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HOW NOT TO CHALLENGE THE COURT

NEAL DEVINS*

Congress should have known better, so should the Clinton White House. By requiring a compelling justification for governmental conduct burdensome of religion and thereby “overturning” *Employment Division v. Smith*,¹ Congress and the White House—through the Religious Freedom Restoration Act (RFRA)²—backed the Court into a corner. Specifically, because RFRA called for “the most demanding test known to constitutional law,”³ Congress limited the Court’s role in defining the parameters of First Amendment religious liberty protections to clarifying ambiguous language in RFRA, rather than actually interpreting the Constitution. Adding insult to injury, lawmakers condemned the Court for its “disastrous,”⁴ “dastardly and unprovoked,”⁵ “devastating”⁶ “degradation,”⁷ if not “virtual[] eliminat[ion],”⁸ of religious liberty protections. For his part, President Clinton, invoked “the power of God,” and voiced his conviction that RFRA “was far more consistent with the intent of the Founders of this Nation than the [*Smith*] decision.”⁹

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1. 494 U.S. 872 (1990).

2. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

3. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2171 (1997).

4. 139 CONG. REC. H2359 (daily ed. May 11, 1993) (statement of Rep. Nadler); 137 CONG. REC. E2422 (daily ed. June 27, 1991) (statement of Rep. Solarz).

5. 137 CONG. REC. E2422 (daily ed. June 27, 1991) (statement of Rep. Solarz).

6. 139 CONG. REC. H2360 (daily ed. May 11, 1993) (statement of Rep. Schumer).

7. *Id.* at H2361 (statement of Rep. Orton).

8. *Id.* at H2359 (statement of Rep. Nadler).

9. President’s Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 PUB. PAPERS 2000 (Nov. 16, 1993).

City of Boerne v. Flores,¹⁰ invalidating RFRA, was the natural and inevitable result of these bad words. Citing *Marbury v. Madison*,¹¹ the Court in *Flores* declared that "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary."¹² Moreover, by telling Congress that "[o]ur 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,"¹³ the Court fought fire with fire.

Or did it? Notwithstanding its apparent equation of Court interpretations of the Constitution with the Constitution itself, *Flores* suggests that elected officials and interest groups may find less draconian outlets to vent their frustration with the Court. In particular, well aware that Congress—through its Fourteenth Amendment, Section 5 ("Section 5") enforcement power—may sometimes remedy unconstitutional state and federal action by "correcting" Court decisions, *Flores*'s chief, if not only, complaint with RFRA was that the statute operated as a naked power grab, transferring from the Court to Congress the power to define constitutional standards of review. In this way, *Flores* does little more than reaffirm the core holding of *Marbury v. Madison*, that is, judicial review is necessary to ensure that the Constitution not be "on a level with ordinary legislative acts . . . alterable when the legislature shall please to alter it."¹⁴ Indeed, unwilling to squelch future democratic challenges to *Smith*, *Flores* does not establish any meaningful rules governing the reaches and limits of Congress's power to "correct" Court decisions.¹⁵

Flores's fuzziness exemplifies the Rehnquist Court's increasing tendency to choose standards that allow for discretionary application instead of absolutist rules.¹⁶ When it comes to the bal-

10. 117 S. Ct. 2157 (1997).

11. 5 U.S. (1 Cranch) 137 (1803).

12. *Flores*, 117 S. Ct. at 2166.

13. *Id.* at 2172. Under this formalistic vision, "the Court will treat its precedents with the respect due them," *id.*, for each branch is obligated to "act within[] its sphere of power and responsibilities." *Id.* at 2171.

14. *Id.* at 2168 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

15. See *infra* notes 71-77 and accompanying text.

16. On this point, see generally Kathleen Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing the preference of the cur-

ance of powers, as I will argue here, standard-based decision making is appropriate.¹⁷ Inflexible rules prevent the branches from engaging in ongoing dialogues over the Constitution's meaning—dialogues that often result in more vibrant and durable constitutional interpretation. For this reason, the Court should have struck down RFRA. Rather than encourage dialogue over the meaning of the Constitution's religious liberty protection, RFRA sought to silence the Supreme Court.

Ironically, *Flores* is open to criticism on these very grounds. Despite its recognition that Congress can sometimes correct errant Supreme Court decisions,¹⁸ *Flores* props up an unworkable formalistic model. The Court, for example, never acknowledged that disagreement with its rulings by lawmakers, government officials, and interest groups often plays a pivotal and salutary role in defining constitutional values. Over time, however, *Flores*'s suggestion that the Court's constitutional interpretations are definitive and final will give way to those social and political forces that prompted RFRA's enactment in the first place. Time and again, the Court has bended in the face of sustained popular resistance to its decision making.¹⁹ In this way, the *Smith*-RFRA-*Flores* saga is simply the opening volley in what promises to be an ongoing and, ultimately, productive dialogue about the meaning of First Amendment religious liberty protections.

I. THE REALPOLITIK OF *CITY OF BOERNE V. FLORES*

In critical respects, *Flores* reads like a high school civics lesson. The Court began and ended its analysis with *Marbury v.*

rent Supreme Court for standards over rules). With regard to the 1996-97 term, see Cass Sunstein, *Supreme Caution: Once Again the High Court Takes Only Small Steps*, WASH. POST, July 6, 1997, at C1. In addition, see generally Neal Devins & Michael A. Fitts, *The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations*, 86 GEO. L.J. 351 (1997) (discussing the Rehnquist Court's dismissal of the line-item veto case for lack of standing).

