the Court's federalism jurisprudence fall into five categories. First, the Court has altered the status quo.²⁵ Second, the Court need not enforce the limits of federalism, because the political process naturally brings local and state interests into the federal legislative process.²⁶ Third, Congress is a proxy for the people and therefore, restricting Congress hurts democracy.²⁷ Fourth, the Court is not institutionally competent to determine the public good; rather, Congress should be given latitude to make law as it sees fit.²⁸ Fifth, state and local governments are less desirable lawmaking fora than the federal government.²⁹

The first is just silly—the Framers rightly expected that government institutions (and in fact all entities holding power) would jockey for position, leading to a constantly evolving set of relationships and adjustments. It will not be the subject of this Article. The second is empirically false and rests on a romantic vision of the willingness of members of Congress to take into account state interests, which I have argued previously³⁰ and will further prove through this Article's examination of the legislative story behind the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The third falsely equates Congress with the people and this system of republicanism with direct democracy, an error I have criticized at length in previous

U. CHI. L. REV. 757 (2001) ("In a number of cases, the Court has asserted its own, highly contestable vision of the Constitution against the democratic process."); Laurence H. Tribe, Comment, *Erog v. Hsub and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170, 288 (2001) ("The key to understanding this Court is to recognize its staggering confidence in its own ability to define and prioritize values of constitutional magnitude and decide which measures are needed to realize those values.").

25. See, e.g., NOONAN, *supra* note 24; Kramer, *We the Court*, *supra* note 2.

26. See, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 193 (1980) (stating that judgment of political branches must preserve federalism); Kramer, *Political Safeguards*, *supra* note 16, at 233-78 (discussing political safeguards of federalism); Kramer, *We the Court*, *supra* note 2; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (discussing distribution of authority between nation and states to serve ends of federalism).

27. Kramer, *We the Court*, *supra* note 2 at 15:

Where prior Courts put restrictions on judicial review to accommodate the views of other branches, this Court has revamped the doctrine to eliminate the other branches' interpretive space and protect its own exclusive custody of the Constitution. This . . . is a central thrust of the Court's recent federalism decisions, especially those limiting Congress's power under Section 5 of the Fourteenth Amendment.

And in the section devoted to the Rehnquist Court's "Assault on Popular Constitutionalism," Kramer asserts, "The Rehnquist Court's activism explicitly denies people *any* role in determining the ongoing meaning of their Constitution, other than by the grace of the Justices themselves (or by the cumbersome process of formal amendment)." *Id.* at 130. (emphasis in original).

28. See NOONAN, *supra* note 24; Caminker, *supra* note 2; Geyh, *supra* note 1; Post & Siegel, *supra* note 2.

29. This is more of an assumption than an assertion in the literature. I discuss the paradigm that frames this assumption in Part IV. See *infra* text accompanying notes 171-73.

30. See Hamilton, *Federalism Enforced*, *supra* note 14.

writings.³¹

The fourth charge misses the point of the Supreme Court's federalism cases. The Court is not inserting itself into the policymaking arena, but rather acting as an arbiter of the question of which lawmaking body—Congress or the state legislatures—is the constitutionally appropriate lawmaker. The federalism decisions patiently explain that they are not choosing between competing policy choices, but rather interpreting the Constitution's boundaries of power.³² This charge also confuses congressional capacity with the actual performance of that capacity; Congress may have a comparative advantage in broad-ranging fact finding over the courts, but that does not mean every time it engages that power it succeeds in proving what it sets out to prove.

The fifth charge flows from a set of presumptions that are outdated. This Article will address the four latter arguments through a concrete example—passage of the Religious Land Use and Institutionalized Persons Act—to show that federalism cannot be entrusted to politics or Congress alone. It is a continuing value for the constitutional order, and a liberty-maximizing aspect of the Constitution. The ultimate conclusion is that the Court's federalism jurisprudence is performing a direly needed public service for the people.

II. WHY STATE AND LOCAL GOVERNANCE IS PREFERABLE TO FEDERAL GOVERNANCE

The Court's federalism jurisprudence is based in part on the clear intent of the Framers. Were that *all* that could be said to support the cases, there would be reason to worry whether they are good constitutional policy. The truth, however, is that there are instances where state and local control are advantageous over federal control. Absent externalities that cannot be controlled by the state, for example, pollution that floats from one state over other states, the states and local governments offer citizens more opportunity for input and greater accountability. The mountain of trash behind one's backyard is always more visible than the mountain in a distant capitol. Likewise, the dealings of the mayor who happens to be one's next door neighbor, church friend, or fellow PTA member are more easily detected, discussed, and verified than the mistakes made by geographically distant representatives.

Although it sounds radical in the current atmosphere of operatic responses to the

31. See Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477 (1994); Hamilton, *supra* note 14; Marci A. Hamilton, *The People: The Least Accountable Branch*, 4U. CHI. L. SCH. ROUNDTABLE I (1996-1997).

32. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) ("Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals."); see also *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001):

Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here. . . . Section 5 does not so broadly enlarge congressional authority.

federalism cases, the Constitution is built on a default principle (shared even by those who were the most ardent supporters of strong federal power, like Alexander Hamilton) that laws should and will be the provenance of the states, unless there are externalities that impede the development of the best public policy.³³ The enumerated powers in Article I list arenas where the Framers believed that the externalities were such that it was necessary to hand these—but only these—powers to Congress. This default principle is explicit in the Tenth Amendment, which guaranteed that the states would reserve significant powers: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”³⁴

The Constitution was drafted *because* the confederated states were unable to coordinate effectively national defense, national taxation to cover the costs of Congress and the confederation, and foreign trade. Those arenas are without question—from either a constitutional perspective or a good public policy perspective—properly under federal control. Yet, having added those arenas for primary federal control, the Constitution was not intended to divest local governments of jurisdiction over other issues, and the Tenth Amendment was added for the purpose of clarifying this commitment.

In fact, on many issues, local control is more likely to achieve better results for the public good than federal control. They include at least land use, local and state law enforcement, school policy, and domestic relations.

The smaller the polity in geography and in population, the easier it is for the people (1) to monitor what their government is doing, (2) to criticize or praise, and therefore (3) to affect public policy. The people’s need to monitor arises because the system is representative, rather than a direct democracy. Federalism makes it easier for the people to monitor issues that are properly under local control, while it places those issues that must be governed at a federal level in the hands of more distant representatives.

These principles are best illustrated through examination of the constitutional design. The crux of the United States constitutional experiment rests on its choice of representation over direct democracy. There were two logistical reasons for rejecting direct democracy: geographic size and the number of citizens. The sheer physical size of the country made the simultaneous gathering of all citizens impossible. The number of citizens also counseled against having to bring them together.³⁵ Representation was

33.

The obligations and the claims of the Federal government were simple and easily definable because the Union had been formed with the express purpose of meeting certain great general wants; but the claims and obligations of the individual states, on the other hand, were complicated and various because their government had penetrated into all the details of social life. The attributes of the Federal government were therefore carefully defined, and all that was not included among them was declared to remain to the governments of the several states. Thus the government of the states remained the rule, and that of the confederation was the exception.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 114-15.

34. U.S. CONST. amend. X.

35. See Marci A. Hamilton, *Power, Responsibility and Republican Democracy*, 93 MICH.L. REV. 1539, 1552 (1995) (“[B]ecause of the many obligations citizens have beyond public

the inevitable conclusion and the need arose to find the means of letting the people monitor and limit their representatives to the extent possible. Federalism gives local citizens more control over issues that directly affect day-to-day life—health, safety, and welfare—while it protects their best interests by placing those issues that cannot be effectively addressed by a committee of the states in the federal Congress.

Others have supported federalism on theories such as: arguing there should not be a double standard of judicial review between federalism and other constitutional principles;³⁶ demonstrating how the institutional safeguards of federalism protect individual liberty;³⁷ arguing that consistent with the intent of the Framers, the Court's "[r]esurrection of judicial review" reflects its attempt to draw lines between the enumerated powers of the federal government and the sovereignty of the states, and that it has an institutional obligation to do so;³⁸ demonstrating other theories, such as the political safeguards theory, do not protect federalism adequately and thus cannot be a substitution for judicial review;³⁹ asserting that the Rehnquist Court's

engagement and due to the sheer number of citizens involved, direct lawmaking does not lead to satisfactory or legitimate results.")(reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)).

36. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 163-64 (2001) (questioning "the longstanding assumption that states' rights are somehow importantly different from other areas of constitutional law in which the necessity and value of judicial review are taken for granted," and asserting that constitutional federalism must be welcomed "home from its long 'exile'" to figure out what sort of judicial review to have in this area); Hamilton, *Federalism Enforced*, *supra* note 14 (arguing that the burden of proof rests on procedural safeguard theorists to show why federalism should not be subject to judicial review, but separation of powers and church/state issues should be).

37. Baker & Young, *supra* note 36, at 136 ("State autonomy ultimately exists to safeguard the liberty of individuals in at least three ways. First, it creates a set of intermediary institutions that exist as a buffer between the individual and the central government."). Secondly, "the idea of limited and enumerated federal powers limits the intrusion of federal regulation on individual autonomy. . . . The Court's decision in *Lopez*, for example, furthered individual liberty in a way that liberal partisans of the Warren Court ought to find familiar: the result of the decision was to invalidate a criminal conviction and let an individual out of jail." *Id.* at 138. Lastly, "federalism protects liberty...by fostering different legal regimes in different states," giving the individual more latitude to better suit his needs. *Id.* at 139.

38. John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1312-13 (1997); see also *id.* at 1404-05:

The Framers created judicial review in order to prevent any of the branches or levels of government from exceeding the written limitations on their powers. . . . By creating a theory designed to protect individual rights at the expense of federalism, the advocates of the political safeguards of federalism may have undermined the Framers' most effective mechanism for guarding individual freedom.

39. Hamilton, *Federalism Enforced*, *supra* note 14; Marci A. Hamilton, *Nine Shibboleths of the New Federalism*, 47 WAYNE L. REV. 931 (2002); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1521 (2001) ("[T]he constitutional text and structure indicate [the] existence [of judicial review] just as they do with the separation of powers and federalism. . . . Allowing the national political process to wholly replace judicial review on federalism questions creates severe distortions in the

jurisprudence reflects an effort to remedy abuses of power by both states and the federal government by “limiting Congress to the use of its enumerated powers in Article I,” by requiring “political accountability for Congress,” and preserving states’ freedom to “operate as laboratories of social and economic policies”;⁴⁰ and by providing examples of specific programs to argue federalism is undermined, such as through federal subsidization of the states and thus calling on the judiciary to restrict such grants.⁴¹ Each of these arguments well supports the federalism revival, but the most essential reason for federalism is the increase in accountability that it generates for the people.

Federalism thus is not a historical oddity best left to disappear, but rather the people’s safety net. Its removal threatens the people, weakens their closest (in both interest and geography) representatives and creates opportunities for a less accountable Congress to take advantage and overreach. Thus, the Supreme Court’s renewed vigor in ensuring cooperative federal and state governments is crucial, not imperial.

Of all the arenas where federalism is fundamentally important, land use control is the arena most widely recognized in the cases and the literature, as Part III shows.

III. THE TRUE STORY BEHIND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (“RLUIPA”)

The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) is a second attempt by Congress, which has been intent on passing legislation benefiting religious entities without reference to state interests, a meaningful record on religious liberty, or state lawmaking capacity. Its first attempt, the Religious Freedom Restoration Act (“RFRA”) was held unconstitutional on federalism, separation of powers, and Article V grounds in *City of Boerne v. Flores*.⁴² RFRA was an unsubtle attempt to overturn 1990 Supreme Court precedent, *Employment Division v. Smith*,⁴³ under the Free Exercise Clause by imposing strict scrutiny on all laws that substantially burden religious conduct.⁴⁴ The Supreme Court was Congress’s target, while the states and RFRA’s

constitutional system.”).

40. William H. Pryer Jr., *Madison’s Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1177 (2002). With respect to the last category, the author asserts that through its jurisprudence the “Court has refused to allow Congress to create new civil rights that override state policies under the guise of enforcing the Fourteenth Amendment,” which allows for greater experimentation by the states. *Id.* at 1118.

41. Ilya Somin, *Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 502 (2002) (discussing how restricting federal grants is one way to “protect federalism from the encroachments of state and federal governments alike”).

42. 521 U.S. 507 (1997).

43. 494 U.S. 872 (1990).

44.

The stringent test of RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise,

invasive impact on their laws received no meaningful attention.

RLUIPA, like RFRA, imposes strict scrutiny, but not on all laws; rather, its focus is on land use and institutionalized persons, primarily prisoners. As with RFRA, the focus of the members of Congress in enacting RLUIPA was on becoming the sole savior of religious liberty, and decidedly not on its disruptive impact on traditional arenas of state control, land use, and prison administration.

A. Interaction Between (and Reaction to) Congress and the Court After RFRA Was Found Unconstitutional

1. RFRA Triggered the Court to Clarify that Prophylactic Legislation Must Be Justified by Widespread and Persisting State Constitutional Abuses

Although it provided minimal constitutional analysis, Congress asserted that it enacted RFRA pursuant to its power under Section 5 of the Fourteenth Amendment, which permits Congress to enforce the guarantees of the Fourteenth Amendment. There is no debate that Congress may provide enforcement mechanisms for state constitutional violations. The separate question raised by RFRA was whether Congress could make constitutional state action illegal in order to stem constitutional violations, whether it could act “prophylactically.” The Court held in *Boerne* that when Congress acts pursuant to its power under Section 5 and outlaws state actions that are otherwise constitutional, there must be a factual basis that justifies the exercise of federal power constraining the states. That factual predicate must show that the states are engaging in “widespread and persisting” constitutional violations.⁴⁵ There was no

the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. . . . Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA.

Boerne, 521 U.S. at 533-34.

45. *Boerne*, 521 U.S. at 526. To illustrate the proper scope of Section 5 legislation, the Court discussed upholding various provisions of the Voting Rights Act and why it “continued to acknowledge the necessity of using strong remedial and preventative measures” in order to “respond to the widespread and persisting deprivation of constitutional rights resulting from this country’s history of racial discrimination.” *Id.* As examples it cited *City of Rome v. United States*, 446 U.S. 156, 182 (1970), where the Court stated “Congress’ considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable,” and also cited *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966), where it stated “Congress had a factual basis to conclude that New York’s literacy requirement ‘constituted an invidious discrimination in violation of the Equal Protection Clause,’” based on the history of racial discrimination. *Boerne*, 521 U.S. at 526-27. Compare these statements with *Boerne*, where the Court stated “[t]he substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.” *Boerne*, 521 U.S. at 534.

question that RFRA rested on a deficient record of constitutional violations: it purported to regulate every law, federal, state or local, but rested on a record containing a handful of anecdotes of instances where religious entities were not deprived of their free exercise of religion, but rather unable to obtain a legislative accommodation.

