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JUDICIAL SUPREMACY AND THE SETTLEMENT FUNCTION

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In *City of Boerne v. Flores*,[1] the Supreme Court repeats the familiar proposition that it is the province and duty of the judiciary "to say what the law is."[2] But the Court also says that Congress has "the duty to make its own informed judgment" on the meaning of the Constitution.[3] The Religious Freedom Restoration Act (RFRA or the "Act")[4] thus exceeded Congress's power not because constitutional interpretation is outside the legislative function, but because the Act was based on an interpretation of the religion clauses that contradicted an existing judicial precedent.[5] Congress, in short, must defer to the Court's existing interpretations. The judiciary's power to interpret the Constitution is not exclusive, but it is, according to *Flores*, supreme as against the judgment of a coordinate branch of government.[6] It is supreme not only in the sense that the Court will give legal effect to its own precedent, but also in the sense that Congress breached a duty when it enacted a law based on its own contrary opinion about the meaning of the Constitution.[7]

Important aspects of this doctrine of judicial supremacy have been appearing in the case law with increasing frequency and clarity. Components of the doctrine are visible in cases constricting the political question doctrine[8] as well as in cases counter-

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1. 117 S. Ct. 2157 (1997).
2. *Id.* at 2172 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
3. *Id.* at 2171.
4. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).
5. *See Flores*, 117 S. Ct. at 2171-72.
6. *See id.*
7. *See id.* at 2172.
8. *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969) (involving a House of Representatives resolution that barred a representative from his seat).

manding Congress's judgments about the meaning of the Commerce Clause,[9] separation of powers,[10] and the Tenth Amendment.[11] Moreover, the sense of self-confidence and self-importance that underlies judicial supremacy can be seen in cases such as *Cooper v. Aaron*[12] and *Planned Parenthood v. Casey*,[13] which strongly disapprove of independent judgments on constitutional issues by state and local officials. *Flores* is the culmination of this series of assertions of power by the federal judiciary. As the Justices gradually have developed judicial supremacy as a fact of institutional life, some thoughtful legal scholars have begun to develop new justifications for it. In particular, the *Harvard Law Review* recently featured a tightly reasoned article, authored by Professors Alexander and Schauer, that defends judicial supremacy "without qualification."[14]

In this Essay, I intend to lay the *Flores* opinion against the Alexander and Schauer article. This comparison, I think, is instructive, albeit in rather perverse ways. Both the opinion and the article conclude that there is a congressional duty of deference,[15] but Alexander and Schauer's analysis demonstrates why the reasons given by the *Flores* Court are inadequate. Moreover, *Flores* helps to highlight flaws in Alexander and Schauer's analysis.

I. LEGISLATIVE DEFERENCE

Why, according to *Flores*, is Congress under a duty to defer to existing judicial interpretations of the religion clauses? Justice Kennedy's opinion develops the answer at length, but it can be

9. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (examining whether the Gun-Free School Zones Act of 1990 exceeded Congress's Commerce Clause authority).

10. *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983) (analyzing the constitutionality of the legislative veto in the Immigration and Nationality Act).

11. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (examining whether Congress can require states to provide for the disposal of waste generated within their borders).

12. 358 U.S. 1 (1958) (ordering the desegregation of Little Rock, Arkansas public schools).

13. 505 U.S. 833 (1992) (plurality opinion) (determining whether five Pennsylvania law provisions substantially burdened a woman's right to an abortion).

14. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).

15. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997); Alexander & Schauer, *supra* note 14, at 1387.

stated concisely: Congress has only enumerated powers, and its power under Section 5 of the Fourteenth Amendment ("Section 5")[16] is to enforce existing constitutional meaning, not to alter that meaning.[17] The Court finds evidence for this distinction in the Amendment's text,[18] in its history,[19] and in the case law that interprets the Amendment.[20] The source of Congress's duty, then, is the Constitution itself.