17. For an analogous argument that the Court should delay resolution of separation-of-powers disputes and thereby encourage informal bargaining over the operation of structural divisions of authority, see Devins & Fitts, *supra* note 16, at 365-75.

18. See *Flores*, 117 S. Ct. at 2163.

19. See *infra* note 24 and accompanying text.

Madison, reminding Congress and the nation that, "[u]nder our Constitution . . . the 'powers of the legislature are defined and limited'"²⁰ and that the "courts retain the power . . . to determine if Congress has exceeded its authority."²¹ Without blinking, *Flores* derived from *Marbury* that Court decisions are sacrosanct and that Congress's role is limited to "mak[ing] its own informed judgment on the meaning and force of the Constitution . . . in the first instance," that is, before the Court has spoken.²² When the Court has acted, popular government's role in affecting constitutional change is limited to "the difficult and detailed amendment process."²³

This suggestion, of course, is nonsense. The historical record provides overwhelming evidence that other parts of government regularly challenge the Court's constitutional reasoning, and that the Court is influenced by these challenges as well as the broader social currents which surround it.²⁴ As Ruth Bader Ginsburg noted a year before her appointment to the Supreme Court, judges "play an interdependent part in our democracy. They do not alone shape legal doctrine[,] . . . they participate in a dialogue with other organs of government, and with the people as well."²⁵ More striking, Anthony Kennedy, in direct conflict with his opinion for the Court in *Flores*, told Congress at his confirmation hearing that they "would be fulfilling [their] duty" by limiting the effects of Supreme Court decisions that they believe are "wrong under the Constitution."²⁶

Kennedy's conflicted view of the relationship between Congress and the Court is not without explanation. *Flores* is em-

20. *Flores*, 117 S. Ct. at 2162 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)).

21. *Id.* at 2172.

22. *Id.* at 2171-72.

23. *Id.* at 2168.

24. For in depth analysis of influences that shape the court's constitutional interpretation see generally NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES* (1996); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* (1988); LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* (2d ed. 1996).

25. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

26. *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 223 (1987) (statement of Anthony Kennedy, Supreme Court nominee).

blematic of the Supreme Court's practice of depicting itself as having the final word on the Constitution's meaning when the Court feels especially challenged by the other branches. For instance, when *Marbury* declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"²⁷ Jeffersonians in Congress—through the threat of impeachment and the elimination of judgeships—sought to neuter the Federalist-dominated judiciary.²⁸ *Cooper v. Aaron*²⁹ is much the same. *Cooper's* claim that "the federal judiciary is supreme in the exposition of the law of the Constitution"³⁰ was made in the face of massive Southern resistance to *Brown v. Board of Education*,³¹ including Arkansas's enlistment of the national guard to deny African American schoolchildren access to Little Rock's Central High School.³² For the Rehnquist Court, *Planned Parenthood v. Casey*,³³ its 1992 decision reaffirming the "central holding" of *Roe v. Wade*,³⁴ nicely illustrates this phenomenon.³⁵

Decided in the midst of legislative deliberation on RFRA, *Casey* underscores the Court's belief that it must resist political challenges to its independence. Refusing to bend to the stated desires of the presidents who appointed them and overrule *Roe* "under political fire,"³⁶ Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter "call[ed] the contending sides of a national controversy to end their national division by accepting" the Court's decision in *Casey*.³⁷ Correspondingly, in acknowl-

27. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

28. See FISHER & DEVINS, *supra* note 24, at 25-35.

29. 358 U.S. 1 (1958).

30. *Id.* at 18.

31. 347 U.S. 483 (1954).

32. See FISHER & DEVINS, *supra* note 24, at 242-56.

33. 505 U.S. 833 (1992).

34. 410 U.S. 113 (1973).

35. *Casey*, 505 U.S. at 853.

36. *Id.* at 867.

37. *Id.* The *Casey* plurality waxed poetic suggesting that if the character and legitimacy of the Court suffered, then the character and legitimacy of our Nation would suffer because the American people's identity was "not readily separate from their understanding of the Court [as an institution] invested with the authority to decide their constitutional cases and speak before all others on constitutional ideals." *Id.* at 868.

edging that the Court lacked the power of the purse and sword and that its authority therefore resided "in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary,"³⁸ the *Casey* plurality concluded that a surrender to political pressure would result in "profound and unnecessary damage" both to the Court and to "the Nation's commitment to the rule of law."³⁹ In other words, as psychologists Tom Tyler and Gregory Mitchell observed, the Court seems to believe that "public acceptance of the Court's role as interpreter of the Constitution—that is, the public belief in the Court's institutional legitimacy—enhances public acceptance of controversial Court decisions."⁴⁰

Notwithstanding intense congressional, presidential, and religious interest and involvement in the abortion dispute, the lessons of *Casey* were lost on the drafters of RFRA. Profoundly upset by the Court's limitation of religious liberty protections to governmental conduct that targets religion, RFRA supporters failed to heed *Casey*'s implicit warning about the Court's sensitivity to political challenges to its authority. Instead, RFRA supporters invested no energy in casting their handiwork as anything but the de jure nullification of the Supreme Court's voice in religious liberty decision making. Making no meaningful attempt to reconcile RFRA's "compelling justification"⁴¹ standard with the Court's standards governing Congress's Section 5 enforcement power,⁴² RFRA's legislative history can only be

38. *Id.* at 865.