The severe disproportion between the scope of RFRA and any evidence of state malfeasance led the Court to announce the principle that a prophylactic law must be “congruent and proportional” to the record of state unconstitutional actions.

Thus, fact finding on the issue of constitutional malfeasance by the states became a crucial element in the federalism cases starting with *Boerne*, and it could be proved through general knowledge or through a factual record built in Congress.⁴⁶ Because

46. With respect to proving through general knowledge, *see supra* note 45; The Court also comments on this in *Boerne*:

[L]ack of support in the legislative record, however, is not RFRA’s most serious shortcoming. Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but ‘on due regard for the decision of the body constitutionally appointed to decide.’ . . . As a general matter it is for Congress to determine the method by which it will reach a decision. Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventative measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.

Boerne, 521 U.S. at 531-32. (citing *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970)).

For example, “[J]urisdictions with a demonstrable history of intentional racial discrimination . . . create the risk of purposeful discrimination’ so that Congress could ‘prohibit changes that have a discriminatory impact’ in those jurisdictions.” *Id.* at 532 (citing *City of Rome*, 446 U.S. at 177). “Remedial legislation under § 5 ‘should be adapted to the mischief and wrong which the [Fourteenth] Amendment was intended to provide against.’” *Id.* (alteration in original) (citing *Civil Rights Cases*, 109 U.S. 3, 13 (1883)). The Court then stated RFRA’s coverage was so “sweeping” it could even be distinguished from measures passed in the area of voting rights (such as the cases just cited) as those acts were confined to certain regions. *Id.* at 533. With respect to proving through the legislative record, the Court contrasted the Voting Rights Act of 1965 with RFRA, stating the former was upheld in cases such as *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), because the provisions challenged were “remedies aimed at areas where voting discrimination has been most flagrant,” and were “necessary to ‘banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.’” *Boerne*, 521 U.S. at 525 (quoting *Katzenbach*, 383 U.S. at 315, 308). Conversely, “RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.” *Id.* at 530-531; *See also* *Bd. of Trs. v. Garrett*, 531 U.S. 356, 370 (2001) (“[T]hese incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 90-91 (2000) (“[I]t is sufficient for these cases to note that Congress failed to identify a widespread pattern of age discrimination by

Congress in recent years has expanded its repertoire to include regulation of the states in arenas where there is no general knowledge of state unconstitutionality, for example, age discrimination legislation, disability legislation, and religious liberty legislation, the fact-finding element has been highlighted.⁴⁷

The fact-finding element in the Court's Section 5 jurisprudence is particularly noteworthy, because the broadest power Congress holds to regulate the states as states lies in Section 5. Congressional power vis-à-vis the states is significantly less under the Commerce Clause and other enumerated powers.⁴⁸ Thus, if Congress sets out to regulate the states as states, it is *best off* acting under Section 5.

2. Fact Finding, the Court, and the Congress

Those criticizing the Supreme Court for "overtaking" the Congress's fact-finding function are confused on two counts. First, they treat the Court as though it is taking over Congress's fact finding responsibilities. To the contrary, the Court is acting not as a policymaker, but rather as an arbiter between constitutionally designated holders of power, the federal government and the states.⁴⁹ By deciding whether the states or the federal government should pursue a particular policy, the Court is not passing judgment on that policy, but rather on which legislature created the policy. This point is made abundantly clear in *Garrett*, where the Court holds that Congress lacked the power to regulate the states and shows simultaneously that the states themselves were pursuing such policies. Antidisability rights inclinations did not drive the decision in *Garrett*, despite the claims of too many of the Court's critics, but rather a decision that

the States.").

47. See *Kimel*, 528 U.S. 62; *Garrett*, 531 U.S. 356; *Boerne*, 521 U.S. 507.

48. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996) (In discussing whether Congress has the power to unilaterally abrogate the states' immunity from suit, the Court said "we have found authority to abrogate under only two provisions of the Constitution." *Id.* First, the Court said it found in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), "that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 . . . allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." *Id.* The Court then stated the only other case which upheld congressional abrogation of the states' Eleventh Amendment immunity was *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), where a plurality "found that the Interstate Commerce Clause, Art. I, § 8 cl. 3, granted Congress the power to abrogate state sovereign immunity, stating that the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages." *Seminole Tribe*, 517 U.S. at 59 (quoting *Union Gas*, 491 U.S. at 19-20). The Court proceeded to find that *Union Gas* was wrongly decided and overruled it. *Id.* at 66. It noted that prior to *Union Gas*, it had never before "suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment." *Id.* at 65. Further illustrating that Congress has more latitude under the Fourteenth Amendment than the enumerated powers, the Court stated that Justice Stevens' criticism, which suggested that certain prior decisions "were based upon an understanding that Article I allowed Congress to abrogate state sovereign immunity . . . ignores the fact that many of those cases arose in the context of a statute passed under the Fourteenth Amendment, where Congress' authority to abrogate is undisputed." *Id.* at 71 n. 15.

49. See sources cited *supra* note 38.

the constitutional design placed such decisionmaking in the states' hands.⁵⁰

The critics also have confused Congress's capacity to engage in wide-ranging fact finding with particular instances of such fact finding. As a matter of institutional competence, it has become a truism that Congress has a greater capacity to engage in far-flung fact-finding than the courts. It can call commissions, form committees, consult experts, and pursue the fact-finding trail, wherever it may lead. Courts, in contrast, are limited to the facts brought before them by interested parties.⁵¹ Yet it is true that Congress, as a general matter, is constitutionally more competent to engage in fact-finding, it is not true that every time it does so it proves what it sets out to prove.

By way of contrast, the courts are particularly well-adapted to analyzing whether a body of facts proves the point intended. Such a role is standard in trials and appellate review.⁵² The Court's federalism jurisprudence draws on this dichotomy of institutional

50.

Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here, and to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court. . . . Section 5 does not so broadly enlarge congressional authority.

Garrett, 531 U.S. at 374;

It is worth noting that by the time Congress enacted the ADA in 1990, every State in the Union had enacted such measures. At least one Member of Congress remarked that "this is probably one of the few times where the States are so far out in front of the Federal Government, it's not funny." . . . A number of these provisions, however, did not go as far as the ADA did in requiring accommodation.

Id. at 368 n.5 (citation omitted). *See also Kimel*, 528 U.S. at 91 ("In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States . . . ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment."). The Court additionally pointed out that "[s]tate employees are protected by state age discrimination statutes, and may recover damages from their state employers, in almost every State of the Union. Those avenues of relief remain available today, just as they were before this decision." *Id.* at 91-92 (citation omitted, listing state legislation regarding age discrimination).

51. *See, e.g., Watkins v. United States*, 354 U.S. 178, 187 (1957) (Recognizing one of the "several basic premises on which there is general agreement," the Court stated: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.").

52. *See* 20 AM. JUR. 2D *Courts* § 37 (1995):

The primary function of courts is to make decisions with regard to matters properly brought before them. . . . In rendering a decision, the court determines the facts of the case and applies the law to those facts. . . . In making their decisions the courts are greatly influenced by judicial precedents. Some decisions are a matter of the court's discretion, which must be exercised in a sound manner, and which should not be abused.

competence, placing Congress in the role of having to prove—if it is going to usurp state power or intermeddle in traditional fields of state authority—that it has a sound basis for doing so, and placing courts in the role of examining the body of evidence Congress provides to determine whether the invasion is justified.⁵³

The years of extreme deference to Congress vis -à-vis state power taught it that it need not investigate the constitutional bases of its actions that affect the states or the empirical need for them.⁵⁴ Rather, the members of Congress took on an attitude that whatever they desired, they could enact with impunity. Thus, the Court's federalism jurisprudence, and especially its Section 5 jurisprudence, as little as it has in fact affected the volume of Congress's power, hit hard. Not surprisingly, entrenched practices continue. Thus, in response to the Court's Section 5 cases, Congress has not altered its fundamental approach by engaging in sound fact finding, but rather resorted to proof by adjective, sparse anecdotes, and sweeping generalizations parading as facts.

3. A Counterproductive Paradigm: Congress Is Good, the States Are Bad

Part of the blame for the anemic congressional response to the Court's federalism cases—as well as the academics' and the press's impassioned, negative responses—must be laid at the feet of a paradigm of a congressional-state relationship that has outlasted its usefulness. The vaunted roles for each crystallized during the Civil Rights Era, the 1950s and 1960s. The states—and especially the southern states—were a very bad element to be distrusted. They sponsored racial discrimination, they encouraged racial discrimination, and they resisted attempts to force them to stop discriminating.⁵⁵

Id. at §47 (citations omitted) (In addition, “A court will also generally refuse to decide a purely hypothetical or abstract question or issue, or one not arising out of the facts involved in a case brought before it.”) (citations omitted); *Id.* at § 47 (Furthermore, “[u]nder the constitutional system of separation of the three branches of government, the functions of the courts, which are part of the judicial branch, cannot be encroached upon by another branch of the government or by any of its agencies.”) (citations omitted).

53. Siegel and Post completely miss the mark here when they argue that the Court is asking Congress to act like a court. Post & Siegel, *supra* note 2, at 7. The Court is asking Congress to be a better legislature, one that collects facts that are relevant to the laws it enacts and respects the states as lawmakers and sovereigns. Instead of defending the inadequacies of Congress's fact finding as endemic to the legislative process, as do Siegel and Post, the Court is spotlighting those inadequacies and training Congress's attention back on the public good.

54. *See, e.g., U.S. v. Lopez*, 514 U.S. 549, 567 (1995) (refusing to uphold a law against federalism attack where the constitutional basis of the Act is not apparent, stating “[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”).

55. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17-18, 24-25 (1971) (holding district courts were authorized under their existing powers to order compliance with their own desegregation plans when local school authorities failed to do so voluntarily and had a long history of maintaining a dual set of schools in a single system); *Griffin v. County Sch. Bd.*, 377 U.S. 218, 222 (1964) (ordering the reopening of a public school where evidence showed it was closed to avoid court-ordered integration); *Goss v. Bd. of Educ.*, 373 U.S. 683, 689 (1963) (striking down a transfer plan which allowed a student in a school where he was a racial minority

When they would not obey judicial dictates to cease discriminating, Congress stepped in with the Civil Rights Acts.⁵⁶ Congress became the hero, the entity to be trusted. The knee-jerk response to the Court's federalism cases is conditioned by this paradigm of Congress and the states, good and bad, trusted and untrustworthy. From this perspective, the Supreme Court's federalism cases and the rhetoric of states' rights appear positively wrongheaded if not mean-spirited.

The paradigm, though, and not the federalism cases, is wrong. While the paradigm worked for the issue of racial discrimination in the mid-twentieth century, it distorts the congressional-states relationship today. The critics of *Board of Trustees of the University of Alabama v. Garrett* have railed against the notion that Congress lacks carte blanche to enact civil rights laws of any stripe, on the *assumption*—as opposed to proof—that the states cannot be trusted to meet civil rights abuses.⁵⁷ There is no other way to explain Professors Post and Siegel's argument for the congressional power to regulate the states through reference to general societal prejudice.⁵⁸ They chastise the *Garrett* Court for refusing to accept evidence of private prejudice as proof of government discrimination, but they fail to come to grips with the fact that not only was there minimal proof of government-sponsored discrimination against the disabled, but also the vast majority of states had outlawed such discrimination.⁵⁹ In the face of such evidence, drawing inferences from evidence of *private* prejudice seems agenda-driven, and the agenda is to empower Congress and to disable the states (even when they protect civil rights).⁶⁰

The *Garrett* Court rightly took into account that the overwhelming majority of the states themselves have enacted laws banning disabilities discrimination.⁶¹ That fact by itself should have shattered the preexisting paradigm of presumed state inadequacy

to transfer to one where he would be in the racial majority, suggesting that what was "deliberate speed" in 1955 might not be in 1963); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (urging compliance with *Brown I* by the states "with all deliberate speed"); *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

56. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 and at 42 U.S.C. § 2000e (2002)); see also Nicole L. Gueron, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991*, 104 YALE L.J. 1201 (1995).

57. See, e.g., Vikram David Amar & Samuel Estreicher, *Conduct Unbecoming a Coordinate Branch: The Supreme Court in Garrett*, 4 GREEN BAG 2D 351 (2001); Elizabeth E. Theran, "Free to be Arbitrary and...Capricious": *Weight-Based Discrimination and the Logic of AntiDiscrimination Law*, 11 CORNELL J.L. & PUB. POL'Y 113 (2001); Note, *The Irrational Application of Rational Basis: Kimel, Garrett, and Congressional Power to Abrogate State Sovereign Immunity*, 114 HARV. L. REV. 2146 (2001); Caminker, *supra* note 2; Geyh, *supra* note 1; Post & Siegel, *supra* note 2.

58. Post & Siegel, *supra* note 2; see also Caminker, *supra* note 2; Geyh, *supra* note 1.

59. *Garrett*, 531 U.S. at 368 n.5, 374 n.9.

60. One has to wonder if part of the zeal against the federalism cases arises in part because lobbying in the states is not nearly as glamorous as rubbing shoulders in the national scene in Washington. There is an antistate elitism that is at play here and that is too little noticed. An interesting sociological study would be to determine how many law professors ranting against the Court's federalism jurisprudence have served in local and state government positions.

61. *Garrett*, 531 U.S. at 368 n.5, 374 n.9.

regarding civil rights and then made way for new questions, like the one the Court insisted must be asked in the Section 5 cases: Are the states engaging in a “widespread and persisting” or a “widespread pattern” of constitutional abuses?⁶² Stepping outside the paradigm, the Court has refused to assume the states are necessarily wrongdoers,⁶³ and instead has posed a question that seemed incapable of being asked under the preexisting paradigm. This is the sort of fresh challenge to entrenched power that makes the Constitution succeed.

Although the Court has been unpopular for posing these questions, it has not stopped asking them, and the answers have been startling. Congress has been exposed as a slipshod operation not paying attention to the constitutional bases of its actions⁶⁴ or the impact of its lawmaking on the states,⁶⁵ and the states have proved capable of being responsible members of the polity. It has also shown a Congress that simply does not care whether it is engaging in duplicative legislation. Rather than paying close attention to national issues and letting the states do what they can do, Congress rushes to feel-good legislation.⁶⁶

The federalism cases interpose a new worldview that is more in touch with current legislative practices than the preexisting paradigm and that demands a fundamental alteration in the way the states and the Congress are seen. Perhaps those resisting the change are emotionally wrought, because they are being asked to abandon the comfort of the “Congress-is-righteous, states-are-evil” paradigm.⁶⁷

62. *Boerne*, 521 U.S. at 531, 532-33 (evidence did not indicate “widespread pattern” of religious discrimination in this country that would require RFRA’s enactment or enforcement, in contrast to the record of “widespread and persisting” racial discrimination which Congress and the Judiciary were confronted with in previous voting rights cases, such as *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)); *Garrett*, 531 U.S. at 369 n.6, 370, 374 (requiring showing of a “pattern of discrimination” that “persisted”); *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 90-91 (2000) (requiring “widespread pattern” of age discrimination).