From one perspective, it is odd for the Court to labor so hard to show that the Fourteenth Amendment does not authorize Congress to alter the terms of the Fourteenth Amendment. Neither Congress, the Executive, nor the Court is authorized to change anything in the Constitution because the procedure for changing the Constitution is prescribed in Article V,[21] which does not authorize unilateral changes by any branch of government.[22] So by "change" or "alter" the Court must mean something short of amendment—perhaps the Court means the sort of change that can occur during the process called "interpretation." Put directly, then, the reasoning might seem to be that Section 5 authorizes Congress to enforce, but not to interpret, the provisions of the Fourteenth Amendment. If this is what the Court meant, then presumably RFRA would have been constitutional if Section 5 had said, "Congress shall have power to enforce *and interpret* the provisions of this amendment."

This, however, cannot be what the Court meant because, as I indicated at the outset, *Flores* plainly states that Congress "has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[23] Congress

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16. U.S. CONST. amend. XIV, § 5.
17. *See Flores*, 117 S. Ct. at 2164.
18. *See id.* at 2163-64.
19. *See id.* at 2164-67.
20. *See id.* at 2167-68.
21. U.S. CONST. art. V. To change the Constitution:
> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes as Part of this Constitution, when ratified by the Legislatures of three fourths of the Several States, or by Conventions in three fourths thereof. . . .

Id.
22. *See id.*
23. *Flores*, 117 S. Ct. at 2171.

thus is authorized to interpret the whole Constitution, including the Fourteenth Amendment. The Court's position, therefore, must be that the terms and history of Section 5 require that, *when interpreting* the terms of the Fourteenth Amendment, Congress defer to existing judicial precedents.

One of the many virtues of the Alexander and Schauer article is that it demonstrates why this explanation for legislative deference begs the question at issue. They write: "Even a written constitution explicitly specifying its authoritative interpreter would rest on a preconstitutional understanding about who should be the authoritative interpreter of *that* provision."[24] Thus, the force of the justification offered in *Flores* ultimately depends not on the meaning of "enforce" in Section 5 but on the Court's assumption that the judiciary is the authoritative interpreter of that word. For members of Congress who do not accept this assumption, the main argument in *Flores* offers no reason to defer to the Court's judgment that "enforce" means to interpret constitutional provisions consistently with existing legal precedent.[25] Certainly members could agree with the Court's constitutional analysis, but they could also in good faith reject that analysis. Indeed, they could reject that analysis even if it were based on much stronger reasons than those actually offered by the Court. Suppose that Section 5 had said, "Congress shall enforce the provisions of this amendment in accordance with applicable judicial precedent." If Congress believed that it should interpret Section 5, then Congress could conclude that "in accordance with" and "applicable" meant that it was free to ignore precedents that in its judgment were inapposite, outdated, or irrelevant. Given that the *Flores* Court's analysis is based on the single, rather cryptic word "enforce," Congress surely could interpret Section 5 so that it does not require legislative deference on the meaning of the rest of the Fourteenth Amendment.

To turn the matter around, consider again the hypothetical possibility that Section 5 specifically authorized Congress "to enforce *and interpret*" the provisions of the Amendment. Would the outcome of *Flores* have had to be different? Not on the Court's assumption that it was authorized to interpret the words

24. Alexander & Schauer, *supra* note 14, at 1369.
25. *See Flores*, 117 S. Ct. at 2172.

"enforce and interpret." The Court could have insisted that in context "to interpret" referred to circumstances where no applicable judicial precedents existed and thus did not include the power to interpret in a way that conflicted with judicial precedent. Although this possibility seems farfetched, recall that under the Court's working assumptions in *Flores*, Congress does have the power both to enforce and interpret the Fourteenth Amendment.[26] The addition of the word "interpret" only confirms these assumptions and need not change the conclusion that Congress's interpretive power must be exercised in accordance with existing precedents.

In fact, of course, neither Section 5 nor any other provision in the Constitution specifies an authoritative interpreter. As Alexander and Schauer note, under this circumstance "it is even clearer" that the document cannot settle whose interpretation is authoritative.[27] In short, the Court's interpretation of Section 5 as requiring Congress to defer to judicial precedents does not determine Congress's constitutional duties unless it can be demonstrated that Congress must defer to the Court's interpretation of Section 5.