39. *Id.* at 869.

40. Tom R. Tyler & Gregory Mitchell, *Legitimacy and Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 1994 DUKE L.J. 703, 715.

41. 42 U.S.C. § 2000bb(a) (1994); see *infra* note 42.

42. It is unclear whether such a reconciliation is possible. For arguments that RFRA can be squared with Congress's enforcement power, see generally Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996). For arguments that it cannot, see generally Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994);

understood as a direct challenge to the Court's basic authority to say "what the law is."⁴³

Let me explain. RFRA, as an initial matter, must be understood against the backdrop of *Employment Division v. Smith*,⁴⁴ a decision that speaks more to the judicial role in overseeing democratic institutions than it does to the substantive meaning of religious liberty.⁴⁵ Proclaiming that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice,"⁴⁶ the *Smith* Court acknowledged that its test would place religious minorities at the mercy of the political process but that discriminatory treatment was an "unavoidable consequence of democratic government."⁴⁷ With that said, the Court seemed confident that religious interests would fare well in the political marketplace, noting that "[society] can be expected to be solicitous [of religious liberty] in its legislation" and citing, as "not surpris-

Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994); William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 1996 DUKE L.J. 291.

43. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). At oral arguments, Douglas Laycock defended RFRA by stating that the statute was "not such a dramatic power grab. The power of interpreting compelling interest remains in [the Supreme] Court." Transcript of Oral Argument, *City of Boerne v. Flores*, 117 S. Ct. 2157 (No. 95-2074), available in 1997 WL 87109, at *42 (Feb. 19, 1997) [hereinafter *Flores* Transcript]. Moreover, suggesting that in cases of purposeful discrimination "there are sometimes advantages to the litigant in proceeding under the free exercise claim," Laycock argued that, notwithstanding RFRA, the *Smith* doctrine was not a dead letter. *Id.* at *43. Although I doubt the correctness of these claims, RFRA can be understood as a frontal assault on the Court without disputing either of these claims. More than anything, my point is about the message that Congress sent the Court. Professor Laycock's oral argument, instead, reveals that Congress could have portrayed RFRA as something short of the overturning of *Smith*. See *infra* notes 64-69 and accompanying text.

44. 494 U.S. 872 (1990).

45. See *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 372-95 (1992) [hereinafter *Hearings*] (statement of Prof. Ira C. Lupu); Joanne C. Brant, *Taking the Supreme Court at its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 6, 17 (1995).

46. *Smith*, 494 U.S. at 889 n.5. In this way RFRA's embrace of strict scrutiny review gave the Justices an instruction they literally could not handle.

47. *Id.* at 890.

ing," numerous religious-practice exemptions.⁴⁸

Smith's institutional concerns did not factor into RFRA's enactment. Rather than view decisions like *Smith* and *Casey* as emblematic of the Rehnquist Court's interest in both defining and defending its conception of the judicial role in government,⁴⁹ the RFRA lobby did little to hide its disdain for the Court. Immediately following the Court's decision in *Smith*, the litigation director for Concerned Women of America remarked that the same conservative Justices that "all the Christians were shouting 'hurray' about when Reagan picked them . . . were all the people who stabbed us in the back on this thing."⁵⁰ This highly personal, highly incendiary rhetoric typified much of Congress's consideration of RFRA.

Congressional hearings showcased representatives from an "unprecedented coalition" of religious and other interest groups.⁵¹ With few exceptions, congressional testimony followed this general format: an outline of the history of religious freedom in America; Supreme Court precedent for the application of the compelling interest standard in free exercise cases; a direct attack on the logic of *Smith* (almost universally condemning the Court's use of the word "luxury" to describe how the compelling interest requirement benefits religious liberty plaintiffs); a prediction about or description of decisions that may or did result from the *Smith* standard; and a demand for a return to the freedom our nation has always cherished.⁵² Very few of the witnesses challenged the legislation, and nearly all of the witnesses attacked *Smith*, often by demanding that Congress overturn the decision. Illustrative of the hearings were the comments of three

48. *Id.*

49. See also *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (declining "the invitation" of the Justice Department under President Bush to reconsider *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *United States v. Eichman*, 496 U.S. 310 (1990) (rejecting federal efforts to limit the effect of *Texas v. Johnson*, 491 U.S. 397 (1989), a decision prohibiting criminal prosecution of flag burning).

50. *High Court Urged to Reconsider*, WASH. POST, May 12, 1990, at C11.

51. 139 CONG. REC. H2357 (daily ed. May 11, 1993) (statement of Rep. Brooks).