63.

It is a question of a different order, however, to say that States in their official capacities, the States as governmental entities, must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens. It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protections of the laws

Garrett, 531 U.S. at 375 (Kennedy, J., concurring).

64. *U.S. v. Lopez*, 514 U.S. 549, 566-68 (1995).

65. *Printz*, 521 U.S. at 918, 929.

66. See *States Rights and Federal Remedies: When Are Employment Laws Constitutional? Hearing Before the Senate Comm. on Health, Education, Labor and Pensions*, 107th Cong. (2001) (prepared statement of Marci A. Hamilton, Visiting Professor of Law New York University School of Law, Thomas H. Lee Chair in Public Law Benjamin N. Cardozo School of Law) (discussing the three prophylactic laws in *Garrett*, *Kimel* and *Alden* which were invalidated by the Court because Congress was not responding to unconstitutional discrimination as required by Section 5 of the Fourteenth Amendment); *Narrowing the Nation’s Power: The Supreme Court Sides with the States: Hearing Before the Senate Comm. on the Judiciary*, 2002 WL 100237731 (prepared statement of Marci A. Hamilton, Paul R. Verkuil Chair of Public Law Benjamin N. Cardozo School of Law).

67. There is no more emotionally wrought attack on the Court than Larry D. Kramer’s

The Court's cases will only have a salutary effect on congressional practices (as well as state authority) if and when Congress takes seriously its fact-finding role when it is enacting laws affecting the states, and when it comes to respect the states as sovereigns. As long as it does not, it jeopardizes the laws it enacts so carelessly. When Congress begins to take those limitations seriously, the spirit of federalism could be revived through more consultation between Congress and the states on issues of public policy, more deference in arenas of traditional state and local control, and a resultant diminution in the vast scope of Congress's burdens, which in turn can bring into focus national priorities. Not a bad payoff for a set of reviled Supreme Court cases.

The scholarly debate over federalism desperately needs grounding in the actual practices of congressional lawmaking that affects the states. There is a tendency in the legal literature to treat the official record of passage as the definitive record, as though the same restraints imposed on the judiciary must be imposed on scholarly inquiry.⁶⁸ Or to state the matter differently, political science has played too little into the examination of congressional lawmaking in the legal scholarship. For example, in a recent article, one professor asserted that there was no opposition to RLUIPA.⁶⁹ Reading the legislative history behind RLUIPA would in fact lead one to that conclusion. No opponents testified (other than myself on constitutional issues), no floor debate occurred, and the vote was a voice vote—a procedure that does not require recording of the names or votes of the members or even the presence of the members and that precludes debate⁷⁰—at which less than a handful of the members of either house were present.

In fact, there was significant and vehement opposition to RLUIPA, especially from local and state government organizations.⁷¹

diatribe in Kramer, *We the Court*, *supra* note 2.

68. The courts have limited their reading of the meaning of a statute to its language first and its official legislative history second, and for some judges a remote second. While the discourse on this issue has been in terms of determining the “meaning” of the statute, it operates as a tool of deference to congressional construction of the record by deterring inquiry into the actual enactment beyond the official record. I do not point to this for the purpose of critiquing the courts, but rather to contrast judicial practice with scholarly norms.

69. Robert W. Tuttle, *How Firm A Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861, 863-64 (2000).

70. Under House Rule I, oral votes, or “a vote by voice,” are taken when the Speaker has put forth a question. Under House Rule XX, “after the Speaker has put a question to a vote by voice,” if a recorded vote is requested and the request is “supported by at least one-fifth of a quorum, the vote shall be taken by electronic device” RULES OF THE HOUSE OF REPRESENTATIVES, §§ 630, 1012. In the Senate, most bills are passed by voice vote only, unless one fifth of the Senators present require a voice vote. *See* Robert B. Dove, *Parliamentarian of the U.S. Senate*, *Enactment of a Law 14* at <http://thomas.loc.gov/home/enactment/enactlaw.html> (last visited Sept. 20, 2002).

71. Letter Opposing RLPA from American Academy of Pediatrics, American Federation of School Administrators, American Humane Association, American Planning Association, American Public Works Association, American Professional Society on Abuse of Children, Child Welfare League of America, Dallas Homeowners League, International Municipal Lawyers Association, League of Conservation Voters, Municipal Art Society, National Alliance of

The following is a detailed inquiry into the passage of the Religious Land Use and Institutionalized Persons Act for the purpose of illustrating the current interaction between Congress and state and local governments.⁷² RLUIPA is a perfect candidate for this inquiry, as it involves federal intervention in an arena—land use law and prison regulation—that has been by tradition and practice left to local and state control. Thus, the potential objection to such an analysis of any federal law—that the subject matter is properly federal and not primarily state—is overcome at the outset.

The following provides the legal context of the RLUIPA discourse that cannot be gleaned by simply reading the hearings and reports constructed by Congress.

B. *The Precursors to RLUIPA*

RLUIPA is the quintessential legislative product—it is a compromise bill, stripped of other elements, containing oddly paired issues: land use and institutionalized persons involving religious individuals and institutions. One cannot understand RLUIPA without also knowing what happened with its precursors, the Religious Freedom Restoration Act⁷³ and the Religious Liberty Protection Act bills.⁷⁴

1. The Religious Freedom Restoration Act (“RFRA”)

As discussed above, the Religious Freedom Restoration Act was enacted to “correct” the Supreme Court’s free exercise decision in *Employment Division v. Smith*,⁷⁵ which ruled that generally applicable laws apply to religious individuals. In other words, the rule of law applied even to those claiming religious privilege.⁷⁶ This is not the Article to go into too many details, but in a nutshell, religious lobbyists prevailed upon Congress to expand religious liberty and civil rights guarantees beyond what the Court interpreted the Constitution to require in *Smith*. Thus, in effect, they argued that religious claimants should not be subject to the rule of law, and that a

Preservation Commissions, National PTA, National Association of Counsel for Children, National Association of Counties, National Association of School Psychologists, National Education Association, National Exchange Club Foundation, National League of Cities, National Network for Youth, National Trust for Historic Preservation, Preservation Action, Sierra Club, Texas Neighborhoods Together, and University of Pennsylvania—Center for Children’s Policy Practice and Research to U.S. Senators (Nov. 3, 1999) (on file with author); Letter Opposing RLPA from the National Governors Association, National Conference of State Legislatures, Council of State Governments, National Association of Counties, National League of Cities, United States Conference of Mayors, and International City/County Management Association to All Members of the House of Representatives (July 13, 1999) (on file with author).

72. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C.A. § 2000cc (2001 & Supp. 2002).

73. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (2001).

74. Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong. (1998); Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

75. 494 U.S. 872 (1990).

76. The decision reflected the majority of free exercise law before *Smith*. It was also a vindication of the early calls for obedience to law by religious leaders at the time of the framing. See generally Hamilton, *supra* note 15.

handful of cases preceding *Smith* that had instituted strict scrutiny in the unemployment context should be extended across all laws.⁷⁷ Congress was eager to acquiesce, and enacted the RFRA of 1993,⁷⁸ which instituted strict scrutiny of every law substantially burdening a religious individual or institution.⁷⁹ It was invalidated less than four years later in *City of Boerne v. Flores*.⁸⁰ The law and its legislative history challenged the Court's authority to interpret the First Amendment in violation of the separation of powers, trenched on every state law in direct repudiation of the inherent limits of federalism, and attempted to wring a constitutional amendment outside Article V procedures.⁸¹

Even though RFRA's impact on the states would be enormous, the overwhelming focus of the hearings on RFRA was the Supreme Court, and decidedly not the states. No less than 405 pages of legislative history were devoted to castigating the Court for its decision in *Smith*.⁸² RFRA meant that state laws traditionally in the realm of the states, from family law, including adoption and medical neglect standards, to immunization exemptions to land use law, would be altered through its application. Neither state nor local officials were called in to consult on its impact. Nor was there any effort by Congress itself to assess the potential impact of RFRA on the states. The takeover of state authority was simply not part of the legislative calculus.

77. See RFRA legislative history (stating that “[t]he purposes of this chapter are (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”), 42 U.S.C. § 2000bb(b)(1)(2) (1994).

78. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2001)).

79. 42 U.S.C. 2000bb(a)(5) (stating that, “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”).

80. 521 U.S. 507 (1997).

81.

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.

Id. at 535-36 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177) (holding the Supreme Court has exclusive power to interpret the Constitution and invalidate laws that violate it);

RFRA[’s] . . . [s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA’s restrictions apply to every agency and official of the Federal, State and local Governments. . . . This is a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

Id. at 532, 534; *Id.* at 529 (“Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.”).

82. Brief for Petitioner at 19 fn. 3, *Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074).

2. The Religious Liberty Protection Act Bills (“RLPA”)

After *City of Boerne v. Flores* invalidated the Religious Freedom Restoration Act, Congress introduced the Religious Liberty Protection Acts of 1998 and 1999, which attempted to reenact RFRA through Article I powers, specifically the Commerce and Spending Clauses.⁸³ It once again introduced strict scrutiny for state laws, and therefore once again raised the specter of significant intermeddling in arenas traditionally left to the states where the states were not in violation of the Constitution. To Congress’s credit, it remembered with RLPA the warning in *United States v. Lopez* to analyze the constitutional bases of its actions.⁸⁴ On its face, RLPA referred to the commerce and spending powers.⁸⁵ Yet, despite the Supreme Court’s admonition in *Boerne* that judicial deference was dependent on congressional diligence,⁸⁶ Congress once again made minimal effort to support its intervention in state law, a point on which I will elaborate below.

After it became clear that RLPA could not be passed—as a result primarily of lobbying by children’s advocates, civil rights advocates concerned about fair housing laws, and conservative Christian organizations concerned about the principles of federalism⁸⁷—many believed that its momentum could not be revived. They were wrong. Those organizations lobbying for land use privileges, led by Rev. Gary Dobson, and for greater authority to thwart prison administrators, led by Charles Colson, head

83. H.R. 4019, 105th Cong. (1998) (Section 2(a) provided, “GENERAL RULE – Except as provided in subsection (b), a government shall not substantially burden a person’s religious exercise – (1) in a program or activity, operated by a government, that receives Federal financial assistance; or (2) in or affecting commerce with foreign nations, among the several States, or with the Indian tribes; even if the burden results from a rule of general applicability.”); H.R. 1691, 106th Cong. (1999) (Section 2(a) provided, “GENERAL RULE – Except as provided in subsection (b), a government shall not substantially burden a person’s religious exercise – (1) in a program or activity, operated by a government, that receives Federal financial assistance; or (2) in any case in which the substantial burden on the person’s religious exercise affects, or in which a removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes; even if the burden results from a rule of general applicability.”).

84. *United States v. Lopez*, 514 U.S. 549, 563 (1995) (“[T]o the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.”).

85. See H.R. 4019; H.R. 1691.

86.

Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. 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. It appears, instead, to attempt a substantive change in constitutional protections.

Boerne, 521 U.S. at 532.

87. See, e.g., *Religious Liberty: Hearing Before the Comm. on the Judiciary, United States Senate, on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure*, 106th Cong. 41-51 (1999) (statement of Christopher Anders, Legislative Counsel, ACLU).

of Prison Ministries Fellowship, continued to push for their particular elements of the bill. The ACLU, along with the Department of Justice, drafted a land use/prison bill, which was transformed in the hands of the ACLU into a land use/institutionalized persons bill. No hearings were held on RLUIPA per se; rather, the hearings on RLPA generally addressing land use law were supposed to stand in as hearings in support of RLUIPA. There was little in the RLPA hearings addressing “institutionalized persons.”⁸⁸

C. *The Legal Landscape of Land Use and Prisons Before RLUIPA*

The hearings for RLPA involving land use, which then became the sole legislative history for RLUIPA, did not even as a cursory matter take into account the law of land use. No land use expert, either in the government or in the universities, was asked to testify to explain either prevailing legal principles in the field or to analyze RLPA’s potential impact in the field. Nor was there any attempt to investigate the existing principles applied to landowners and religious landowners in the land use process.

1. Land Use: A Tradition of Deference to State and Local Governments

Land use law has always been a creature of state and local law. The reason for this is three-fold. First, the permanent nature of land—its immovability—makes its uses far more relevant to those who are nearby than those who are far away. Second, how land is used is an essential ingredient for communities to develop their character and to pursue shared purposes.⁸⁹ Land use law is one of the key ways that communities come together to set priorities, to establish their character, and to meet fiscal, aesthetic, and lifestyle needs. Third, by keeping land use law local, citizens have more direct access to their representative (than if those representatives were national) and a proportionally larger voice in the land use process that directly affects them. Land use law is enacted

88. While there were no hearings on institutionalized persons, issues concerning them were addressed intermittently. *See id.* at 5 (testimony and written statement supplementing testimony of Steven T. McFarland, Director of the Center for Law and Religious Freedom):

And, finally . . . [a]ny legislation that this committee proffers should avoid the temptation, we would urge, to carve out protection from certain politically powerless groups, including most notably prison inmates. . . . [O]nly 1/10th of 1 percent of all of the prisoner litigation brought during the 3 1/2 years of RFRA were based upon or contained any claim or reference to the Religious Freedom Restoration Act. So carving out prison inmates will not appreciably diminish frivolous prisoner litigation.

89.

In the 1970s, innovative communities began to add to their regulatory programs techniques like planned unit development, cluster zoning and special zoning to deal with issues like airports, floodplains, and the preservation of agricultural land. . . . Most communities would like to know when and where growth will take place. For some, such knowledge has become essential to coping with overloaded facilities and services or protecting sensitive lands.

1 ZONING AND LAND USE CONTROLS § 4.01[1] (Matthew Bender & Co 2002) (citations omitted).

by the state and local governing bodies and implemented by locally elected or appointed boards, with publicized public hearings an integral component in altering the law and in applying it.⁹⁰

The Supreme Court has consistently recognized “the States’ traditional and primary power over land and water use.”⁹¹ There is no indication in the Court’s case law that

90. For example, with respect to zoning ordinances, see 12 RICHARD B. POWELL, *POWELL ON REAL PROPERTY* § 79C.01 (Michael Allan Wolf ed., 2000) (“Zoning is the primary legal process by which a municipality controls the use and development of real property within its jurisdiction.”) (citation omitted);

Zoning statutes and ordinances generally provide for public hearings before the municipal legislative body, a zoning commission, or other designated body on zoning ordinances or regulations, as well as on amendments. The legislative hearing prior to enactment of a zoning ordinance is, in essence, a forum for expression of public opinion

Id. at § 79C.13[3][b].