In *Flores*, the Court makes no such demonstration. The closest it comes to arguing for what Alexander and Schauer call a "preconstitutional understanding"[28] is a brief paragraph at the end of the opinion. Immediately after acknowledging that congressional power includes constitutional interpretation, the majority states:

> 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.[29]

In this passage, the Court does suggest a reason for its assumption that the judiciary is the authoritative interpreter of Section 5. It says that "[o]ur national experience"—not constitutional

26. *See id.* at 2171.
27. Alexander & Schauer, *supra* note 14, at 1370.
28. *Id.* at 1369.
29. *Flores*, 117 S. Ct. at 2172.

meaning—supports the view that this division of responsibility will best preserve the Constitution.[30] The passage, however, is unsatisfactory in a number of ways. First, the Court offers no explanation for what it means by the word "best," so the historical claim is impossible to evaluate. Second, because the substance of the claim is only that preservation has worked best when "*each part* of the government" respects the Constitution and the determinations "of *the other* branches,"[31] the passage, unless it simply assumes the matter at issue, is consistent with judicial deference to legislative interpretations. It does not help to add that it is a judicial duty to say what the law is because the Court has just conceded that interpretation is also—and always has been—a part of the legislative function.

Even if these problems are ignored, Alexander and Schauer develop a third and decisive objection to justifications based on historical experience. They write: "[A] principle of historical reference would owe its political validity and its status as law to current acceptance . . . . The present, and not the past, decides whether the past is relevant."[32]

The Court meets this point only by implication, indeed, only in its use of the single word "preserved."[33] Because of this word, it is possible to read the passage as suggesting that we, today, should be convinced, because of our historical experience, that an extraconstitutional rule of legislative deference is desirable because this rule best stabilizes constitutional meaning. Thus, at the end of its opinion, the Court might be seen as refashioning its earlier argument that the Fourteenth Amendment denies Congress the power to alter the content of the Fourteenth Amendment. Now making a prudential and institutional argument, the Court can be viewed as claiming that its precedents must control when they are in conflict with a legislative interpretation because otherwise the meaning of the Constitution would change more than is desirable.

If persuasive, this argument provides a reason for members of Congress to defer to judicial precedents even if they do not ac-

30. *Id.*
31. *Id.* (emphasis added).
32. Alexander & Schauer, *supra* note 14, at 1370.
33. *Flores*, 117 S. Ct. at 2172.

cept the Court's assumption that it is the authoritative interpreter of Section 5. The argument would be stronger, of course, if it contained some indication of what kinds of changes or what rate of change is undesirable. Fortunately, the Alexander and Schauer article is an extended explanation of why change in announced constitutional meaning should be avoided. Not so fortunately, thinking about *Flores* makes clear that this explanation does not justify a rule of legislative deference.

II. LEGISLATIVE SUPREMACY

Alexander and Schauer argue that stability in the announced meaning of a law, including constitutional law, is desirable because the nature or purpose of law is "to settle authoritatively what is to be done."[34] No matter what the content of the law, the fact that a set of issues is settled allows people to coordinate their behavior and induces various kinds of cooperative behavior.[35] This "settlement function" cannot be served, they argue, unless a preconstitutional norm establishes a single, authorative interpreter among the various competitors.[36] They observe that one such possible norm is judicial supremacy, but they quickly add that "[t]his is not the only possible preconstitutional norm."[37] The chief alternative to judicial supremacy, according to Alexander and Schauer, is that "each official decide for herself what the Constitution requires."[38] The bulk of their remaining analysis shows that deference to judicial precedent is preferable to this "interpretive anarchy."[39]

Readers of *Flores* will immediately recognize that Alexander and Schauer's assertion that interpretive anarchy is the "chief alternative"[40] to judicial supremacy is questionable. RFRA is only the latest in a long history of congressional statutes that seek to substitute legislative judgments about the meaning of the Constitution for judicial interpretations.[41] Moreover, these

34. Alexander & Schauer, *supra* note 14, at 1371.
35. *See id.*
36. *See id.* at 1377.
37. *Id.*
38. *Id.*
39. *Id.* at 1379.
40. *Id.* at 1377.
41. Areas affected include: voting rights, equal protection, state sovereignty, the commerce power, and separation of powers. *See* LOUIS FISHER & NEAL DEVINS, PO-

congressional efforts often have been successful either as a practical or a formal matter. Indeed, some studies indicate that the Court very rarely has strayed for long from strong expressions of national political will about the meaning of the Constitution.[42]