52. See, e.g., *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong. 16-24 (1990) (statement of Rep. Solarz); *id.* at 30-37 (statement of Rev. Dean M. Kelley, Counselor on Religious Liberty, National Council of Churches).

members of the "Coalition for the Free Exercise of Religion": for Robert Dugan, Jr., representing the National Association of Evangelicals, *Smith* "deprived us of our birthright as Americans" and must be "overrule[d],"⁵³ for Dallin H. Oaks, from the Church of Jesus Christ of Latter-Day Saints (the Mormon Church), the statutory specification of a compelling interest standard was "a legitimate and a necessary response by the legislative branch to the degradation of religious freedom resulting from the *Smith* case,"⁵⁴ and for Oliver S. Thomas, general counsel of the Baptist Joint Committee on Public Affairs, *Smith* was the "Dred Scott of first amendment law."⁵⁵

Lawmakers read from a nearly identical script, routinely condemning *Smith* and calling upon their colleagues to reverse it.⁵⁶ Lawmakers and the White House also paid homage to RFRA's interest group sponsors, applauding the Coalition for the Free Exercise of Religion,⁵⁷ one of the broadest coalitions ever assembled to support a bill before Congress, for spanning "ideological and religious lines."⁵⁸ Correspondingly, with no meaningful interest group resistance, constitutional roadblocks were not placed in front of RFRA, and, as such, Congress barely touched upon the question of whether the Supreme Court would approve of RFRA. For example, Congress did not engage in the type of fact finding that would place RFRA within the ambit of the Court's, admittedly murky, Section 5 precedent. Congress did not make specific findings of fact "that formally neutral, generally applicable laws have historically been instruments of religious persecution, that enacting separate religious exemptions in every statute is not a workable means of protecting religious liber-

53. *Hearings*, *supra* note 45, at 10, 14 (statement of Mr. Dugan).

54. *Id.* at 25 (statement of Mr. Oaks).

55. *The Religious Freedom Restoration Act: Hearings on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong. 42 (1992) (statement of Mr. Thomas).

56. For a sampling of lawmaker comments, see *supra* notes 4-8 and accompanying text. Lawmakers, however, paid scant attention to the pre-*Smith* Court's failure to vigorously apply strict scrutiny review in religious liberty cases. See Eisgruber & Sager, *supra* note 42, at 495-97.

57. See 139 CONG. REC. S14362 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch).

58. President's Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 PUB. PAPERS 2000 (Nov. 16, 1993).

ty, and that litigation about governmental motives is not a workable means of protecting religious liberty."⁵⁹ Instead, Congress was content to do precisely what RFRA's interest group sponsors asked for, that is, repudiate *Smith* as inconsistent with the Framers' intent through legislation that would not protect neutral laws that burdened religion.⁶⁰

The Supreme Court had no choice but to view RFRA as a frontal assault on its authority. For starters, Congress's power to correct the Court through positive law invariably raises profound questions about the appropriate balance of authority between the judiciary and democratic government.⁶¹ These institutional concerns, moreover, figured prominently in *Smith*.⁶² RFRA's doctrinal context therefore sensitized the Court to judicial independence concerns.⁶³

With its antenna already up, the scope and legislative history of RFRA, quite appropriately, pushed the Court over the edge. In particular, RFRA's embrace of strict scrutiny review effectively limited the judicial role to the application of the statutory compelling justification test.⁶⁴ More significant, no matter how

59. See *Hearings*, *supra* note 45, at 331 (testimony of Prof. Douglas Laycock). Congress, of course, could have made these factual findings without pursuing these matters at legislative hearings. It did not, despite being advised that such fact finding would strengthen RFRA's constitutionality. See 42 U.S.C. §§ 2000bb(a)(1)-(4) (1994).

60. See 42 U.S.C. § 2000bb(a) (1994). Indeed, rather than reinstate the status quo at the time of *Smith*, RFRA provided for greater protection of religious liberty than the Court did at the time of *Smith* or, for that matter, any other time. See Eisgruber & Sager, *supra* note 42 at 445-52.

61. For a sampling of this literature, see Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993); Peter M. Shane, *Voting Rights and the "Statutory Constitution"*, LAW & CONTEMP. PROBS., Autumn 1993, at 243; Van Alstyne, *supra* note 42, at 291.

62. See *supra* notes 44-48 and accompanying text. The instrumental role played by religious interests in RFRA's enactment, moreover, lends credence to *Smith*'s conclusion that religious interests are well protected in the political marketplace. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

63. The fact that RFRA imposed huge costs on state and local governments by requiring them to satisfy strict review whenever their conduct burdened religion, added to this sensitivity. See Steven G. Calabresi, *A Constitutional Revolution*, WALL ST. J., July 10, 1997, at A14.

64. In responding to Douglas Laycock's claim that the Court preserves its "judicial independen[ce]" through its interpretation of RFRA, Chief Justice Rehnquist re-

its proponents dressed it, the legislative history of RFRA smelled, looked, and tasted like a populist abrogation of the judicial function.⁶⁵ The story of RFRA features accusations of judicial incompetence and insensitivity;⁶⁶ congressional hearings that, for the most part, operated as a special-interest lovefest;⁶⁷ repeated assertions that RFRA overturned, not supplemented, Supreme Court decision making;⁶⁸ and congressional disinterest in finding facts that would suggest RFRA corrected, rather than overruled, *Smith*.⁶⁹

The Court could not ignore this legislative history, especially when confronted with a statute as sweeping as RFRA.⁷⁰ Congress, the White House, and interest groups challenged the Court's credibility and authority. Put on the defensive, as it was in *Casey*, the Court used *Flores* to emphasize first principles and

marked "if we're faithful to our oaths we've got to say, we're looking at what Congress meant by this. . . . [T]hat's not nearly the same thing as having, as *Marbury* said, the final word on what the Constitution means." *Flores* Transcript, *supra* note 43, at *41. More precisely, because RFRA adopts "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 117 S. Ct. 2157, 2171 (1997), it is impossible for the Court to reinvigorate constitutionally-based religious liberty decision making by, for example, holding that *Smith* is constitutionally infirm.