91. *Solid Waste Agency v. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1944) (“[R]egulation of land use [is] a function traditionally performed by local governments.”)). *See also* *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (“[R]egulation of land use is perhaps the quintessential state activity.”); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (upholding Congress’s police power over District of Columbia to enact redevelopment project to improve public health); *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928) (reviewing zoning restrictions under low level scrutiny); *Gorieb v. Fox*, 274 U.S. 603, 610 (1927) (upholding local setback requirement); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927) (upholding zoning ordinance prohibiting construction of business buildings); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (local ordinance imposing building restrictions upheld). In addition to these cases dealing with the constitutionality of zoning regulations, the Court also has given state and local governments broad latitude in the land use arena by interpreting the Takings Clause narrowly. *See, e.g.*, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2001) (mere enactment of regulations implementing moratoria against all viable economic use of petitioners’ property did not constitute a per se taking under the Fifth Amendment); *City of Boerne v. Flores* 521 US 507, 534 (1997) (zoning ordinance applied to a church is valid; RFRA unconstitutionally exceeds the scope of Congress’s Fourteenth Amendment enforcement powers); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031-32 (1992) (where a state seeks to sustain a regulation that deprives land of all economically beneficial use, it may resist compensation only if it can be proven that the owner’s proscribed use interests were not part of his or her title to begin with); *Yee v. City of Escondido*, 503 U.S. 519, 539 (1992) (city’s rent control ordinance, allowing mobile park landowners to terminate a tenant’s lease only when the landowner wanted to change the use of his or her land or upon nonpayment of rent—which effectively transferred wealth from the more affluent landowners to the tenants—did not amount to a per se taking); *Nordlinger v. Hahn*, 505 U.S. 1, 12-13 (1992) (a state law providing for strict limits on real property taxes and assessments rationally furthered legitimate purposes, and exemptions that resulted in unequal assessments did not violate federal constitutional law); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 485 (1986) (Pennsylvania’s Bituminous Mine Subsidence and Land Conservation Act was justified and, therefore, constitutional); *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (because respondent-bank did not apply to the appellate board for variances from the zoning ordinance at issue, and did not seek compensation through state procedures, its Takings claim was not yet ripe for

these principles become inapplicable when the landowner is a religious entity or individual. To the contrary, the Court dismissed an appeal as lacking a substantial federal question brought by a church claiming the right to locate in a residential district, and later characterized that dismissal as follows:

When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.⁹²

The federal courts' recognition that land use law is a state and local power has meant that each state has been left to develop its own land use jurisprudence and that the federal courts have "emphasize[d their] reluctance to substitute [their] judgment for that of local decisionmakers, particularly in matters of such local concern as land-use planning"⁹³

Some state courts express the principle of deference in separation of powers terms:

In enacting zoning ordinances, the municipality performs a legislative function and every intendment is in favor of the validity of such ordinances. It is presumed that the enactment as a whole is justified under the police power and adapted to promote the public health, safety, morals, and general welfare. . . . [I]n such cases the wisdom of the prohibitions and restrictions is a matter for legislative determination.⁹⁴

review); *Sporhase v. Nebraska*, 458 U.S. 941, 954, 957 (1982) (reciprocity provision in state's water statute impermissibly burdened interstate commerce. The unexercised federal regulatory power did not foreclose state regulation of water resources, of the uses of water within the state, or of interstate commerce in water); *Agins v. Tiburon*, 447 U.S. 255, 261 (1980) (zoning ordinances that placed appellants' property in a zone where property may only be devoted to one-family dwellings, accessory buildings, and open-space uses, which effectively prevented appellants from erecting multiple-dwelling residences, did not constitute a Taking at all); *Penn. Cent. Trans. Co. v. New York City*, 438 U.S. 104, 132-134 (1978) (Landmarks Preservation Commission's refusal to permit owner to erect a building on top of Grand Central Terminal did not constitute a Taking); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926) (injunction enjoining enforcement of a local ordinance that imposed certain building restrictions was not proper because it was a valid exercise of authority of the village and the landowner was unable to prove that he had been injured).

92. *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 397-98 (1950) (referring to *Corp. of Presiding Bishop of Church of Latter-Day Saints v. Porterville*, 338 U.S. 805 (1949)).

93. *Congregation Kol Ami v. Abington Township*, 309 F.3d 120 (3d Cir. 2002); *Samerica Corp. v. Philadelphia*, 142 F.2d 582, 596 (3d Cir. 1998); *see also Lapid-Laurel v. Zoning Bd. of Scotch Plains*, 284 F.3d 442, 451 (3d Cir. 2002) (stating that Third Circuit joined Fourth and Tenth Circuits in recognizing "the value of local [land use] authorities resolving [fair housing accommodation] on their own without interference from the federal courts").

94. *Corp. of Presiding Bishop of Church of Latter-Day Saints v. Porterville*, 203 P.2d 823,

Here is where the absence of a legal backdrop against which to judge that which was presented at the hearings on RLPA is most deeply felt. The value of federalism as a means of permitting individual communities to shape their goals, and as a means of permitting experimentation in achieving the elusive public good, is crystal clear in land use law. The states do not share a monolithic set of principles regarding land use by religious landowners, or any other landowners for that matter. Instead, they have been permitted to develop a wide variety of land use approaches that are keyed to the values, land, and public good sought in each particular community. Like other states, for example, Pennsylvania, has “no uniform state policy for land use and development—policies necessarily differ from municipality to municipality.”⁹⁵ These principles are utterly absent during the hearings involving land use law and RLPA.

Despite the variety, there is no state that gives religious landowners complete *carte blanche* under land use laws. Every state applies at least some elements of its land use law to religious landowners, whether it is zoning or use restrictions, or both. Some states are more accommodationist than others, for example, Massachusetts gives churches the right to choose their zoning and location.⁹⁶ Even Massachusetts, however, imposes safety and welfare restrictions on religious landowners.⁹⁷ In contrast to Massachusetts, California has treated religious landowners as ordinary landowners, and has not permitted them to trump zoning plans that prohibit churches in residential districts.⁹⁸ There is a rich variety of approaches, with the states operating as independent laboratories for the optimal handling of land use principles vis-à-vis religious landowners. Different treatment can be attributed to different traditions, different values, different dominant land uses, and different state constitutional treatment for religious entities.

There is also more to land use law than the mere fact of 50 governing jurisdictions. Within each jurisdiction, there are many categories of land use permits and restrictions, from setback to height and dimensional requirements, to occupancy limitations, as well as zoning.⁹⁹ Traffic and the requisite parking is a dominant concern, as is bringing

826 (1949) (citations omitted).

95. *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743, 747 (3d Cir. 1982).

96. *See* *Dover Amendment* MASS. GEN. LAWS ch. 40A, § 3 (1993 & 2002 Supp.) (limiting the zoning regulations that can be imposed on the religious use of property); *see also* *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (holding the *Dover Amendment* and town by-law passed constitutional scrutiny under the Establishment Clause of the First Amendment.).

97. *See* *Dover Amendment* MASS. GEN. LAWS ch. 40A, § 3; *see also* *Boyajian*, 212 F.3d at 3 (“[The *Dover Amendment*] provides, in part, that a zoning regulation may not restrict the use of land for religious . . . purposes . . . except that ‘reasonable regulations’ are permitted concerning such characteristics as the bulk and height of structures, open space, and parking.” (discussing *Dover Amendment* restrictions)).

98. *See generally* *Minney v. Azusa*, 330 P.2d 255 (Ca. Ct. App. 1958), *appeal dismissed*, 359 U.S. 436 (1959).

99. *See, e.g.*, RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 79C.05 (4)(a) (discussing setbacks, stating that “[s]etback restrictions have been upheld as a valid exercise of the police power. Such laws promote a host of public welfare objectives that include: (1) the improvement of visibility and safety for pedestrians, drivers, and occupants of buildings along the roadways; (2) the reduction of fire hazards; (3) the insuring of adequate light and air around buildings; and

together compatible uses.¹⁰⁰ Fire safety requirements, noise abatement, water usage, and environmental concerns also must be factored in.¹⁰¹ Some jurisdictions emphasize some elements more than others, but there is in general an attempt to find the right mix of factors to maximize optimal and harmonious use. Thus, focusing on any one element or zoning district in any one jurisdiction will not do justice to the entire balance of landowner rights and responsibilities in that particular jurisdiction, or the possibilities for location within that jurisdiction.¹⁰²

The universe of land use law is quite impressive and complex, though utterly missing from the RLPAs history. For example, there are approximately 122,955,000 housing units in the United States.¹⁰³ There are also approximately 268,254 houses of worship,¹⁰⁴ approximately 92,012 public elementary and secondary schools, and 27,223 private elementary and secondary schools in the United States, 21,334 of which are religious schools.¹⁰⁵ These statistics do not include other potentially relevant numbers, for example, the number of day care centers, religiously affiliated or otherwise, the number of homeless shelters, the number of religious gatherings held in private

(4) the fostering of aesthetic values.” (citations omitted)).

100. *See, e.g.*, PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 37.01[1](a), (c)(i) (“The foundation of land use regulation in the United States is the comprehensive plan.”) (“At a minimum, a good comprehensive plan should address at least the following elements regarding the physical future of the community: future land use; transportation and circulation (major routes, not every road); (public) sewer and water service (major lines and service areas); park and recreation areas . . . ; school sites . . . ; major public facilities . . . ; expansion areas for institutions, such as universities . . .”).

101. *See, e.g.*, 6 *id.* at § 37.01 [1](c)(ii) (“[State] [e]nabling acts may also permit or require local governments to plan for . . . environmental factors,” and then continues to describe state recycling plans, renewable energy sources plans and mitigating water pollution plans. (citations omitted)). *See also* 7 *id.* § 44.01(1) (discussing the purpose of conditional use permits for such things as service stations, schools, *religious* institutions, nursing homes, police, and fire stations because although they may be needed, problems arise related “to traffic congestion, air and noise pollution, population density and . . . public safety”).

102. Courts tend to look to the entire zoning plan in a constitutional challenge. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Civil Liberties for Urban Believers, et al. v. City of Chicago*, No. 94CU6151 2001 U.S. Dist. Lexis 17213 (N.D. Ill. 2001); *Minney v. Azusa*, 330 P.2d 255, 262 (Cal. Ct. App. 1958), *appeal dismissed*, 359 U.S. 436 (1959).

103. U.S. Dept. of Commerce, Census Bureau Reports on Residential Vacancies and Homeownership, Table 3 (released July 26, 2002) *available at* <http://www.census.gov/hhes/www/housing/hvs.html>.

104. AMERICAN RELIGION DATA ARCHIVE, RELIGIOUS GROUPINGS: FULL U.S. REPORT (2002) (original data source: ASSOCIATION OF STATISTICIANS OF AMERICAN RELIGIOUS BODIES, RELIGIOUS CONGREGATIONS AND MEMBERSHIP IN THE UNITED STATES 2002 (2002)), *available at* <http://www.thearda.com/RCMS/2000/USReport2000.html>.

105. For public school statistics, see NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPT. OF ED. NCES 2001-339R, OVERVIEW OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS AND DISTRICTS: SCHOOL YEAR 1999-2000 (2001), *available at* <http://nces.ed.gov/pubs2001/2001339r.pdf>. For private school statistics, see NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPT. OF ED. NCES 2001-330, PRIVATE SCHOOL UNIVERSE SURVEY: 1999-2000 (2001), *available at* <http://nces.ed.gov/pubs2001/2001330.pdf>.

residential homes, or the number of church-run activity centers and camps.

There is no suggestion in the RLPA history that the Supreme Court has ever addressed the issue of zoning and land use, though, of course, it had addressed it as early as 1926, where it accurately predicted the necessity of increasing land use regulation:

Building zone laws are of modern origin. . . . Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems are developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.¹⁰⁶

Nor did Congress study the changing nature of houses of worship.

The traditional concept of a small church serving the immediately neighboring community undoubtedly had something to do with the idea that such use was an integral part of community life in “the best and most open localities.” However the establishment of a modern church, not dependent upon local residents as its communicants, and in some instances attracting people from far distances, the inevitable use of the automobile in connection therewith and the increased activities of the church for social and community functions having only a remote connection with its primary function, all present a different zoning picture.¹⁰⁷

Religious landowners regularly submit plans for multi-use buildings in the tens of thousands of square feet—and some hundreds of thousands¹⁰⁸—offering not just worship, but also religious education, elementary and high school education, banquet halls for religious celebrations, including weddings and bar and bat mitzvahs,¹⁰⁹ coffee houses, motion picture theaters, fitness centers, all-night volleyball courts, child and senior day care centers, and social services, such as homeless shelters, soup kitchens, and drug and alcohol abuse treatment. Indeed, this trend has culminated in a move toward all-inclusive religious communities, from megachurches that are on the scale of

106. *Ambler Realty*, 272 U.S. at 386-387.

107. 1 RATHKOPF, *LAW OF ZONING AND PLANNING*, p. 19-28 (3d ed.1975).

108. *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 2002 WL 1827845 (C.D. Cal. Aug. 6, 2002) (case involving church proposing 100,000+ sq. ft. building).

109. *See, e.g., Congregation Kol Ami, et al. v. Abington*, No. 01-1919 2001 U.S. Dist. LEXIS 10224 (E.D. Pa. July 20, 2001) (3d Cir.); *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000); *Sts. Constantine & Helene Greek Orthodox Church v. New Berlin* (complaint filed in E.D. WI).

a sizable shopping mall¹¹⁰ to planned communities that encompass not just a house of worship, but many social services and even private homes.¹¹¹ This is a trend toward buildings that have greater negative secondary effects on neighbors, whether residential or commercial, and that raises issues properly and regularly considered by land use authorities in creating Master Plans or in the day-to-day determination of permit and variance requests.

The federal courts have jurisdiction to hear federal constitutional challenges to land use laws, with that review traditionally taking the route of rationality review either under the Equal Protection Clause or the Due Process Clause.¹¹² Challenges under the Free Exercise Clause are governed by *Employment Division v. Smith*, which does not speak directly to land use (nor does any other free exercise case), but institutes the rule that generally applicable laws that are applied neutrally and not motivated by animus are valid.¹¹³ Under all three of these theories, in the absence of purposeful discrimination, state and local governments are given wide latitude to serve their communities and to achieve the common good through innovative land use planning.

Neither the tradition of deference nor the values behind such deference were discussed or even intimated during the recorded oral or written testimony on land use and RLPA.