Even so, interpretive anarchy may be, in some sense, a more important alternative to judicial supremacy than legislative supremacy. Nevertheless, as Alexander and Schauer briefly acknowledge,[43] an argument that judicial supremacy is preferable to interpretive anarchy is not an argument that judicial supremacy is preferable to legislative supremacy. At most, Alexander and Schauer establish that *some* authoritative interpretation of the Constitution is desirable. Consequently, despite their evident intention to discourage legislative challenges to judicial precedents, their argument is quite consistent with the conclusion that judges should defer to legislators at least some of the time. If in *Flores* the Court had accepted Congress's interpretation of the Free Exercise Clause, the meaning of that clause would have been settled, or at least so it would appear on the face of things.

If the Court had deferred to Congress, however, then Congress would have been free to legislate again, and the effective meaning of the Free Exercise Clause could be unsettled. "[S]hort-term majoritarian control," as Alexander and Schauer put it,[44] may be incompatible with the settlement function. Here again, however, *Flores* complicates the picture. After all, when Congress passed RFRA, it adopted the "compelling interest" test that the Court itself had announced in cases such as *Sherbert v. Verner*.[45] Congress enacted RFRA only because the Court had abandoned its own interpretation in favor of the doctrine of minimal justification enunciated in *Employment Division v. Smith*.[46] Indeed, during the interim period between *Smith* and *Flores*, the Court in *Church of the Lukumi Babalu Aye, Inc. v.*

LITICAL DYNAMICS OF CONSTITUTIONAL LAW 69-150, 229-80 (2d ed. 1996).

42. *See, e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

43. *See id.*; Alexander & Schauer, *supra* note 14, at 1377 n.80.

44. *Id.* at 1380; *see also id.* at 1376, 1377 n.80 (noting that the Constitution serves as a "stabilizing force" on fundamental issues but the authoritative interpretation of the Constitution need not be the Supreme Court's).

45. 374 U.S. 398 (1963).

46. 494 U.S. 872 (1990).

City of Hialeah[47] significantly modified this second doctrine by establishing a rather stringent motive test. If Congress now defers to the judiciary on the meaning of the Free Exercise Clause, the Court could change its interpretation yet again. Alexander and Schauer do acknowledge, of course, that the Court can alter its interpretations, but they assume that such variations will be relatively rare and benign—opportunities to correct occasional mistakes rather than threats to the settlement function of law.[48] Their analysis thus elides the relevant question, namely: Which institution, if assigned the role of authoritative interpreter, would be less likely to change its interpretations?

Like the *Flores* majority, Alexander and Schauer may think this question unimportant because as a matter of overwhelming historical evidence, the Court has been more likely than Congress to preserve constitutional meaning. If so, they, like the Court, provide no documentation. How anyone who has lived through a significant part of the modern period of tumultuous judicial creativity could treat the relative stability of judicial interpretations as self-evident is baffling.

The historical record demonstrates that the modern Supreme Court has changed the effective meaning of the Constitution repeatedly and dramatically.[49] The relative stability of judicial interpretations, therefore, cannot simply be assumed or inferred from idealizations of judicial conduct. The problem, however, is not merely that Alexander and Schauer ignore what is, in fact, a colorful judicial record of interpretive instability. The larger problem is that there are reasons to suspect that their "preconstitutional norm" of legislative deference[50] is a major cause of the chaotic doctrinal record of the modern Court. These reasons emerge from a closer examination of *Flores*.

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47. 508 U.S. 520 (1993).

48. *See* Alexander & Schauer, *supra* note 14, at 1377 n.80 (claiming that adherence to precedent makes courts less likely than the legislature or the executive to alter interpretations); *id.* at 1386 (characterizing judicial alterations as corrections).

49. *See* ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 6-26 (1989).