65. No doubt, as RFRA's defenders' claim, floor debates did address the statute's constitutionality and congressional hearings featured some constitutional scholars, at least two of whom discussed the circumstances under which the Supreme Court might uphold RFRA. See Robin-Vergeer, *supra* note 42, at 608-12. It is also true that both the Senate and House Reports, despite acknowledging that the purpose of RFRA was to "overturn" *Smith*, concluded ipse dixit that RFRA was "a new statutory prohibition" that "[d]id not purport to legislate the standard of review to be applied" in constitutional litigation. S. REP. NO. 103-111, reprinted in 1993 U.S.C.C.A.N. 1892-1912, at 14 n.43, 19 (1993); accord H.R. REP. NO. 103-88, at 6-7, 14 (1993). Notwithstanding Congress's consideration of RFRA's constitutionality, there is very little in the statute's legislative history to signal to the Court that democratic government seriously considered the Court's decisions and its status as a coequal branch. See S. REP. NO. 103-111, at 5-7 (discussing *Smith* and its impact).

66. See *supra* notes 4-8 and accompanying text.

67. See S. REP. NO. 103-111, at 2 (listing the members of the pro-RFRA organizations that testified before the Committee).

68. See *id.* at 8-9, 12, 14.

69. See *supra* notes 59-60 and accompanying text.

70. It is also noteworthy that RFRA spawned countless law review articles, most of which challenged its constitutionality. Without overstating the importance of this scholarly "culture of expectations" to the Supreme Court's decision making, there is some reason to think that legal academics can have a conditioning influence on the Court. See Lawrence Marshall, *Intellectual Feasts and Intellectual Responsibility*, 84 NW. U. L. REV. 832, 842-50 (1990).

to lecture the nation on the importance of judicial independence to the "rule of law."

Flores, although decisive in its invalidation of RFRA, sheds little light on congressional authority to correct Supreme Court decisions.⁷¹ Concluding that Congress's Section 5 power is limited to "[l]egislation which deters or remedies constitutional violations,"⁷² but acknowledging that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern,"⁷³ *Flores* settled on an extraordinarily amorphous standard: Is there a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end?"⁷⁴ By choosing "[a]gainst [t]heories, [a]gainst [r]ules" and focusing "their attention only on what is necessary to decide" the case before them,⁷⁵ *Flores* allows the Court to pick and choose the Section 5 battles it will fight with Congress. Moreover, recognizing that "Congress must have wide latitude in determining"⁷⁶ whether its corrective legislation is, in fact, remedial, *Flores* acknowledged Congress's power to engage the Court in constitutional dialogues.⁷⁷

71. Similarly, although sensitive to "the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens," *City of Boerne v. Flores*, 117 S. Ct. 2157, 2159 (1997), *Flores* is of limited value to the ongoing debate about federalism-based limits on congressional action. See Stephen Gardbaum, *The Federalism Implications of Flores*, 39 WM. & MARY L. REV. 665 (1998); Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 WM. & MARY L. REV. 849 (1998).

72. *Flores*, 117 S. Ct. at 2163.

73. *Id.* at 2164.

74. *Id.* at 2163. RFRA is an easy case, even under this nebulous standard. Congress's objectives are patently nonremedial. "[RFRA] appears, instead, to attempt a substantive change in constitutional protections." *Id.* at 2170.

75. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 14 (1995); see also Sullivan, *supra* note 16, at 56-95 (discussing the current Supreme Court's preference for standards over rules).

76. *Flores*, 117 S. Ct. at 2164.

77. For example, nothing in *Flores* suggested that the Court will question the legality of Congress's repudiation of *City of Mobile v. Bolden*, 446 U.S. 55 (1980), in which the Court required proof of discriminatory intent as a basis for voting rights litigation. Recognizing, among other things, that the combination of at-large election schemes and racial block voting will disenfranchise racial minorities, Congress—as part of its 1982 amendments to the Voting Rights Act—concluded that the "intent test focuses on the wrong question and places an unacceptable burden upon plain-

Flores's recognition that Congress will, on occasion, correct the Court is quite consistent with its strong words about the judicial function. The Justices, for the most part, understand that they cannot definitively settle divisive political controversies.⁷⁸ To suggest otherwise, that is, for the Court to declare itself the "ultimate interpreter" of the Constitution, and mean it, is an obvious invitation to disaster. Court packing, court stripping, impeachment, and general disregard of unpopular decision making might well follow in the wake of a Court that sees its authority over the Constitution as second to none.⁷⁹ For this reason, although the Justices will, up to a point, suffer fools on the Hill, the Court must resist direct challenges to its institutional independence. Citations to *Marbury v. Madison*⁸⁰ and intimations of judicial supremacy in *Cooper v. Aaron*,⁸¹ the Nixon