2. Prisons: Deference to Prisons Authorities

The Supreme Court's cases have addressed directly the role of the Free Exercise Clause in the prison setting. As in the land use context in general, prison officials have been given broad latitude to achieve order in the prisons even in the face of free exercise challenges.¹¹⁴ A state's sovereignty is particularly implicated where the issue

110. See Patricia Leigh Brown, *Megachurches As Minitowns*, N.Y. TIMES, Late Edition, May 9, 2002, at F1.

111. See *Greenwood Village vs. A Church's Rights*, ROCKY MOUNTAIN NEWS, Opinion, August 12, 2002 (describing a church's plan to expand from the 32,000 square feet it currently occupies on a nine-acre site, onto an adjoining 4.5 acre lot. The result would be double floor space, expansion of sanctuary to seat up to 900 people, classrooms, a chapel, community areas, a music room, and an additional parking lot allowing for 250 spaces. After applying for an amendment to its special-use permit to begin expansion, the City Council voted against it, and the church has now filed suit.). See also Jo Becker, *Rural Montgomery's Church-State Debate*, WASHINGTON POST, February 27, 2002, at B1 (discussing proposal to develop a megacomplex of churches in the middle of Montgomery County, Washington's agricultural preserve. The proposal for this area, which is zoned to preserve Montgomery's dwindling farmland and open space, includes using the land to house four religious institutions and ancillary schools, turning it into what some call a "church park.").

112. These cases are brought under 42 U.S.C. § 1983. See, e.g., *Kol Ami v. Abington Township*, No. 01-1919 2001 U.S. Dist. LEXIS 10224 (E.D. Pa. July 20, 2001) vacated by 309 F.3d 120 (3d Cir. 2002).

113. 494 U.S. 872 (1990). This principle was applied to a religious landowner in *Cornerstone Bible Church v. Hastings*, 948 F.2d 464, 472-73 (8th Cir. 1991).

114. See, e.g., *Congregation Kol Ami v. Abington Township*, 309 F.3d 120 (3d Cir. 2002); In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's

is enforcement of its own criminal laws and the execution of the relevant punishment. Neither the fact of such deference in the courts, nor the reasons for it, were part of the discussion over RLUIPA. Indeed, there was virtually no discussion of prison issues at all, and certainly none regarding “institutionalized persons” other than prisoners.

D. The Legislative History Behind RLUIPA

The same problem—scope of application—that was endemic to the Religious Freedom Restoration Act (“RFRA”)¹¹⁵ infected deliberations over the never-enacted Religious Liberty Protection Act (“RLPA”).¹¹⁶ Both RFRA and RLPA attempted to institute strict scrutiny of a huge swath of laws. RFRA applied to every law in the country.¹¹⁷ RLPA aimed for the same expanse, but would have done so through Congress’s power under the Commerce and Spending Clauses, and not just Section 5 of the Fourteenth Amendment. Their huge though unspecified scope combined with their religiocentric titles meant that it was difficult for sponsors to focus on any single application of the bills to existing laws.¹¹⁸ Hearings thus tended to operate at the level of the general, and unsupported generalizations were the norm, with no particular area of law receiving any degree of comprehensive treatment.

1. The Procedure

RLUIPA was introduced on July 13, 2000.¹¹⁹ Despite persistent requests by local government groups to testify, including the National League of Cities and the National Association of Counties, they were never permitted to get on the record.¹²⁰ The best

limited resources for preserving institutional order. When accommodation of an asserted right will have a significant ‘ripple effect’ on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.

Turner v. Safley, 482 U.S. 78, 80 (1987); O’Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987) (“By placing the burden on prison officials to disprove the availability of alternatives, the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of the prison administrators.”).

115. Religious Freedom Restoration Act of 1993 (“RFRA”), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2001)).

116. Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong. (1998); Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

117. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

118. For the same reasons, it was equally difficult for groups, like the states or local governments, not intimately involved in the legislative process to determine that their interests were likely to be directly affected. This was an acute problem with RFRA. It became less problematic as the workings of RFRA and its progeny became more familiar, and the title itself could not shield its impact from the local and state governments. See also Hamilton, *supra* note 14.

119. H.R. 4862, 106th Cong. (2000).

120. See, e.g., Letter from Nat’l Assoc. of Counties, Nat’l League of Cities, The United States Conference of Mayors, and Nat’l Assoc. of Towns and Townships to Senators (July 12, 2000) (on file with author) (strongly opposing RLPA and stating “we have been excluded from the current negotiations”); Letter from Nat’l League of Cities and Nat’l Assoc. of Counties to

they were able to do was to organize an off-the-record “briefing” session in the House when RLPA was pending, where they presented their concerns to staffers.

After opponents were informed that RLUIPA would be taken up again after the summer recess, RLUIPA was passed by voice vote in both Houses during the evening immediately preceding the summer recess.¹²¹

2. The Legislative History and Record

The Court’s decision in *Boerne v. Flores*¹²² invalidating RFRA shocked the members of Congress, because for the first time in many decades the Court refused to rubber stamp Congress’s record.¹²³ For RFRA, the members had committed hundreds of pages to the record excoriating the Supreme Court’s interpretation of the Free Exercise Clause in *Employment Division v. Smith*, and very few pages to the object of their enactment: federal, state, and local law and those protected by such laws.¹²⁴ They were enacting a law with enormous impact, affecting every law in the country, yet they put into the record only a small number of anecdotes involving an even smaller number of laws affecting religious conduct.¹²⁵ The Court refused to presume that the states were engaged in widespread free exercise violations (given there is no general knowledge of such violations), and refused to find the few anecdotes sufficient to

Senator Orrin Hatch, Chair, Senate Judiciary Committee (June 2, 1999) (on file with author) (expressing strong reservations about RLPA and requesting “an opportunity to testify”); Letter to Senators, from Nat’l Assoc. of Counties, July 20, 2000 (requesting Senate Judiciary Committee hearings and a bill markup session before enactment); *see also* Letter of National League of Cities, National Association of Counties, U.S. Conference of Mayors, and the International Municipal Lawyers Association to Rep. Henry Hyde, Chair, House Judiciary Comm. (June 21, 1999) (urging House Judiciary Committee not to act on RLPA and to “fully consider” the far-reaching ramifications of this bill before taking further action upon it).

121. 146 CONG. REC. S7, 779 (daily ed. July 27, 2000); 146 CONG. REC. H7, 191 (daily ed. July 27, 2000) (passed at 6:27 p.m.).

122. 521 U.S. 507 (1997).

123. *See Boerne Hearings*, 1997, *supra* note 24 (convening to discuss Congress’s authority to enact legislation such as RFRA, which was struck down as applied to the states).

124. *See Boerne*, 521 U.S. at 512-15 (“Congress enacted RFRA in direct response to the Court’s decision in . . . *Smith* (citation omitted).” *Id.* at 512. Members of Congress debated the points of constitutional interpretation the Court disagreed on “in hearings and floor debates. Many criticized the Court’s reasoning, and this disagreement resulted in the passage of RFRA,” wherein Congress announced that in *Smith*, “the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion,” and went on to say that one of RFRA’s stated purposes was “to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened.” *Id.* at 515.

125.

Much of the discussion centered upon anecdotal evidence of autopsies performed on Jewish individuals and [a]mong immigrants in violation of their religious beliefs . . . and on zoning regulations and historic preservation laws (like the one at issue here), which, as an incident of their normal operation, have adverse effects on churches and synagogues.

Id. at 530-31.

show a pattern of unconstitutional conduct that would justify RFRA's heavy burden across all state laws.¹²⁶

Despite RFRA's enormous impact on state laws and governance, Congress did not introduce into the record any assessment of the law by state officials—because it was unconcerned about such impact. Nor did Congress make any attempt to bring state or local governments into the three years of deliberation. At the last minute, Senator Reid attempted to create an exception for the prisons, but his objection was too late in the sense that the law's momentum was too strong, and the law was passed in 1993 without an exception through voice vote in the House and recorded vote in the Senate.¹²⁷ From the viewpoint of the members of Congress, RFRA was a law aimed at the Supreme Court, with an incidental and constitutionally irrelevant effect on the states.

Boerne yanked the Congress's attention away from its project of correcting the Supreme Court and back to the states. All of a sudden, Congress was supposed to consider whether the states were in fact committing constitutional violations that justified federal intervention. Congress could not treat its powers as plenary, but rather as limited by state powers. This did not sit well. Immediately following *Boerne*, the House held hearings, venting its disapproval of *Boerne*.¹²⁸

RLPA was introduced against this backdrop. On the one hand, Congress was fuming over the Court's presumptuous recapture of power, but on the other, if it wanted a bill affecting the states to pass constitutional muster, it had to at least appear to be in line with constitutional limitations. The RLPA effort improved upon RFRA by more closely focusing on constitutionality.¹²⁹ Yet, there was no increased concern for state interests.

The hearings on RLPA covered several topics, including land use. All those testifying, except me, backed the move to increase the power of religious landowners

126.

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. . . . Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. . . . Even assuming RFRA would be interpreted in effect to mandate some lesser test, . . . the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

Id. at 533-34.

127. See 139 Cong. Rec. H. 2356 (May 11, 1993) ("House voted to suspend the rules and pass, by voice vote."); 139 Cong. Rec. S. 14461 (Oct. 27, 1993) ("Passed in the Senate, after striking all after the enacting clause and substituting in lieu thereof the text of S. 578, Senate companion measure, as amended."); 139 Cong. Rec. H. 8713 (Nov. 3, 1993) ("House agreed to the Senate Amendment to the bill, by voice vote—clearing the measure for the President.").

128. *Boerne* Hearings, 1997, *supra* note 24.

129. There were two Senate Judiciary Committee hearings on June 23 and September 9, 1999. See *Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protective Measure: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. (1999).

across the land use process. Under the Court's federalism jurisprudence, Congress had two paths open. Either the unconstitutional conduct of the states was so notorious (think back to the Civil Rights Era) that all could agree without further proof that the states required federal correction burdening them with federal regulation exceeding constitutional requirements,¹³⁰ or Congress needed to put together a record that showed a *widespread recent pattern*¹³¹ of *unconstitutional* conduct in the states.¹³² They failed rather abysmally.

The RLPA legislative history on alleged land use abuses falls into one of five categories, as the chart in the Appendix shows: (1) two instances of unconstitutional state action; (2) two allegations of facts purporting to show unconstitutional

130. *See, e.g., Boerne*, 521 U.S. at 520, 530-34. Here, the Court explained that Congress's authority to regulate using its enforcement powers under Section 5 of the Fourteenth Amendment is limited to legislation that is *congruent and proportional* to an identified injury. It stated,

[R]egardless of the state of the legislative record, RFRA cannot be considered remedial, preventative legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.

Id. at 532. The Court continued, stating "[t]he provisions restricting and banning literacy tests, upheld in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *Oregon v. Mitchell*, 400 U.S. 112 (1970), attacked a particular type of voting qualification, one with a long history as a 'notorious means to deny and abridge voting rights on racial grounds'" (quoting *South Carolina v. Katzenbach*, 383 U.S. 301 at 355 (1966) (Black, J., concurring and dissenting)), *id.* at 533, and concluded that, while Section 5 legislation does not require "termination dates, geographic restrictions or egregious predicates" (as there were in *Katzenbach* and *Oregon*), if "a congressional enactment pervasively prohibits *constitutional* state action in an effort to remedy or prevent *unconstitutional* state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5." *Id.* at 533 (emphasis added).

131. *See, e.g., Boerne*, 521 U.S. at 530 ("A comparison between the Voting Rights Act and RFRA is instructive. In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 90-91 (2000) (requiring "widespread pattern" of age discrimination); *Garrett v. Bd. of Trs. of Univ. of Ala.*, 531 U.S. 356, 374 (2001) (requiring showing of a "pattern of discrimination" that persists).

132. *See, e.g., Boerne*, 521 U.S. at 532 ("RFRA . . . cannot be understood . . . to prevent unconstitutional behavior."); *Kimel* 528 U.S. at 91 (stating that when reviewing the record as a whole, "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. Although lack of support is not determinative of the § 5 inquiry," (citing *Boerne*, 521 U.S. at 531-32) its "failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field."); *Garrett*, 531 U.S. at 370 (even though Congress had some basis for which to believe people with disabilities were being discriminated against, stating "[s]everal of these incidents [in the record] undoubtedly evidence an unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA. . . . These incidents taken together fall far short of even suggesting the pattern of unconstitutional action on which § 5 legislation must be based." (referencing *Kimel*, 528 U.S. at 89-91 and *Boerne*, 521 U.S. at 503-31).

government action; (3) two references to cases where the courts did not find constitutional violations and the religious entity criticized the result; (4) multiple references to garden variety zoning laws applied to churches; and (5) private, rather than governmental, expression that does not implicate constitutional violations. The House Report attempts to meet its burden through an adjective, summarizing this evidence as “massive,”¹³³ but it is not even close to significant on the question of whether local and state governments persistently violate constitutional principles in the application of the thousands of land use laws routinely applied to millions of citizens, including religious landowners, every year.

a. Two Unconstitutional Actions in the Record

In the absence of general knowledge that the state governments are regularly violating the Constitution,¹³⁴ evidence of widespread and persisting unconstitutional government action is necessary to show that the states are engaged in “widespread and persisting” unconstitutional conduct.¹³⁵ The handful of assertions made in the RLPA hearings are on par with the inadequate record in *Boerne* on religious animus and on disability discrimination by the states under the ADA and held to be inadequate in *Garrett*.¹³⁶ This is especially so when compared against the backdrop of thousands of zoning authorities across the fifty states, handling claims from many thousands of landowners. The sheer size of the land use universe makes the record of unconstitutional conduct cited in the RLPA hearings not “massive,” but rather minute.

The RLPA land use record alleges two unconstitutional actions by land use authorities disadvantaging churches. It cites two cases showing unconstitutional conduct. First, there is reference to *Love Church v. City of Evanston*,¹³⁷ in which a district court in the Seventh Circuit entered judgment in favor of a church that alleged that ordinance requirements, which precluded the church from obtaining a lease (due to increased congregation size), violated their free exercise rights under the First Amendment, as well as their rights to equal protection and due process under the Fourteenth Amendment. The Seventh Circuit Court of Appeals vacated the judgment, however, finding that the church failed to present a “case” or “controversy” sufficient to establish standing under Article III.¹³⁸ Second, there is reference to *Orthodox*

133. 146 Cong. Rec. S7774-801 (daily ed. Jul. 27, 2000) (remarks of Sen. Hatch).

134. See *Boerne*, 521 U.S. 507; *supra* notes 44, 45. The Court found the converse of the voting rights laws to be true with RFRA, explaining, “[t]he history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.” *Boerne*, 521 U.S. at 530; see also *id.* at 525-26, where the Court used *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), to illustrate that there is a necessity of remedial and preventive measures to address constitutional deprivations of constitutional rights when “judged with reference to the historical experience . . . it reflects.” *Id.* at 308.