50. Alexander & Schauer, *supra* note 14, at 1377.

III. JUDICIAL SUPREMACY

When Congress passed RFRA, why did it enact an abandoned judicial doctrine into statutory language? Possibly, Congress agreed with the Justices who once had adopted the compelling interest test that this doctrine accurately reflected the values of the Free Exercise Clause. Nevertheless, it is odd that Congress did not modify the language more than it did. Even the addition of a "least restrictive means" requirement, which the Court describes as new,[51] was cribbed from other cases.[52] Perhaps the compelling interest test is a model not only of interpretive accuracy but also of statutory precision. But this is unlikely, given the history of variation and uncertainty in the judiciary's use of that doctrine until its abandonment.[53] A more likely possibility is that Congress utilized judicial language because members of Congress share the widespread public belief that responsibility for interpreting the Constitution is primarily judicial. They were, after all, expressing an opinion about *which* Court was right in interpreting the First Amendment, not claiming a fully independent legislative prerogative of interpretation. In this sense RFRA represented partial legislative deference to judicial precedent.

Even a partial commitment to the doctrine of judicial supremacy thus has consequences for the attitudes and behaviors of members of Congress. One consequence is that in carrying out their duties under Section 5, they will be inclined to use language taken from the case law. If Congress had been more deferential, it would have accepted the most current precedent as authoritative and thus presumably would have incorporated into its statute some combination of the rationality and motive tests. If members of Congress had not been deferential at all, they would have felt free to draft language wholly different from any version of the Court's doctrinal formulations.

Flores, therefore, raises the question whether a preconstitutional rule of legislative supremacy might produce

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

52. *See, e.g.*, Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

53. *See* Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 529-34 (1994).

statutes that served the settlement function more effectively than judicialized language. In the abstract, it is possible that Congress, if left entirely to its own devices, could use either vague language that allows for little predictability or specific language that allows for a high degree of predictability. We do know that the Court's constitutional doctrines, especially in the area of the religion clauses, are confusing, indeterminate, and manipulable.[54] Consequently, an unconstrained Congress conceivably might do better.

In fact, the circumstances of *Flores* suggest some common sense reasons for believing that statutes enacted under a doctrine of legislative supremacy would serve the settlement function better than doctrinal language does. To begin with the most obvious point, RFRA was proposed because *Smith* was enormously unpopular with large segments of the public. Moreover, an accountable body such as Congress presumably will, on average, be likely to reflect popular sentiments more faithfully than the relatively isolated Court. If an announced constitutional norm is popular, then it is probably safe to assume less pressure will exist to change it.

In fact, one reason for the doctrinal gyrations that have typified the modern Court's record is that many of its decisions have been politically unpopular.[55] Despite widespread assumptions about judicial supremacy, these controversial decisions have generated acute political pressures that have been brought to bear on the Court both formally—for example, through the confirmation process—and informally—for example, by street demonstrations.[56] Relative judicial isolation sometimes does enable judges to resist such pressures, but by separating constitutional meaning from public understanding and aspiration, it also creates an inherently unstable situation. It is perplexing that sophisticated legal scholars such as Alexander and Schauer seem to view legislative accountability ("short-term majoritarian control")[57] only as an impediment to interpretive stability. Political insulation can produce

54. *See, e.g.*, Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 150 (1991).

55. *See* ROBERT F. NAGEL, JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE 62-64, 71-80 (1994).

56. *See id.* at 27-43 (discussing confirmation hearings); *id.* at 45-59 (examining the impact of political protests on the Court).

57. Alexander & Schauer, *supra* note 14, at 1380.

circumstances likely to lead to interpretive revisions.

It is true that the doctrine of judicial supremacy could be extended to prevent not just congressional recalcitrance but all popular, nonprofessional disagreement with the Court's constitutional interpretations. Language in *Planned Parenthood v. Casey*[58] flirts with this view, and the Alexander and Schauer article also hints at this more radical position.[59] If this expanded version of judicial supremacy were accepted, then it might be thought that the Court's interpretations could depart from popular understandings and sentiments and still remain stable because virtually all political pressure to change those interpretations would be precluded. By almost any standard, this degree of judicial supremacy is deeply controversial. It is also unrealistic. Although the doctrine of judicial review is widely accepted, since *Marbury v. Madison*[60] it never has succeeded in preventing significant political resistance to the Court's pronouncements. No matter what articles in the *Harvard Law Review* urge, it is inconceivable that reverential attitudes toward the Court could grow so strong as to inhibit all significant political disagreement with its decisions.