tiffs in voting discrimination cases." S. REP. NO. 97-417, at 13 (1982). Despite similarities between voting rights legislation and RFRA (the explicit repudiation of a Court decision and the substitution of a legislatively crafted impact test for a judicially devised intent test), there are critical differences between the two measures. Unlike RFRA, which denies the judiciary a meaningful voice in religious freedom decision making, voting rights legislation has hardly quieted the Court's voice. Starting with *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court has issued several landmark voting rights decisions. The *Bolden* legislation, moreover, is part of an ongoing dialogue between the Court and Congress on voting rights. The 1982 amendments, for example, came in the wake of *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which upheld Congress's repudiation of Court-approved literacy tests. See Shane, *supra* note 61, at 260. It is also relevant that the 1982 voting rights reforms were not limited to the *Bolden* question and, as such, did more than simply challenge the Court. Finally, due to early opposition to the impact standard by both the Reagan administration and some of the Republican leadership, Congress and interest groups invested significant energy in addressing the constitutionality of the voting rights changes and, with it, developing an evidentiary record that, compared to RFRA at least, supported the need for corrective legislation. For a thumbnail sketch of the 1982 amendment's legislative history, see FISHER & DEVINS, *supra* note 24, at 274-88.

78. John Marshall's sequencing of the merits and jurisdiction in *Marbury* and Earl Warren's efforts at crafting a unanimous opinion in *Brown* by limiting the decision's scope are but two notable examples of Justices taking into account the political repercussions of unpopular decisions. See FISHER & DEVINS, *supra* note 24, at 25-35, 242-56.

79. See generally Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability* 84 VA. L. REV. (forthcoming 1998) (describing the negative consequences of exclusive judicial supremacy on constitutional interpretation).

80. 5 U.S. (1 Cranch) 137 (1803).

81. 358 U.S. 1, 18 (1958).

tapes case,⁸² and *Planned Parenthood v. Casey*⁸³ are classic examples of this phenomenon.

So is *Flores*. The Court protects its turf without forbidding subsequent entreaties. Moreover, because its proportionality test is so fluid, the Court can pay close attention to the circumstances surrounding future congressional invocations of Section 5. For a Court seeking to preserve its status in the government, *Flores* is an eminently sensible and predictable decision.

II. SHAPING CONSTITUTIONAL VALUES

Flores's balancing act is more than predictable. By defending its institutional authority while allowing for future populist challenges to its decision making, the Court in *Flores* recognized—albeit grudgingly—the centrality of vigorous interchanges between the Court, elected government, and the public in shaping constitutional values. RFRA, in contrast, was an outright repudiation of the judicial function. The Court, relegated to interpreting congressionally specified standards, no longer had a voice in defining the content of First Amendment religious liberty protections. Unlike mechanisms designed to prompt the Court to reconsider *Smith*, say, the appointment of Supreme Court nominees who may well disagree with the decision or the enactment of legislation exempting specific religious practices,⁸⁴ RFRA's slash and burn approach to dialogues between the Court and elected government promotes acrimony between the branches and little else.

RFRA's failings are about more than the technical preservation of three discrete branches of government. Judges and politi-

82. See *United States v. Nixon*, 418 U.S. 683, 703 (1974).

83. 505 U.S. 833 (1992).

84. For examples of narrowly focused congressional exemptions of religious practice, see National Defense Authorization Act for Fiscal Years 1988 and 1989 § 508, 10 U.S.C. § 774 (1994) (limiting reach of Supreme Court decision in *Goldman v. Weinberger*, 475 U.S. 503 (1986), by allowing members of armed services to wear an item of religious apparel on their uniform); American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C.A. § 1996a (West 1996) (limiting reach of *Smith* by exempting, from state and federal criminal prosecution, the ceremonial use of peyote by Indians). For examples of state exemptions of religious practice, see Neal Devins, *Fundamentalist Christian Educators v. State: An Inevitable Compromise*, 60 GEO. WASH. L. REV. 818 (1992).

cians sometimes react differently to social and political forces. Congress, for example, focuses its "energy mostly on the claims of large populous interests, or on the claims of the wealthy and the powerful, since that tends to be the best route to re-election."⁸⁵ Courts, in contrast, are less affected by these pressures, for judges possess life tenure.⁸⁶ Accordingly, because special interest group pressures affect courts and elected officials in different ways, a government-wide decision-making process encourages a full-ranging consideration of the costs and benefits of different policy outcomes. For this reason, both courts and elected officials should be activists in shaping government policy.

This politicization of constitutional discourse, while contributing to partisan value-laden constitutional analysis,⁸⁷ is better than the alternatives—legislative or judicial supremacy. Legislative supremacy, as *Flores* recognized, would blur the line separating the Constitution from ordinary laws.⁸⁸ Moreover, subject to the pressures of reelection, "legislatures are too likely to get caught up in the passions of the moment, be they flag burning, alleged communists in the State Department, or the need to really sock it to various types of criminal defendants."⁸⁹ For progressives and conservatives alike, lawmakers' propensity to do that which is politically expedient makes legislative supremacy unpalatable.

Judicial exclusivity, like legislative supremacy, creates more problems than it solves. "When technologies are changing rapidly, when facts or values are unclear and when democracy is in a state of moral flux, courts [with limited fact finding capacity and inability to respond quickly to changing circumstances] should recognize that they may not have the best or final answers."⁹⁰ Moreover, lacking the powers of purse and sword, as *Casey* rec-

85. Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 273 (1993).

86. See *id.* As to what judges maximize, see Richard Posner, *What Do Judges and Justices Maximize?*, 3 SUP. CT. ECON. REV. 1 (1993).