135. *Boerne*, 521 U.S. at 526; *supra* notes 45, 62, 118, 125, 126; See also *Kimel*, 526 U.S. 62; *Garrett*, 531 U.S. 356.

136. *Garrett*, 531 U.S. at 370 (“[T]hese incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.”).

137. 896 F.2d 1082 (7th Cir. 1990).

138. *Id.* at 1087.

Minhan v. Cheltenham Township Zoning Hearing Board,¹³⁹ in which an increase in traffic was found to be an insufficient reason to deny a special exception permit. Here the proposed use of converting a residence to a synagogue would actually cause less traffic than a normal use of the same type because the congregations members were Orthodox Jews who did not drive to services. That is the entire set of proven cases of unconstitutional conduct.

b. Two Allegations of Facts Purporting to Show Unconstitutional Government Action

The legislative history also cites a study done at Brigham Young University (originally done by the law firm of Mayer, Brown and Platt) that labels safety and traffic issues in land use cases as a pretext for discrimination against “minority” churches, but with no proof of any discriminatory purpose.¹⁴⁰ Moreover, the study never justifies its use of the term “minority” or how it chose the instances it examines. Second, there is reference to a mayor in a land use proceeding who made racially discriminatory comments.¹⁴¹ There is no discussion whether the mayor was expressing the purpose of

139. 552 A.2d 772, 774 (Pa. Commw. Ct. 1989).

140. *See, e.g., Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong.* 131-53 (1998) (testimony of Prof. Cole W. Durham, Jr., Brigham Young Univ. Law School and written statement following testimony with appendix to written statement) (discussing study he prepared with the law firm of Mayer, Brown & Platt in January 1997, and asserting “[h]uman experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise disturbance, rather than on such crasser grounds as lessening of property values or loss of open space. . . . [U]nder such circumstances it is necessary to most carefully scrutinize the reasons advanced for a denial to insure that they are real and not merely pretexts used to preclude the exercise of constitutionally protected privileges.” *Id.* at 135 (quoting *In re American Friends of the Society of St. Pius v. Schwab*, 417 N.Y.S. 2d 991, 993 (N.Y. App. Div. 1979)), and then concluded prejudice was a “substantial factor in a large number of cases . . .” *Id.* at 136.). However, the only support offered for his conclusion were the results from this study which used data to compare treatment received by smaller religious groups with that received by larger groups from which he concluded,

Minority religions representing less than 9% of the population were involved in over 49% of the cases regarding the right to locate religious buildings at a particular site, and in over 33% of the cases seeking approval of accessory uses. . . . While a study of this type can at best give a rough picture of what is happening, the conclusion seems inescapable that illicit motivations [*sic*] affecting disputes in the land use area.

Id. at 136. Several others who testified drew on Durham’s study and showed support of these conclusions brought forward, but surely it does not “seem reasonable to assume that [in] these cases . . . their religious rights are being violated” based on statistics and speculation alone. *Id.* These conclusions, without more, are not conclusory at all.

141. *Id.* at 91-93 (testimony and written statement of John Mauck, attorney) [hereinafter *Mauck Testimony*] (citing mayor who said, “We don’t want Spics in this town.”). The bulk of Mauck’s testimony involved generalizations and subjective impressions. He asserted that

the land use decision, which would make the comment relevant to an unconstitutional action, or his private motivation that was distinct from the law's purpose, which would not implicate a constitutional claim.¹⁴² Finally, there is a general claim, without support, that churches are treated less well than other assembly uses.¹⁴³

The following categories of testimony did not articulate constitutional violations in the states, but rather described circumstances where the courts rejected the constitutional claim, where the law is generally applicable, or where the action cited was private and not governmental.

c. Cases Where the Courts Did Not Find a Constitutional Violation

The RLPA history contains two references to a case where the court did not find a constitutional violation, but the individual testifying criticized the result at length. Criticism was directed toward the zoning authority in Forest Hills, Tennessee for creating an Educational and Religious Zone, which encompassed existing churches and a school, and under which the plaintiff, the Church of Latter-Day Saints, was unable to obtain a permit and for refusing to rezone the area. The court found no constitutional violation for the denial under these circumstances, where the church sought to build in a residential district.¹⁴⁴ More criticism was then directed at the court's rationale for denying the church's permit and for its application of *Smith*, which resulted in finding the intent of the City "was not directed to restraining the right of an individual to practice religion, the intent was to regulate the use of the City's land,"

"racism motivated [a zoning board denial] in some way." *Id.* at 92. He also said that "[Chicago] was glad to be rid of a pesky challenge," when a church settled on a funeral home in the South Side after it was told that a commercial district and a potential nightclub district were not going to work, and cited three instances where land churches desired were rezoned manufacturing districts. *Id.* at 92.

142. *See Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 248-49 (1990) (In holding Equal Access Act applied to school board because it allowed a limited public forum for club meetings, the Court found that "the Act's prohibition of discrimination on the basis of 'political, philosophical, or other' speech as well as religious speech [was] a sufficient basis for meeting the secular purpose prong of the *Lemon* test," maintaining that, "[e]ven if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *Id.* at 248 (citations omitted). It was enough that "the Act on its face grants equal access to both secular and religious speech" for it to find that it did not "endorse or disapprove of religion." *Id.* at 249 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring))). *See also id.* at 249 (the "Court is 'reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute'") (quoting *Mueller v. Allen*, 463 U.S. 388, 394-395 (1983)).

143. *Mauck Testimony*, *supra* note 141, at 91-99.

144. *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 22-31 (1999) (prepared statement of Von G. Keetch, Counsel to the Church of Latter-Day Saints) [hereinafter *Keetch Testimony*] (referring to *Corp. of Presiding Bishops v. Bd. of Comm'rs of the City of Forest Hills*, No. 95-1135, 96-868, 96-1421 (Davidson County Ch. Ct. Tenn., Jan. 27, 1998)).

and therefore its actions were constitutional.¹⁴⁵

d. Typical Land Use Restrictions Applied to Churches

The vast majority of the evidence gathered by Congress regarding land use authorities and churches involved garden variety land use laws. While such laws create “burdens” in the colloquial sense, the incidental burdens caused by such generally applicable laws are constitutional.¹⁴⁶ There was no attempt to prove

145. *Keetch Testimony*, *supra* note 144, at 23 (quoting judge stating that city’s anti-development ordinance preserved the “aesthetic” interest and would “maintain ‘suburban estate character’ of the city” and thus upheld denial (quoting *Forest Hills*, No. 95-1135, 96-868, 96-1421 at 40)).

146. *See* *Employment Div. v. Smith*, 494 U.S. 872 (1990); *see also* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that local zoning authorities’ denial of a church’s application for a building permit to enlarge a church in Boerne, Texas, pursuant to its historic preservation ordinance, was constitutional because the state laws to which RFRA applies are general applicable and not ones that have been motivated by religious bigotry); *Mount Elliott Cemetery Ass’n v. City of Troy*, 171 F.3d 398 (6th Cir. 1999) (affirming a grant of summary judgment to the City of Troy and holding that the city’s ordinances governing residential and community facilities districts, applied in denying plaintiff cemetery association’s rezoning request, are neutral laws of general applicability); *Anderson v. Douglas County*, 4 F.3d 574 (8th Cir. 1993) (holding that the county’s regulations requiring conditional use permits were generally applicable and that plaintiff failed to establish that similarly situated persons did not have to obtain like permits); *Rector, Wardens, & Members of Vestry of St. Bartholomew’s Church v. New York*, 914 F.2d 348, (2d Cir. 1990) (holding that New York’s Landmark Law applied in preventing plaintiff from replacing its activities building with an office tower, was a valid, neutral regulation of general applicability); *San Jose Christian Coll. v. City of Morgan Hill*, No. C01-20857, 2002 WL 971779 (N.D. Cal. Mar. 5, 2002) (the court found that the city’s denial of the church’s rezoning application to use a hospital property for a college campus did not violate the college’s Free Exercise or other First Amendment rights because the churches were not treated any differently than other assemblies and church schools were treated no differently than any other school); *Civil Liberties for Urban Believers v. City of Chicago*, No. 94CV6151, 2001 U.S. Dist. LEXIS 17213 (N.D. Ill. Oct. 17, 2001) (holding that city’s zoning laws that restricted church buildings to residential zones, or commercial zones with a special use permit were generally applicable zoning laws that neutrally burdened all land owners without imposing a substantial burden on the free exercise of religion, and that the city’s regulation of the placement of church buildings was unrelated to expression or assembly rights); *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 155 F. Supp. 2d 142 (D. N.J. 2001) (denying association and several individuals’ attempt to enjoin defendant Borough and council members from disturbing the lechis that delineated the boundary of an eruv, and holding that Borough’s denial of permission was a reasonable, neutral access restriction of general applicability that could not have amounted to viewpoint discrimination); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995) (granting summary judgment to the city, and its commission, and holding that the county’s zoning ordinances, excluding homeless shelters and food banks as customarily related activities to a church or religious institution, were neutral regulations of general applicability that were not aimed at impeding religion); *National Amusements, Inc. v. Town of Dedham*, 846 F. Supp. 1023 (D. Mass. 1994) (concluding that the town ordinance did not target the theater because it was part of a series of generally applicable ordinances designed to aid the security of the township); *St. Paul’s Protestant Episcopal Church v. City of*

otherwise.

During the RLPA hearings, church representatives referred to the following typical land use restrictions: (1) occupancy requirements;¹⁴⁷ (2) limits on operational hours;¹⁴⁸ (3) having to buy adjacent residential lots in order to build church structures in residential zones;¹⁴⁹ (4) having to go through the zoning approval process in order to convert a school to religious use;¹⁵⁰ (5) being subject to landmarking laws;¹⁵¹ (6) distinctions drawn by land planners between tax-generating and tax-exempt properties;¹⁵² (7) being subject to zoning restrictions;¹⁵³ and (8) the requirement that a

Oakwood, No. C-3-88-230, 1993 U.S. Dist. LEXIS 21319 (S.D. Ohio Mar. 3, 1993) (granting summary judgment to and holding that the City of Oakwood had not violated the Free Exercise Clause of the First Amendment by preventing plaintiff from obtaining a building permit to construct a parking lot on the property it acquired for that purpose with its generally applicable zoning ordinance); *Cornerstone Bible Church v. Hastings*, 740 F. Supp. 654 (D. Minn. 1990), *aff'd in part, rev'd in part*, 948 F.2d 464 (8th Cir. 1991); *First Baptist Church of Perrine v. Miami-Dade County*, 768 So. 2d 1114 (Fla. Dist. Ct. App. 2000) (denying church's petition for a writ of certiorari on appeal from the lower court's decision upholding the county's decision not to grant the church any zoning special exceptions and a sign variance in order to expand its school because the zoning code was entirely secular in purpose and effect).

147. See *Protecting Religious Freedom After Boerne v. Flores (Part III): Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 15-19 (1998) (testimony and prepared statement of Mark E. Chopko, General Counsel, United States Catholic Conference) [hereinafter *Chopko Testimony*].

148. See *Chopko Testimony*, *supra* note 147, at 15-19.

149. *Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary* 105th Cong. 200 (1998) (testimony of Bruce D. Shoulson, attorney) [hereinafter *Shoulson Testimony*].

150. See *Mauck Testimony*, *supra* note 141, at 274 ("I think the intent there,"—referring to RLPA 1998—"is to have an area where religious groups can freely locate without discretionary governmental approval, and that could be better said by adding, 'location in the jurisdiction where it can freely locate without discretionary governmental approval;' because some municipalities think that everything they do is reasonable and all of their special use standards are reasonable."); *Protecting Religious Freedom After Boerne v. Flores (Part III): Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 31 (1998) (prepared statement of Steven T. McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society) [hereinafter *McFarland Testimony*] (referring to *Ira Iglesia de la Biblia Abierta v. Banks*, 129 F.3d 899 (7th Cir. 1997), and characterizing the Court's decision that Chicago City Alderman that introduced and enacted ordinances to rezone the parcels where churches would have been a permitted use as allowing them to "enjoy absolute legislative immunity from lawsuit liability for their manipulative political power play").

151. See *Protecting Religious Freedom After Boerne v. Flores (Part II): Hearing on 1999 H.R. 106-219 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 41-44 (1998) (testimony and prepared statement of Richard Robb, member of the First Presbyterian Church of Ypsilanti, Michigan).

152. See *Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 55, 57 (1998) (testimony and prepared statement of Marc D. Stern, Director, Legal Department, American Jewish Congress) [hereinafter *Stern Testimony*].

153. See *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 94 (1999)

religious landowner must own at least a leasehold on a property for standing to challenge zoning regulations.¹⁵⁴

There was also a report by the Presbyterian Church of a survey of its congregations regarding land use issues.¹⁵⁵ According to the Church, the Church won sixty-seven percent of its land use challenges before 1980 and only fifty-seven percent of its land use challenges after 1980. There was no explanation why 1980 was chosen as a relevant dividing line, no disclosure of the total number of actual cases, and no indication that this uptick in losses was caused by unconstitutional government conduct. Nor was there any intimation that it was due to anti-Presbyterian bias in the land use process.

e. Private Expression that Does Not Implicate Constitutional Violations

The RLPA testimony regarding land use also included references to the offensive remarks of private individuals participating in the public hearings that are part and parcel to the land use process. Claims were made about anti-Semitic remarks,¹⁵⁶ an anti-

(prepared statement of Rabbi David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism) (discussing Jodi Wilgoren, *Troubled House of Worship*, L.A. Times, July 9, 1997, at B1 and Beth Schuster, *One Zoning Law, Two Outcomes*, L.A. Times, Nov. 11, 1997, at B1, and characterizing what was reported as “[a] court in Los Angeles declin[ing] to protect the rights of fifty elderly Jews to meet for prayer in the Hancock Park Area, because Hancock Park had no place of worship and the City did not want to create precedent for one.”). This testimony concerned a shul in Hancock Park in Los Angeles that was denied a permit because it was located in a residential district where churches were not permitted. California law permits zoning authorities to include churches in districts other than residential districts. *See generally* *Minney v. City of Azusa*, 330 P.2d 255 (Cal. Dist. Ct. App. 1958). *See also* Becker, *supra* note 111.

154. *See McFarland Testimony*, *supra* note 150, at 31 (describing the congregation in *Love Church v. City of Evanston*, 896 F.2d 1082 (7th Cir. 1990)), as only being able to locate if they went “through the laborious and costly process of applying for a special use permit.”). In that case, the court held that the church failed to allege a “distinct and palpable” injury traceable to the city’s actions or properly redressable by a favorable ruling. *Love Church*, 896 F.2d at 1087. Therefore, it lacked standing to sue as there was no “case” or “controversy” for resolution by Article III courts. *Id.* at 1082. The church was represented by Attorney John Mauck.

