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TWO VERSIONS OF JUDICIAL SUPREMACY

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The easiest way to defend the Religious Freedom Restoration Act's (RFRA)[1] constitutionality was to establish the "substantive" interpretation of Congress's power under Section 5 of the Fourteenth Amendment ("Section 5").[2] According to that interpretation, Congress's power to "enforce" the provisions of Section 1 includes the power to specify the substantive rights protected by the guarantees against abridgements of privileges and immunities, deprivations without due process, or denials of equal protection.[3] The substantive interpretation has its widely known difficulties,[4] but they were not the reasons the Court gave for rejecting the substantive interpretation. The Court invoked a strong principle of judicial supremacy instead: "Congress does not enforce a constitutional right by changing what the right is."[5]

The very use of the word *changing* signals the Court's commitment to its theory of judicial supremacy, for Congress can *change* a right only if its prior specification by the Supreme Court has controlling force. The Court offered few reasons indeed for its position. After using the drafting history of the Fourteenth Amendment to show that Congress insisted on the withdrawal of a proposal that would clearly have created a substantive power in Congress,[6] the Court argued that it had not relied

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1. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

2. *See* U.S. CONST. amend. XIV, § 5 (stating that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article").

3. *See id.* § 1.

4. For example, it is not obvious how it can accommodate the often-expressed desire to treat Supreme Court specifications of the rights guaranteed by Section 1 as a floor.

5. City of Boerne v. Flores, 117 S. Ct. 2157, 2164 (1997).

6. *See id.* at 2164-65. I put it in this awkward way because a congressional deci-

on the substantive interpretation in any of its prior cases.[7] To the extent that the Court offered reasons for rejecting the substantive interpretation, they were restatements of the principle of judicial supremacy, again using the language of change: "If Congress could define its own powers by *altering* the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, *unchangeable* by ordinary means.' . . . Shifting legislative majorities could *change* the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[8] But the word *change* gives what rhetoricians call a persuasive definition of Congress's power, not a reason for the Court's conclusion. Only the claim of judicial supremacy supports the use of that word.

The Court could have invoked a relatively narrow version of judicial supremacy to justify the result in *Flores*. One of the reasons the Court gave in *Employment Division v. Smith*[9] for rejecting the compelling state interest standard for neutral laws of general applicability that had an adverse impact on religious practice, was that the courts could not sensibly apply the standard.[10] Justice Scalia argued first that the compelling interest standard would have to be applied to every religious practice, not merely to those that were central to the believer's belief system.[11] Any effort to determine centrality would conflict with the fundamental religion clause principle that courts cannot assess

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sion to insist on withdrawing a proposal might be a stronger indication of congressional understanding than a simple refusal to enact the proposal. Justice Scalia did not join this portion of the Court's opinion. Nor did he explain why drafting history was irrelevant to the question in *Flores* but a minute scanning of *The Federalist Papers* was relevant to determining the implications of the Constitution's federalist structure. *See* Printz v. United States, 117 S. Ct. 2365, 2377 (1997). Two possibilities are that the particular drafting history was thought to be too obscure a guide to determining the understanding the ratifiers had of the Fourteenth Amendment's meaning, or that the discussion of *The Federalist Papers* in *Printz* was directed mainly at refuting the claim, made primarily by Justice Souter, that a careful reading of them established the constitutionality of the Brady Handgun Control Act. *See id.* at 2401-04 (Souter, J., dissenting).

7. *See Flores*, 117 S. Ct. at 2166-67.

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

9. 494 U.S. 872 (1990).

10. *See id.* at 886-87.

11. *See id.* at 886.

the merits of religious beliefs:[12] How could a court "contradict a believer's assertion that a particular act is 'central' to his personal faith?"[13] According to Justice Scalia, application of the compelling interest standard would require exemptions for religious believers from many laws

> ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.[14]

The Court concluded that "[t]he First Amendment's protection of religious liberty does not require this."[15] The consequences of taking the compelling interest standard seriously would be so severe that this standard cannot be an acceptable test to determine when the Constitution requires an exemption from a neutral law of general applicability.