87. See LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF 3 (1996).

88. See *supra* notes 14-15 and accompanying text; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

89. Calabresi, *supra* note 85, at 272.

90. Sunstein, *supra* note 16, at C1; see also DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977) (discussing the expanded lawmaking function of the judiciary).

ognized, the Court's authority is necessarily tied to "the people's acceptance of the Judiciary."⁹¹ The Court is well aware of this; for example, in explaining the extraordinary importance of public opinion in its decision making, Justice Owen Roberts, whose alleged "switch in time" saved the *Lochner* Court from Roosevelt's Court-packing plan,⁹² acknowledged that "[l]ooking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country."⁹³ Popular acceptance of the Court then, cannot be divorced from social and political pressures. Otherwise, democratic institutions and the public at large will reject the Court and, in so doing, diminish its stature.⁹⁴

To be sure, those who believe that Congress is not "ideologically committed or institutionally suited to search for the meaning of constitutional values" may question the practicality of this dynamic decision-making model.⁹⁵ Populist constitutional interpretation, however, serves as an important foil for the Court. Ever since Thomas Jefferson declared the Alien and Sedition Act, which criminalized speech critical of the government, a constitutional "nullity" and pardoned everyone convicted under it,⁹⁶ the executive and legislative branches have limited the effects of Court rulings, more often than not by providing for greater individual rights protection than the judiciary.⁹⁷

91. *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

92. For a thoughtful, provocative treatment of the nexus between Court-packing and the Court's doctrinal transformation, see Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994).

93. OWEN J. ROBERTS, *THE COURT AND THE CONSTITUTION* 61 (1951).

94. See Devins & Fisher, *supra* note 79 (manuscript at 161, on file with author). For a competing perspective, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

95. Owen Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979); see also Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983) (arguing that lawmakers have little incentive to seriously consider constitutional questions). For an opposing view, see Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985) (arguing that Congress has the institutional capacity to interpret the Constitution).

96. See Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 11 *THE WRITINGS OF THOMAS JEFFERSON* 42-44 (Albert Ellery Bergh ed., 1904).

97. For an early defense of this claim, see Henry W. Edgerton, *The Incidence of Judicial Control over Congress*, 22 CORNELL L.Q. 299 (1937). For a more recent defense, see Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241 (1993).

Democratic attempts to limit *Smith* are much the same. "Given the breadth of support for RFRA both within and outside of Congress, it would be difficult to imagine a piece of congressional legislation that could more powerfully demonstrate a societal consensus concerning the meaning of a constitutional provision."⁹⁸ While RFRA went too far—taking this consensus and shoving it down the Justices' throats—a moderation of *Smith*'s cramped view of religious liberty may well be in order. Over time, as was true with legislative and executive challenges to the Alien and Sedition Act, the Court may conclude that *Smith* has been invalidated by "the court of history."⁹⁹

The prospect of the Court backing away from *Smith* in the face of popular resistance is anything but disquieting. "[O]ur ability to combine active democracy, constitutional principles, and judicial judgment"¹⁰⁰ rejects the notion of an ultimate constitutional interpreter in favor of a dynamic process. Contrary to suggestions that judicial supremacy is necessary to stave off "interpretive anarchy,"¹⁰¹ social and political forces outside the courts help make the Constitution more relevant, more vital. Bickel described the courts as engaged in a "continuing colloquy" with political institutions and society at large, a process in which constitutional principle is "evolved conversationally not perfected unilaterally."¹⁰²

Balance-of-powers disputes, in particular, are best resolved through this process of give-and-take between the branches. "[T]he success of a shift in formal powers from one branch or institution to another depends ultimately on how easily the other branches, as well as the public at large, may be able to respond through formal and informal venues to the change."¹⁰³ This repeat player aspect to separation-of-powers disputes dis-

98. Conkle, *supra* note 42, at 89.

99. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1967).

100. JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 167 (1984).

101. Alexander & Schauer, *supra* note 94, at 1379.

102. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 254 (1962).

103. Michael A. Fitts, *The Foibles of Formalism: Applying A Political "Transaction Cost" Analysis to Separation of Powers*, 47 CASE W. RES. L. REV. 1643, 1653-54 (1997).

tinguishes them from many traditional challenges because the branches are forced over time to react to and make accommodations with each other. For this reason, when it comes to Congress's Section 5 authority to correct the Supreme Court, there are great benefits to a fluid decision-making rule. *Flores* serves up such a rule¹⁰⁴ and, as such, facilitates constitutional dialogues between the courts and elected government.

Flores is far from perfect, however. In defending its institutional turf, the Court in *Flores* embraced a formalistic vision of the separation of powers. Through repeated citations to *Marbury*, the Court claimed that each branch must act "within its sphere of power and responsibilities"¹⁰⁵ and that "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary."¹⁰⁶ Moreover, concluding that the Court must resist "the political branches of the Government [when they] act against the backdrop of a judicial interpretation of the Constitution already issued,"¹⁰⁷ *Flores* sounds like a paean to judicial supremacy. To be sure, placed alongside *Flores*'s modest, indeterminate holding, this sweeping rhetoric seems, more than anything, a statement of the Court's sensitivity to those social and political forces which engulf it. Nonetheless, this formalistic rhetoric is disquieting. It suggests an institutional compartmentalization that is overly parochial, ultimately short-sighted, and factually inaccurate.