155. *See, e.g., Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998) (testimony of Rev. Elenora Giddings Ivory, Director, Washington Office of the Presbyterian Church (U.S.A.)) (providing results of data the church collected in annual session reports regarding land use difficulties; data collected from a regular annual statistic gathering process where 11,500 congregations around the country are polled); *Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the Senate Comm. on the Judiciary*, 105th Cong. 51, 57-58 (1998) (testimony and prepared statement of Douglas Laycock, Professor of Law, University of Texas School of Law) (discussing survey of Presbyterian congregations).

156. *See, e.g., Shoulson Testimony*, *supra* note 149, at 363 (giving an example of what he believes may influence zoning board decisions when there is anti-Semitism in a community, stating that “[D]uring a hearing on an application for an Orthodox Jewish institution, an objector stood and turned to the people in the audience wearing skull caps and said, ‘Hitler should have killed more of you.’”).

Pentecostal remark,¹⁵⁷ and racially motivated remarks.¹⁵⁸ Private prejudice, although distasteful and immoral, is not unconstitutional. United States citizens have the right to believe whatever they choose, free of government coercion, and the right to express unpopular views in open government fora.¹⁵⁹

In order for the private prejudice described in the RLPA testimony to rise to the level of a constitutional violation, the government would have to embrace the prejudicial purpose. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."¹⁶⁰ There was no indication in the RLPA testimony or record that the government in the circumstances described was motivated or controlled by unconstitutional discriminatory purpose.

3. Land Use Evidence Available but Not in the RLUIPA Record

By the time RLUIPA was introduced, the most scientific study of land use data and churches to date was published in the *Journal of Church and State*. Sociology Professor Mark Chaves and William Tsitsos took their data from the 1998 National Congregations Study.¹⁶¹ The numbers indicated that only one percent of those religious institutions seeking a permit or license were denied.¹⁶² Moreover, of those six congregations that encountered problems in the zoning process, five were from mainstream religious groups,¹⁶³ not minority religions as the Brigham Young study cited in the RLPA testimony claims. The Chaves study was brought to the attention of the members of Congress, but Professor Chaves was not asked to testify and the study itself was not included in the record.¹⁶⁴

The other interesting land use evidence available to Congress, but not included in the record, was a letter written by Mayor Rudolph Giuliani of New York City.¹⁶⁵ With

157. See, e.g., *Mauck Testimony*, supra note 141, at 94 in written testimony (referring to *Family Christian Fellowship v. City of Winnebago*, 151 Ill. App. 3d 616 (1986), stating "A church purchased a former school building for their religious activities. One remark by a neighbor which was reported to us was 'let's keep these [G. D.] Pentecostals out of here.'").

158. See, e.g., *Mauck Testimony*, supra note 141, at 91-92; *Stern Testimony*, supra note 152.

159. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977); *Cohen v. California*, 403 U.S. 15 (1971).

160. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 at 448 (1985) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

161. Mark Chaves and William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH AND STATE 335, 337 (2000).

162. *Id.* at 341.

163. *Id.* at 342.

164. See *Religious Liberty: Hearing on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure Before the Senate Comm.*, 106th Cong. 191 (1999) [hereinafter *RLP Senate Hearings*] (prepared statement of Marci A. Hamilton, Distinguished Visiting Professor of Law, Emory University School of Law); see *id.* at 149 (testimony of Douglas Laycock, Professor of Law, University of Texas School of Law) (arguing percentages in study "cannot be understood as representative of all of U.S. congregations").

165. Letter from Rudolph Giuliani, Mayor of New York, to Charles E. Schumer, United

land use planning an important priority in large cities, he implored the members to slow RLUIPA down and to permit the cities to become involved in the dialogue.¹⁶⁶ His letter was not acted upon, obviously, and not included or even mentioned in the record.

E. RLUIPA in the Courts

On the land use side, RLUIPA has been given wide berth. In *Murphy v. Zoning Commission of New Milford*,¹⁶⁷ the lower court applied RLUIPA as broadly as possible. And in *Freedom Baptist of Delaware County v. Township of Middletown*,¹⁶⁸ the lower court rejected the constitutional arguments raised by the township against RLUIPA. The *Freedom Baptist* court rested on the House's choice of adjectives in assessing the record, quoting the House Report's reference to the record as "massive,"¹⁶⁹ without independently assessing the record for purposes of assessing its constitutionality under Section 5 of the Fourteenth Amendment.

The first opinion to hold RLUIPA unconstitutional was one addressing prison practices.¹⁷⁰ Because it only addressed the Commerce and Spending Powers, it did not analyze the record. Since there was no record supporting the institutionalized person's side of the Act—and there is no general social knowledge that prisons regularly violate the constitutional rights of religious prisoners—the Section 5 theory was not destined for success in any event. Recently, two more courts have held that RLUIPA is unconstitutional in the prison context as it violates the Establishment Clause.¹⁷¹

IV. AN ACTION PLAN FOR CONGRESS: HOW FEDERALISM ENCOURAGES CONGRESS TO SERVE THE PUBLIC GOOD

As I have previously explained, members of Congress have no constitutional obligation to meet with or to listen to any or all individuals affected by a law.¹⁷²

States Senator (D-NY) and Daniel P. Moynihan, United States Senator (D-NY) (July 25, 2000) (on file with author).

166. *Id.*

167. 148 F. Supp. 2d 173 (D. Conn. 2001), *motion denied*, 223 F. Supp. 2d 377 (D. Conn. 2002).

168. 204 F. Supp. 2d 857 (E.D. Pa. 2002) (consent judgment settling suit approved in November 2002).

169. *Id.* at 862 (quoting 146 CONG. REC. S7774-01 (daily ed. July 27, 2000) (statement of Sen. Hatch, Ex. 1, Joint Statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutional Person Act of 2000)).

170. *In re Rowland*, No. HC 4172 (Cal. Super. Ct., County of Monterey, July 31, 2002) (holding RLUIPA unconstitutional under the Commerce and Spending Clauses and the Establishment Clause) (unpublished opinion).

171. *See* *Ghashiyah v. Dep't of Corrs. of Wis.*, 2003 U.S. Dist. LEXIS 3739 (E.D. Wis. Mar. 4, 2003); *Madison v. Riter*, 2003 U.S. Dist. LEXIS 1094 (W.D. Va. Jan. 23, 2003).

172. Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 557-558 (1994) [hereinafter Hamilton, *Discussion and Decisions*] (“[U]nder the Supreme Court’s recurrent rhetoric, the press clause constructs an incentive structure that obviates the need for a direct legal obligation to disclose as it accomplishes disclosure without imposing such an obligation.”).

Members of Congress have tremendous latitude during their term of representation to enact law with or without consultation. Some scholars have attempted to create a right to involvement in the legislative process, but the project is doomed from both practical and constitutional perspectives.¹⁷³ Thus, this Article is *not* suggesting a constitutional obligation for Congress to call in representatives of the states whenever it enacts a law affecting the states, though it might make good sense as a general matter.

A very different point is being made. The RLUIPA history is not being offered for the purpose of critiquing the legislative process to fix it, but rather to illustrate that the states' interests, even in an arena that is traditionally theirs, like land use, and even following invalidation of similar federal laws on federalism grounds, are not given serious consideration by the members. The notion that state and local interests are factored in at the federal level as a natural byproduct of the political process is simply empirically false.¹⁷⁴ Not only are state and local interests not factored in, they are ignored; in the legislative history of RLUIPA, Congress never acknowledged the large body of law making clear that land use is "quintessentially" a matter for local control and ignored explicit requests by state and local government groups to testify.¹⁷⁵

The RLPA/RLUIPA legislative history illustrates that the states are *assumed* to be bad constitutional actors—a handful of claims is sufficient for Congress to proceed to interfere significantly in a quintessentially local arena and for it to claim a "massive" record of state misconduct.¹⁷⁶ Moreover, members of Congress attach little to no value to having fifty discrete states independently pursuing the public good. This latter point never comes up in the record, neither from those chosen to testify nor from those members making statements or asking questions.

Those advocating deference to Congress in the federalism context¹⁷⁷ are intent on reinforcing this imperialistic side of Congress. In effect, Congress and those scholars criticizing the Court's federalism jurisprudence have written out of the Constitution the federalist design and especially the Tenth Amendment. The Court's federalism corrective, therefore, may come as a shock, but is for that very reason desperately needed.

A. *The Questions Congress Should Have Asked Before Enacting RLUIPA to Avoid Invalidation on Federalism Grounds*

The righteous indignation directed at the Court's insistence that Congress do a better job of documenting the need for its actions that intermeddle in state affairs is a

173. See *id.* at 510-11 (discussing proposals put forth by William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1092 (1989), and Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986)).

174. See Hamilton, *Federalism Enforced*, *supra* note 14, at 1070-72 (criticizing theories of Kramer, Choper, and Wechsler, who propose this notion).

175. See, e.g., cases cited *supra* note 62 and accompanying text.

176. See *FERC v. Mississippi*, 456 U.S. 742, 767 (1982). See also *supra* note 62 and accompanying text.

177. See Caminker *supra* note 2; Kramer, *We the Court*, *supra* note 2; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 100 YALE L.J. 441 (2000); Post & Siegel, *supra* note 2.

bit much.¹⁷⁸ Part of the problem lies in the overly romanticized vision of Congress as savior, described above, but it also seems to rest in an overly romanticized vision of how Congress in fact operates. For example, Reva Siegel and Robert Post state that “[l]egislative hearings ought not to stimulate adversaries; their primary purpose is to inspire new forms of collective commitment.”¹⁷⁹ Adversaries are inevitable in the policymaking of legislatures, because—barring constitutional infirmities—there are always many policy paths to be taken. Indeed, Siegel and Post just get it wrong: legislative hearings *simulate* collective commitment for the very purpose of avoiding and suppressing adversaries to a particular piece of legislation. Communal collectivity suppresses differences and therefore makes it impossible to have the full debate necessary to tease out the strengths and weaknesses of a particular bill. RFRA provides an ideal example. The thin patina of collective disregard for the Supreme Court evident in the RFRA hearings operated to ensure that those most severely affected by RFRA—children, minorities attempting to get fair housing, and state and local governments themselves—would not be alerted to their adverse interests. It worked until the very end of the process when prison authorities figured out the likely impact and tried desperately to get the bill amended before it passed.

In fact, the collective dynamic *within* the group of organized religions backing RFRA and then RLPA also operated to suppress internal debate and the legislative debate, and therefore disabled the debate that leads to illumination. The mantra during RFRA and RLPA was that a large coalition of religious groups had come together with civil liberties groups to back the legislation. This reassured members of Congress and lulled those interests most likely to be negatively affected. To stay cohesive, members of the coalition agreed to a no-exceptions rule. No religious group was willing to agree to an exception to the law, for prisons or children or any other reason. The reason? Those religious groups with differing agendas were afraid their interests might be traded away by other religious groups. Once religious groups started identifying why they were actually involved in the process and agreeing to particular exceptions, the coalition would surely fray. While they could agree on the general goal of accruing more power to trump the law, there were many particular policy results over which they would differ. The no-exceptions rule meant that the agendas of the individual religious organizations were not revealed for some time. It took the ACLU five years to come to understand that one of the overriding agendas motivating some of the coalition was a desire to trump the fair housing laws. The adversarial element in the legislative process is a spur to better laws, not a hindrance to a desirable collective process.

In light of the principles of federalism, and not just the doctrine, Congress should have asked the following questions about RLUIPA.

First, what is the degree of interference with state and local law? This question alone would have enriched the deliberations over RLUIPA, because it would have led the members to inquire about the existing law, to understand that land use was one of the last bastions of true local control and one of the primary means by which communities shape their character and serve collective needs. It might also have tipped them off to the fact that thousands of homeowners, that is, constituents, were going to be unhappy when their private property rights were reduced vis-à-vis their religious

178. See Post & Siegel, *supra* note 2; Kramer, *We the Court*, *supra* note 2, at 11-32.

179. Post & Siegel, *supra* note 2 at 16.

landowning neighbors. The large leap from deference to strict scrutiny caused by RLPA/RLUIPA could have been made more understandable to the members.

Second, what are the purposes and aspirations of state and local laws affected by the federal law? What are the local and state goals behind smart growth, master plans, open space, and zoning laws in general? This is a question that is grounded in respect for the dual sovereignty of the states.

Third, why is it that local land laws differ in their treatment of religious landowners? This question was unlikely to be asked until questions were asked about the nature of land use law in general. But once the local quality of land use law was made clear, the members might have been led down the path of asking the justification for the differing—though constitutional—treatment. Here is where the value of federalism, the fifty-state laboratory principle, might have been let in the door.

Fourth, given the interconnectedness of all members of a community covered by a master zoning plan (a reality that comes out once one analyzes even a single zoning plan), what was the likely impact of privileging religious land uses vis-à-vis all other land uses, including residential uses? Had they investigated the nature of land use law, and not just the doctrine, though even investigating the doctrine would have been an improvement on the process, they would have been led to ask about the potential negative effects of giving religious entities what they were requesting. Land use law is the quintessential zero-sum game, where giving privileges to one landowner more often than not undermines the rights of neighbors and other members of the community. The way RLPA/RLUIPA was presented—with the focus on religious entities alone—permitted the question of whether other landowners would be harmed to remain unasked.

Finally, have any states experimented with a regime like RLPA/RLUIPA, giving religious entities special privileges in the land use process? What was the result? Precisely because of federalism, the states may well have experiences that can inform the Congress, and they may have a variety of experiences. For an example relevant to RLUIPA, note Massachusetts's willingness since the 1950s to give churches *carte blanche* to choose location.¹⁸⁰ This was a rule that never caught on in other states, and the reasons for their resistance would have been informative to a Congress thinking of giving churches a leg up against every land use law, and not just zoning. Moreover, even states that have given churches some special treatment in the land use arena, like New York, have not insisted that local governments prove every land use ordinance was the least restrictive means possible.¹⁸¹ Finally, seven states had adopted state RFRAs, most of which apply strict scrutiny in the land use context.¹⁸² They could have and should have been completed. Just knowing that few states had embarked on the

180. See MASS. GEN. LAWS ch. 40A, § 3 (1994 & Supp. 2003)(known as the “Dover Amendment”).

181. See *Rhema Christian Fellowship v. Common Council of Buffalo*, 452 N.Y.S.2d 292 (N.Y. Sup. Ct. 1982) (upholding the denial of a special use permit for a church seeking to convert property in an economic redevelopment zone, where the city passed a resolution to impose a one-year moratorium on the issuance of use permits for new and different property uses, as it bore a substantial and direct relationship to the public health, safety, morals, or general welfare).

182. See Gary S. Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Liberty Under the Pennsylvania Constitution*, 4 U. Ps. J. Const. L. 81, 126 (2001).

regime proposed for the entire country would have helped to contextualize the debate over RLPA/RLUIPA.