Still, it is possible that the Justices themselves might believe that all, or most, political disagreement with their decisions is inappropriate. Presumably, Alexander and Schauer think that it would be desirable for members of the Court to adopt this view. Perhaps they think that the Justices, fortified by a proper understanding of the settlement function of constitutional law, will reject or ignore the political pressures that cannot be eliminated. Once again, however, *Flores* complicates the picture. The case demonstrates that even Justices who adopt the doctrine of judicial supremacy will be affected by political pressure in ways that undermine the settlement function.

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58. 505 U.S. 833 (1992) (plurality opinion).

59. *See id.* at 867 (stating that the Court's task in *Roe v. Wade*, 410 U.S. 113 (1973), had been to call "the contending sides of a national controversy to end their national division"); Alexander & Schauer, *supra* note 14, at 1386 (stating their opposition to "direct disregard by officials of Supreme Court opinions that are plainly 'good law,' in the sense of an overwhelming professional consensus"); *see also id.* at 1382-83 (discussing President Lincoln's decision not to defer to *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857)).

60. 5 U.S. (1 Cranch) 137 (1803).

In *Flores*, the Court did not ignore the political pressure manifested in RFRA. Convinced that this sort of disagreement is illegitimate, the Justices reacted to perceived defiance of their authority by significantly unsettling the case law interpreting Section 5.[61] Indeed, Congress's intention to disagree with the Court—a matter not even discussed in earlier Section 5 cases[62]—is now arguably the crucial consideration in defining the power "to enforce" in Section 5.[63] Litigators must now ponder what other civil rights statutes might have been intended to or designed to impose "substantive changes" in the level of constitutional protections established by the Court.

In the process of reacting to congressional defiance, the Justices also withdrew even further from their earlier interpretations of the Free Exercise Clause. The Court declared that RFRA was not "responsive to . . . unconstitutional behavior."[64] The Court viewed Congress's intentions as improper and therefore concluded that a constitutional standard, which it had previously decreed to be constitutionally required in most respects, was not even responsive to unconstitutional behavior.

I might be wrong to read *Flores* as establishing a new measure of congressional authority under Section 5 or as suggesting an even more restrictive level of protection for the free exercise of religion. The Court may subsequently construe *Flores* differently, but that is the point. In the meanwhile, constitutional meaning has been unsettled. I do think that an examination of a wide range of cases—in criminal procedure, school desegregation, abortion, free speech, and so on—shows that members of the Court often react to perceived disagreement by altering con-

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61. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966).

62. *See, e.g., id.*

63. The logic of *Flores* bears an uncanny resemblance to the logic of *Romer v. Evans*, 116 S. Ct. 1620 (1996), in which the Court found that the public's purpose in enacting the antigay rights initiative called Amendment 2 was illegitimate animosity. *See id.* at 1627. In *Romer*, the Court inferred this motivation from what it viewed as the otherwise inexplicable scope of the amendment. *See id.* at 1629. Similarly, in *Flores*, the Court found RFRA to be so "out of proportion to a supposed remedial or preventive object" that it could only be explained as an "attempt [at creating] a substantive change in constitutional protections." City of Boerne v. Flores, 117 S. Ct. 2157, 2170 (1997). In each case, the Court inferred from overbreadth a conclusion about impermissible motivation—animosity toward gays in the former, and disagreement with the Court in the latter.

64. *Flores*, 117 S. Ct. at 2170.

stitutional meaning.[65] This response is exactly what everyday experience would predict. Acceptance of a preconstitutional rule of judicial supremacy does not ensure that judges will concentrate on legal issues and ignore political pressures. On the contrary, such a rule produces a mind-set that is highly likely to react angrily to political disagreement.

To the extent that the Court uses constitutional interpretation as a club to punish what it sees as political recalcitrance, its interpretations are likely to become, at least for a while, even more unacceptable to the public at large. This, I think, is the history in a number of areas, including school busing and abortion.[66] In the end, of course, political pressures may die away as the public sees the costs of disagreement mount inexorably. But what the record shows is that in important instances the Court eventually yields to the pressures generated by its escalating interpretations.