"There is a magnetic attraction to the notion of an ultimate constitutional interpreter," wrote Walter Murphy, "just as there is a magnetic pull of some passkey to constitutional interpretation that will, if properly turned, always open the door to truth, justice, and the American way."¹⁰⁸ But just as finality "is not the language of politics,"¹⁰⁹ constitutional decision making is a never-ending process. The ongoing struggle between the Court

104. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997).

105. *Id.* at 2171.

106. *Id.* at 2166. This suggestion, that *Marbury* supports judicial supremacy, is bogus. See FISHER & DEVINS, *supra* note 24, at 10-12, 17-18, 25-35.

107. *Flores*, 117 S. Ct. at 2172.

108. Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 417 (1986).

109. *Id.* (quoting Benjamin Disraeli).

and Congress over the meaning of religious liberty reveals this basic truth of our system of government. *Flores's* holding, if not its rhetoric, recognizes the necessity of this interactive process.

III. CONCLUSION: WHAT'S NEXT

Congress, the White House, and interest groups were justified in expressing their disagreement with *Smith*. Nevertheless, democratic challenges to *Smith* fell short. By repeatedly and unhesitatingly proclaiming their authority to "undo" Court efforts to limit First Amendment protections of governmental conduct that targeted religion, Congress and the White House sought to beat the Court into submission, but not to engage it in a dialogue about religious liberty protections. Although conversations between the courts and elected government can be sharp, even bitter, RFRA was not about conversations, and as such, *Flores* was as correct as it was inevitable.

From RFRA's ashes, a constructive conversation between the courts and democratic government may emerge.¹¹⁰ Admitting that the Justices had good reason to view RFRA as "encroaching on the Court's domain," lawmakers and interest groups are turning their attention to "more narrowly written laws."¹¹¹ For example, through its power of the purse, Congress can condition federal grants on state compliance with federal standards governing the protection of religious liberty.¹¹² Congress, moreover, could exempt specific religious practices from *Smith*, practices where the *Smith* standard cloaks pernicious discrimina-

110. The focus of this section is federal governmental challenges to *Smith*. States, of course, are not bound by *Flores's* Section 5 analysis and, under *Smith*, are free to exempt religious practices from state law.

111. Linda Greenhouse, *Laws Are Urged to Protect Religion*, N.Y. TIMES, July 15, 1997, at A15; see also T.R. Goldman, *Back in Congress' Court*, LEGAL TIMES, July 14, 1997, at 8 (discussing potential actions Congress may take in response to the *Flores* decision).

112. See Greenhouse, *supra* note 111, at A15. Congress made effective use of its spending powers in prompting recalcitrant Southern states to comply with nondiscrimination in education objectives. See GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 2-3 (1969). Between 1963 and 1968, for example, the percentage of black children in all-black schools in the South dropped from 98% to 25%. See GARY ORFIELD, *PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-1980* 5 (1983).

tion.¹¹³ Correspondingly, the executive may seek to expand religious liberty protections through its powers to interpret statutes, launch regulatory initiatives, and file briefs before the Supreme Court.¹¹⁴ Congress and the White House, finally, may use the appointments and confirmation process to put Justices sympathetic to the rights of religious minorities on the Court.

What Congress ought not to do is engage the Court in a dogfight over its authority to strike down RFRA. Claims made by Senators Edward Kennedy (D-Mass.) and Orrin Hatch (R-Utah), that "[w]e cannot take this no' [sic] from the Supreme Court,"¹¹⁵ and that the "Court has thrown down the gauntlet, and we intend to pick it up,"¹¹⁶ will incite, not engage, the Court. In contrast, by accepting *Flores*, lawmakers and interest groups may learn that the Court is willing to take part in a dialogue over both the reach of *Smith* and Congress's power to counteract the decision. Unlike RFRA, this dialogue may allow all parts of government and the public to come together in crafting a mutually acceptable understanding of religious liberty. Although such constitutional decision making may seem unprincipled, it appropriately reflects a system, like ours, in which courts do not guard constitutional rights alone. "Courts," as Justice Ginsburg rightly observed at her confirmation hearings, "share that profound responsibility with Congress, the [P]resident, the states, and the people."¹¹⁷

113. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997) (suggesting that Congress may utilize its Section 5 power when its focus is "the object or purpose" of state conduct). It is unclear whether, under *Flores*, Congress could extend RFRA-like protections throughout the federal government. For an argument that *Flores* is limited to Congress's power vis-à-vis the states, see Kent Greenawalt, *Why Now Is Not the Time for Constitutional Amendment: The Limited Reach of City of Boerne v. Flores*, 39 WM. & MARY L. REV. 689 (1998).

114. The Clinton White House, for example, issued guidelines protecting religious expression in the federal workplace. See Peter Baker, *Workplace Religion Policy Due*, WASH. POST, Aug. 14, 1997, at A1.

115. *Equal Time: The Supreme Court's Revocation of the Religious Freedom Restoration Act* (CNBC television broadcast, June 27, 1997), available in LEXIS, News Library, Script file (statement of Sen. Kennedy).

116. *Id.* (statement of Sen. Hatch).

117. Joan Biskupic, *Ginsburg Stresses Value of Incremental Change*, WASH. POST, July 21, 1993, at A6.