Once again, this is a question that rests on respect for the states as sovereigns and simply cannot be posed absent a modicum of respect for the states as dual sovereigns. The elitism behind the antistate sentiment that permits Congress to charge ahead with laws directly affecting state laws with little inquiry into state impact is absent from this question.

Admittedly, none of these questions would have been welcome input for the religious lobbyists orchestrating the enactment of RLUIPA, but the responsibility to the public good does not rest on their shoulders, but rather on the members'.¹⁸³ The failure to ask and to investigate must be laid at the feet of the members, regardless what the interest group insists is "best" to achieve passage.

B. The List of Questions for Every Enactment Affecting State and Local Interests

From the mistakes made in RLUIPA and from the Court's federalism cases, it is possible to generalize to questions that ought to be asked about any federal law affecting the states to right the balance between federal and state authority. It is not enough for the state and local government organizations to make the federalism arguments on deaf ears.¹⁸⁴ Rather, the members of Congress need to ask these questions and care about the answers. The states by themselves have proved incapable of forcing Congress to do so when the Supreme Court eschewed federalism review. Now that the Court has taken up this responsibility and the Congress will not be able to get its enactments through the courts without some modicum of respect for state interest and law, there is a live possibility that the states' entreaties will no longer necessarily fall on deaf ears. The questions Congress should ask are as follows:

1. What is the constitutional basis for the federal act and what strictures does federalism place on that source of authority?¹⁸⁵
2. Is there a relevant body of law, federal or state, or a state policy that preexists the

183. Hamilton, *Discussion and Decisions*, *supra* note 172, at 560-61:

The attorneyship model [used to describe our system of representative democracy] charges representatives with the responsibility to make decisions on an informed and independent basis. This necessary independence combined with the capacity to make decisions beyond the narrow confines of one's own identity, sharply reduces the force of the notion that courts must oversee the legislature's decisions of inclusion during the deliberative process. At the same time, the importance of a set of structural mechanisms for encouraging representatives actually to engage their delegated power in a responsible way becomes apparent.

184. That is precisely what happened with RLPA. Letters from the government organizations repeatedly emphasized federalism and the tradition of deference to the states and local governments in arenas such as land use law and prison oversight. *See supra* note 120 (listing letters). None of these concerns ever made it into the record, either through written or oral testimony or inclusion of letters in the record.

185. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

act?¹⁸⁶

3. What does that body of law require? What is the policy goal?

4. How would this federal law affect state law? This is a question that needs to be asked in several different ways. Obviously, how *much* it will affect state law is relevant,¹⁸⁷ but so is the question of how it will *operate* to affect state law.¹⁸⁸ Is the law directly regulating the states in their sovereign lawmaking capacities, like RLUIPA, or is it incidentally affecting the states in other roles, for example, as market participants, like the Drivers Privacy Protection Act?¹⁸⁹ Is the law heavy-handed or respectful, more than is necessary to achieve the federal government's goals or on target?

5. Who will be affected by this law, including citizens, state and local officials and lawmakers, beyond those lobbying for the law? For example, how will zoning hearing boards have to alter their existing procedures to adapt to the federal mandate in RLUIPA, which requires it to consider whether the ordinance is based on a compelling interest, and even more likely to torque the process significantly, whether the ordinance is the least restrictive means for achieving the compelling interest for this religious landowner? Or, how will neighbors be affected?

These could have been history-changing questions had they been asked in Congress of RFRA, RLPA, or RLUIPA. The obsessive focus of all three enactments was on the claimed needs of the religious entities and their requests to disable generally applicable laws. Once the spotlight moved from the religious entities to the states, the local governments, and other citizens, the laws' full impact could have been more accurately envisioned and assessed, both by the members and by those who would have lobbied against it had they fully understood the impact beyond merely serving religious entities.

6. For a law under Section 5 of the Fourteenth Amendment, if the record is thin on state constitutional violations, why is that?¹⁹⁰ Are there indicia of unconstitutional conduct not yet investigated? Or, as in the disability and age discrimination contexts, are the states themselves forbidding the unconstitutional conduct and therefore unlikely to be violating such norms themselves?

7. If the states are already regulating in the same arena, are the federal efforts largely duplicative and therefore unworthy of further congressional attention?¹⁹¹

8. If the states are already regulating in the same arena, and the law is not simply duplicative, do the states have lessons for Congress?

9. Do state legislators and law enforcement authorities have insights into the law that would help Congress meet the policy need without violating the limits of federalism? While this last question is not mandated by the Court's federalism jurisprudence, it is logically implied, and it is a path to increasing both efficiency in the process and effectiveness of a law.

To be sure, this action plan for Congress is more deliberative than active. What it

186. See *Garrett*, 531 U.S. at 356; *Kimel*, 528 U.S. at 62; *Boerne*, 521 U.S. at 507; *Printz v. United States*, 521 U.S. 898 (1997); *Lopez*, 514 U.S. at 549.

187. See *Boerne*, 521 U.S. at 507; *Lopez*, 514 U.S. at 549.

188. See *Printz*, 521 U.S. at 898.

189. See *Reno v. Condon*, 528 U.S. 141 (2000).

190. See, generally *Garrett*, 531 U.S. at 356; *Kimel*, 528 U.S. at 62; *Boerne*, 521 U.S. at 507.

191. See, e.g., *Garrett*, 531 U.S. at 368 n.5, 374 n.9; *Kimel*, 528 U.S. at 91-92.

shows is that the Court's federalism cases have not just limited Congress's latitude, but rather created the potential for better deliberations in Congress. Once the legislative inquiry incorporates recognition of state law, interests, and policy, the chokehold of interest groups can be lessened at least to the point that Congress has a horizon more likely to encompass the public good. In the dynamic of intergovernment respect, a Congress more attentive and respectful of state efforts also could have the salutary effect of making state actors more devoted to state interests (as opposed to individual political ends). The attorneys general and the governors have tended to shy away from the major federalism challenges, for example, in the *Boerne* and *Garrett* cases before the Court—despite the negative impact of the law on the state law and policy—because it may not be in their political interest to offend either the members of Congress or national interest groups.¹⁹²

Political elites, including academics and journalists, have been seemingly united against federalism, making it a less than attractive goal for the state politicians to embrace. With the wedge of the federalism jurisprudence, and a Congress more respectful of the states' role in the constitutional scheme, these state leaders might be more willing to identify themselves with state initiatives and laws, and might even take a more public stand against federal laws that will overtake their state laws and policies. While it is no panacea and certainly will not affect those circumstances where Congress seeks to appease an interest group as it expects the courts to invalidate, the Supreme Court has given the states an opportunity to be respected and not necessarily subservient in the congressional process.

The constitutional regime is subverted when state actors are discouraged from criticizing federal representatives and federal law, because there is no effective means of limiting their encroachments. When the Supreme Court steps in to interpret the Constitution's relative delegations of power to the Congress and the states, it empowers the states not just by invalidating federal encroachments but also by giving the states standing in the never-ending fight over the power to govern. As a result, the benefits to Congress are not even the best benefit gained by limiting Congress's agenda to truly national topics. A benefit also lies in empowering the states as political actors and representatives of the people.

V. CONCLUSION

Think about the laws Congress has either invalidated or limited under its federalism jurisprudence. Just for a moment, still the rant of disapproval that hounds the Court's federalism cases to date. The Gun-Free School Zones Act—a law any local or state government would add to its preexisting criminal laws if its current laws were not adequately protecting children in schools.¹⁹³ The Brady Bill—a law commandeering

192. Hamilton, *Federalism Enforced*, *supra* note 14, at 1080 (stating “State officials today may rail against Washington or national politicians, but that railing is calculated to appeal to a broad (translate ‘national’) audience, not to further state interest. . . . [S]tate officials have sacrificed state interest for personal gain[.]” and are hounded by “the same lobbies that hound the federal government,” *id.* at 1079; and also discussing why, “[a]s an intellectual and as a constitutional matter, the role of the representative is quite different from the role of the politician,” *id.*).

193. *See* 18 U.S.C. § 922(q) (2002); *see also* *United States v. Lopez*, 514 U.S. 549 (1995)

local officials to serve the federal government, regardless of the states' policies, laws, or means.¹⁹⁴ The so-called Religious Freedom Restoration Act—the law everyone loved, and the impact of which no one understood.¹⁹⁵ The Americans with Disabilities Act as applied to the states—a law that duplicated what the states could and did ban themselves.¹⁹⁶ The Age Discrimination in Employment Act as applied to the states—another civil right the states were willing to protect and a law that enforced a principle that is not constitutionally protected.¹⁹⁷ Finally, the Violence Against Women Act, a law which attempted to redress the inadequacy of state law enforcement by making the perpetrator pay the victim.¹⁹⁸ Solely from the perspective of the public good, the invalidation of these laws left the public no farther from the public good than where it started. The states either had (or would soon have) equivalent legal protections or were easily capable of providing the same protections once the Washington lobbyists moved out of town into the states and persuaded the states their agendas were worthy.

The federalism cases have created a class of worried elites—in the universities, in Washington, in the Congress. The reigning question is what to do about this wayward Court that is banking on all the wrong entities—the fifty states. The answer is to let Congress come back to earth and to watch closely how congressional lawmaking changes when state interests must be respected. When the sky does not fall, and when congressional lawmaking is relieved of having to serve every local, state, and national interest simultaneously, Congress may no longer be castigating the Court, but rather thanking it. The states may find new resolve to defend state sovereignty. And the people may find themselves better served by the two sovereigns whose realms they occupy simultaneously.

(holding that Congress exceeded its powers under the Commerce Clause as Act had nothing to do with commerce or economic activity, and thus the Act was invalid).

194. *See* 18 U.S.C. § 922 (2002); *see also* *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress violated constitutional principles of dual sovereignty and separation of powers through the Act which mandated that state and local law enforcement officers conduct background checks on handgun purchasers, distinguishing between commandeering the states and placing conditions on the grant of federal benefits; Congress could not circumvent the prohibition against compelling states to enact or enforce a federal regulatory program by conscripting the states' officers directly, and thus the Act was invalid).

195. *See* 42 U.S.C. § 2000bb (2002); *see also* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Section 5 of the Fourteenth Amendment did not give Congress the authority to enact RFRA and thus Act was invalid).

196. *See* 42 U.S.C. §§ 12111-12117 (2002); *see also* *Garrett*, 531 U.S. 356 (holding that Congress did not validly abrogate the states' sovereign immunity from suit by private individuals under Section 5 of the Fourteenth Amendment, and thus the Act was invalid).

197. *See* 29 U.S.C. §§ 621-634 (2002); *see also* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that Congress did not validly abrogate states' sovereign immunity from suit by private individuals under Section 5 of the Fourteenth Amendment, and thus the Act was invalid).

198. *See* 42 U.S.C.S. § 13981 (Law Co-op 1997 & Supp. 2002); *see also* *United States v. Morrison*, 529 U.S. 598 (2000) (holding that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment gave Congress the authority to enact the Act because the statute governed the conduct of private individuals instead of harm caused by the state and was outside of Congress's remedial power, and thus the Act was invalid).

APPENDIX

RLPA TESTIMONY ON LAND USE

Land Use Decisions Found Unconstitutional	<ol style="list-style-type: none"> 1. Churches not permitted as a matter of right anywhere without special permit is unconstitutional (<i>Love Church v. City of Evanston</i>, 896 F.3d 1082 (7th Cir. 1990), discussed <i>supra</i> note 154). 2. Increase in traffic not a sufficient basis (<i>Orthodox Minhan v. Cheltenham Township Zoning Hearing Bd.</i>, 552 A.2d 772 (Pa. Commw. Ct. 1989), discussed <i>supra</i> note 139 and accompanying text).
Allegations that Facts Show an Unconstitutional Action	<ol style="list-style-type: none"> 1. Brigham Young study (safety and traffic are pretext) (<i>Supra</i> text accompanying note 140). 2. Mayor said “we don’t want any spics in this town.” (<i>Mauck Testimony, supra</i> note 141).
Court Does Not Find Constitutional Violation	<ol style="list-style-type: none"> 1. Corp. of Presiding Bishops. v. Bd. of Comm’rs of City of Forest Hills (discussed in <i>Keetch Testimony, supra</i> note 144). 2. Used generally applicable and neutral test from <i>Smith</i> to find that city’s Education and Religious Use zones were constitutional (Corp. of Presiding Bishops. v. Bd. of Comm’rs of City of Forest Hills (discussed in <i>Keetch Testimony, supra</i> note 144)).
Typical Zoning Issues Applied to Churches	<ol style="list-style-type: none"> 1. Occupancy in Arapahoe County, Colorado (<i>See</i> 1999 H.R. 106-219, discussed <i>supra</i> note 151; <i>Chopko Testimony, supra</i> note 147). 2. Operational hours in Colorado proposed restricting hours church could operate, same way county restricts commercial operation (<i>Cf. Anderson v. Douglas County</i>, 4 F.3d 574 (8th Cir. 1993), discussed <i>supra</i> note 146). 3. Adjacent lots—locating in residential district is hard because church has to acquire several adjacent lots. (<i>Shoulson Testimony, supra</i> note 149) 4. Family Christian wanted to convert school to religious use (<i>Mauck Testimony, supra</i> note 150) 5. Distinction between tax generating and non-tax generating (<i>Stern Testimony, supra</i> note 152). 6. Rezoning is a legislative activity (<i>McFarland Testimony, supra</i> note 150, discussing <i>Ira Iglesia de la Biblia Abierta v. Banks</i>, 129 F.3d 899 (7th Cir. 1997)). 7. Have to hold the leasehold on property while church litigates (<i>Mauck Testimony, supra</i> note 154, discussing <i>Love Church</i>) 8. Presbyterian congregations report that they have experienced increase in contact with government requiring land use permits (<i>Supra</i> note 155 (Testimony of Giddings and Laycock)). 9. City can deny residential use for temple (<i>Supra</i> note 153 (Statement of Saperstein discussing <i>Hancock Park, California</i>)).
Private, Not Governmental Expression	<ol style="list-style-type: none"> 1. Anti-Semitic remark (<i>Shoulson Testimony, supra</i> note 156). 2. Neighbor wants to keep out Pentecostals (<i>Mauck Testimony, supra</i> note 157, discussing <i>Family Christian Fellowship v. City of Winnebago</i>, 151 Ill. App. 3d 616 (1986)). 3. Racial motivation (<i>Mauck Testimony, supra</i> notes 141, 158).

	<p>4. Racial motivation (<i>Stern Testimony</i>, <i>supra</i> note 158)</p> <p>5. Clifton, New Jersey denied permit to mosque (H.R. 106-219 n.111, 106th Cong. (2000)) (incorrectly crediting this anecdote to Marc Stern's testimony from March 1998)</p>
--	--