The above passage can be read as follows.[16] The compelling interest standard is peculiarly inappropriate in the free exercise context. Invoking it actually threatens the values protected by the Free Exercise Clause because, in its practical implementation, the courts would inevitably inquire into issues like the centrality of particular religious beliefs. Drawing on a different area of law, one might say that the Court concluded that the compelling interest test did not provide a "judicially . . . manageable standard[] for resolving" claims that a neutral law of general applicability impermissibly burdened religious belief and prac-

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12. *See id.* at 887.

13. *Id.*

14. *Id.* at 888-89 (citations omitted).

15. *Id.*

16. I do not suggest that my reading is the only one possible. I should mention as well that, in the course of making his argument, Justice Scalia asserted—with no justification other than his own commitment to a highly formalist view of what legality requires—that "watering [the compelling interest standard] down here would subvert its rigor in the other fields where it is applied." *Id.* at 888.

tice.[17] In addition, one might say, Article III bars courts from enforcing constitutional norms when they lack such standards.

Consider RFRA in this light. The Court could have invalidated RFRA on the relatively narrow ground that Congress directed the courts to apply a standard that, according to this reading of *Smith*, courts of the sort created by Article III simply cannot apply.[18] Such a ruling would have used judicial review to defend the Article III courts themselves, which is a narrow ground on which to defend the practice.

Flores adopted a broader version of judicial supremacy. According to Justice Kennedy, "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[19] The exercise of that right and duty, he continued, explains "the presumption of validity" the Court gives to congressional statutes.[20] The Court's action in invalidating RFRA shows, however, that Congress's decisions *about* the limits of "its sphere of power and responsibilities" receive no deference.[21] The Court's analysis of RFRA's constitutionality proceeded entirely on the terms the Court itself set: Whether Section 5 of the Fourteenth Amendment gives Congress the power to do anything other than prescribe remedies, sometimes prophylactically, for violations of rights the Court independently defines, and, thus, whether RFRA could be justified as a remedial statute.[22]

The Court's version of judicial supremacy raises a number of questions. First, consider the incentives such an approach gives

17. Baker v. Carr, 369 U.S. 186, 217 (1962).

18. In conversations before the Court decided *Flores*, most scholars with whom I raised this issue thought that the Court could not seriously have meant that the compelling interest standard was unsuitable for judicial application. After all, they pointed out, the Court employed the standard in other contexts, such as equal protection and free speech. I note, however, that administering the compelling interest standard in those contexts might not impel the courts to inquiries equivalent to those into the centrality of particular religious beliefs, and so the use of the standard in those other contexts might not raise the peculiar problem the Court faces in the context of religious values.

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

20. *Id.* at 2172.

21. *Id.* at 2171.

22. *See id.* at 2164.

Congress when it considers legislation that might lie outside Congress's sphere of power and responsibilities. If the Court gives no deference to Congress's decisions about the limits of that sphere, then it gives members of Congress no incentive to deliberate seriously over the constitutional issue of the scope of congressional power.[23] The most members of Congress can do is predict what the Supreme Court will say their powers are, rather than attempt to determine for themselves how the Constitution defines their powers.

One obvious justification for the Court's approach is that Congress is self-interested when it defines the scope of its own power. Members of Congress have an interest in maximizing their own power by expanding their sphere of power and responsibilities. *Any* decision they make, no matter how fully deliberated, will be shaped, and perhaps distorted, by this self-interest. A rule giving their decisions some deference would endorse this self-interested behavior, but a rule denying deference has at least the potential to offset it.

Note, however, that this is an objection equally available to those who would question the Court's version of judicial supremacy. If members of Congress have an incentive to maximize the sphere of their power and responsibilities, then so do Supreme Court justices with respect to *their* sphere. For example, *Flores* exemplified the Court fully exercising its power-maximizing capacity.[24] If the Court was properly skeptical about Congress's

23. This is not to say that members of Congress *have* no incentives to do so, but only that the Court's rules give them no additional incentives beyond those they might already have. I discuss that possibility below.