When the Court yields, it does so in ways that maintain at least the appearance of consistency. This appearance, of course, is exactly what should be expected of judges who accept the rule of judicial supremacy as fundamental. But in denying or obscuring the nature of their own behavior, they tend to announce doctrines that are especially unlikely to serve the settlement function. For instance, in *Casey*, the Court emphatically denied that political pressure should affect its decisions on abortion and loudly reaffirmed the basic holding of *Roe v. Wade*.[67] A plurality of the Justices then jettisoned the notorious but clear trimester system and substituted an "excessive burden" test, the operational meaning of which can only be determined on a case-by-case basis.[68]

The seeds of this same sequence can already be located in the changing case law regarding Section 5. Suppose Congress reacts to *Flores* by enacting new civil rights laws that test the Court's will. Suppose further that the Court ratchets up the incipient doctrines in *Flores*, perhaps by requiring a closer and closer fit

65. *See* NAGEL, *supra* note 55, at 71-77.

66. *See id.* at 79-80.

67. *See* Planned Parenthood v. Casey, 505 U.S. 833, 868-69 (1992) (plurality opinion).

68. *Id.* at 873-79.

between the effects of the laws and the Court's precedents. This escalation would eventually invalidate laws that are now overwhelmingly viewed as important and useful. At that point, the Court would be likely to deflate *Flores* while insisting that nothing was changing. Motive inquiry, for example, is similar to the undue burden test in that it is *ad hoc* and would provide convenient cover for judicial retreat. As the school desegregation cases[69] show vividly, "illegitimate motive" is a standard that permits superficial stability in announced meaning but also allows extremely wide variations in operational meaning.[70]

The rule of judicial supremacy, in short, cannot be evaluated simply as a jurisprudential concept. If the rule is being recommended for use in the political system we actually have, then its likely psychological and institutional consequences must be considered. Those consequences may or may not be healthy on other grounds, but they seem rather clearly at odds with the settlement function of law.

IV. CONCLUSION

Alexander and Schauer demonstrate that the rule of judicial supremacy cannot be inferred from the Constitution, as the Court in *Flores* attempts to do. But their effort to deduce that rule from the settlement function of law is in turn undermined by *Flores*, which poses a question that Alexander and Schauer largely pass over. That question is: Why is judicial supremacy more likely than legislative supremacy to serve the settlement function? *Flores*, despite its own argument, suggests that a persuasive answer to this question is unlikely because it reminds us of the many ways that judicial supremacy operates in our political system to undermine stability and predictability.

Nevertheless, judicial supremacy may be superior to interpretive anarchy. Nothing in this Essay has dealt directly with that possibility. Moreover, it should be noted that jurists, such as those in the *Flores* majority, and scholars, such as Alexander and Schauer, may all believe at some level that there can be no

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69. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

70. *Cf. Brinkman*, 433 U.S. at 414 (noting that findings of discriminatory motive are problematic in "multimembered public bodies" such as school boards).

practical difference between legislative supremacy and interpretive anarchy. They may think that if Congress can challenge judicial authority, then there is no stopping point. When other political officials see that the national legislature can rightfully resist judicial precedent, all politicians will make the same claim. And according to the very argument I have made, in our political system no preconstitutional argument in favor only of legislative supremacy is likely to change that fact.

This point suggests to me that interpretive anarchy is the only available option. The inevitablity of anarchy seems to be implied because I can see no reason why the force of the argument would not also apply to judicial supremacy. Once Americans see that judges claim to be entitled to make interpretations that are authoritative, other officials inevitably will make the same claim on at least some issues some of the time. This dynamic suggests that we must always have had some significant amount of interpretive anarchy, and I think that we have.

It would follow that interpretive anarchy must not be as incompatible with stability and predictability as judges and scholars often assume. There are many reasons why this might be so.[71] As anyone who has successfully navigated a busy city sidewalk knows, social coordination is not only a matter of rules but also of unspoken assumptions and inarticulate experience. In very significant respects, the American constitutional system has been stable because history and culture have made many issues too clear to need words and too certain to permit disputes. Adjudication, along with preconstitutional beliefs about the authoritativeness of judicial interpretations, no doubt tends in some ways to reinforce this massive bedrock of common instinct and expectation. In other ways, though, constitutional litigation shatters this heritage. The exact relationships between legal rules and deeper cultural understandings present many fascinating questions. Neither the Constitution as written nor abstract jurisprudence will yield the answers.

71. *See* NAGEL, *supra* note 49, at 17-26.