24. One might even argue that the Court was *less* responsible about its exercise of power-maximizing capacity than Congress was. For example, in rejecting a proposed modification of RFRA to exempt prison rules from its coverage, Congress made a deliberate decision that the religious freedom interests it sought to promote were more important than the federalism and law enforcement interests raised by a number of state prison administrators. *See* Katya Lezin, *Life at Lorton: An Examinination of Prisoners' Rights at the District of Columbia Correctional Facilities*, 5 B.U. PUB. INT. L.J. 165, 179-180 (1996). Over 40 Senators thought the federalism and law enforcement claims were substantial enough to justify a limit on Congress's power-maximizing activity. In contrast, only Justice Breyer suggested, though he did not say that he would so hold, that the Court ought to have been more cautious in maximizing its power through a strong version of judicial supremacy. *See Flores*, 117 S. Ct. at 2186.

decisions defining the scope of its own sphere of power and responsibilities, then so should Congress and the citizenry be skeptical about the Court's decisions defining—and maximizing—the scope of *its* sphere of power and responsibilities.[25]

"But surely this cannot be right," a critic of this claim might reply. Someone has to define the scope of each institution's sphere of power and responsibilities. The skeptical position is that the only two candidates—Congress and the Courts—are self-interested: each has an incentive to maximize its own sphere. Then, however, we appear to have no ground for choosing who should prevail in circumstances where, by hypothesis, neither decision maker is disinterested.

There may be some grounds for making the choice, however. The most obvious justification is that one of the decision makers may have additional incentives that offset the power-maximizing incentive. The issue in *Flores* was whether Congress exceeded the powers granted it in the Constitution.[26] This is a classic question of federalism: Congressional action exercised beyond the limits of its granted powers intrudes on powers reserved by the Constitution to the states.[27] Consider, therefore, Herbert Wechsler's argument that the Constitution's structure gives members of Congress incentives to be responsive to the interests of state and local governments, including both their interests in matters of substance—what policies about public assistance

25. There is a common intuition that Congress cannot be trusted to protect either individual rights or federalism issues because of its self-interest. That, it is said, would be like setting the fox to guard the chicken coop. My point is that the Court is a fox too. Suppose we assume that the Court makes good faith efforts solely to enforce the limits the Constitution places on Congress. Even so, its interest in maximizing its power will induce it to err on the side of limiting Congress too much. Further, those who assume that the *Court* will act in good faith to enforce the Constitution seem, in this context, unwilling to assume that *Congress* will act in good faith. Somehow Congress's power-maximizing interests are thought, not simply to operate in conjunction with, but to displace, its good faith; I know of no reason to adopt that assumption with respect to Congress but not with respect to the courts.

26. *See Flores*, 117 S. Ct. at 2172.

27. This formulation elides the question of how one understands congressional action that violates the Constitution because it violates individual rights. My personal view is that it is best to understand federalism limits as internal constraints on the enumerated powers granted Congress, and individual rights limits as external constraints on congressional power. Nothing in what follows turns on this distinction, however.

ought to be pursued, and the like—and their interests *qua* governments.[28] It seems fair to say that no one today believes that Wechsler's arguments retain much force. But the most substantial recent exploration of this question, by Larry Kramer, seems to confirm that there is something in the deep structure of American politics—associated perhaps with the structure of our party system—that persistently generates congressional deference to the interests of state and local governments even in times of expanding national government power.[29] As a result, there do appear to be incentives operating on members of Congress that offset their power-maximizing incentives on issues of federalism, even though we may be unable to identify those incentives precisely.

In contrast, the only incentives operating on Supreme Court justices to offset *their* power-maximizing incentives are *strategic*: In particular circumstances, the justices might refrain from doing what one might—nonstrategically—think would maximize their power.[30] For example, they might refrain from holding a

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28. *See* 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).

29. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994). To say that Congress has deferred to state and local governments' interests is not to say, of course, that state and local governments have prevailed on every issue of concern to them. Deference does not mean abject surrender, after all, but only respectful consideration. Incentives to respect state and local governments' interests can exist even if alone they are insufficient to determine policy outcomes.

30. Of course, justices are interested in things like securing the respect of their communities of reference—the legal profession as a whole, the Federalist Society, the editorial page of the *Wall Street Journal*, or whatever. And they have an interest in understanding themselves to be principled people standing above the humdrum of daily politics. Finally, the justices, like members of Congress, want to see the policies they favor become law. None of this operates in any systematic way, however, and in particular, cannot systematically offset the power-maximizing interest. For example, some justices may want to reduce federal judicial power to supervise state criminal justice systems, while other justices may want to ensure that Congress has great authority to regulate the national economy, a policy that would reduce the courts' power to invalidate congressional legislation. Two points seem important here: First, justices can ensure that their preferred policy becomes law only by exercising *their* power; and second, although some justices may prefer some policies that reduce federal judicial power, others will prefer contrary policies, producing no systematic effects that operate on the level of preferred policies, thus leaving the incentive to maximize power as such unaffected.

statute unconstitutional because they are concerned about some forms of congressional retaliation. These strategic concerns, however, are not systematic, in that their force will vary depending on the circumstances, and sometimes indeed might *support* power-maximization by the Court.[31] The anticentralization incentives operating on Congress work in only one direction, and do so in every setting.[32] If this analysis is correct, then Congress has some incentives that operate systematically to limit its members' power-maximizing urges in federalism matters, but the Supreme Court does not have similar incentives that operate systematically to offset its power-maximizing urges with respect to Congress.[33] That alone might be reason enough to reject judicial supremacy over Congress on federalism questions.

Larry Alexander and Frederick Schauer offer another resolution to the problem of choosing between the Court and Congress as final decision maker with respect to the scope of each one's sphere of power and responsibilities.[34] Much of their argument

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31. For example, the justices might believe that the minority that lost in Congress on the issue before the Court was particularly well-positioned to support the Court on other issues. Other examples include: the phenomenon of the Court "remembering the future," as described by Alexander Bickel, *see* ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 100 (1978); Court action taken in response to legislators' affirmative desire to defer a contentious issue to judicial resolution, as described in Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35 (1993); and judicial constituency-building strategies that exploit political divisions in the legislature to seize opportunities for independent judicial action—which I believe is the best way of understanding the modern development of a law of gender discrimination.

32. Anticentralization incentives, however, might sometimes be insufficient to overcome the incentives in particular cases for congressional action that reduce the power of the states.

33. Of course, sometimes the Court's power-maximizing incentives might produce a coalition with the states against Congress, to maximize the Court's power vis-à-vis Congress, or with Congress against the states to maximize the power of the national government of which the Court is a part. But these are merely *examples* of the ways in which the Court's power-maximizing incentives might instantiate themselves, not examples of incentives that offset the Court's power-maximizing incentives. Other strategic considerations might influence the way in which the Court goes about maximizing its power. For example, it may need public and congressional support for its initiatives to succeed (just as Congress may need judicial support).

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

appears to support a version of judicial supremacy.[35] They appear—but only appear—to argue that the rule of law entails that public officials should regard the Supreme Court's interpretation of the Constitution as a reason for acting in accordance with that interpretation, even if the official's independent analysis of the Constitution leads the official to conclude that the Court's interpretation is erroneous: "[N]onjudicial officials are . . . obliged to subjugate their constitutional judgments to what they believe are the mistaken constitutional judgments of others."[36] The reason is that law must "settle authoritatively what is to be done."[37] Law coordinates behavior among people who disagree about what to do, and coordination is desirable because it allows people to conduct their affairs in a reasonably stable environment.[38] Law can coordinate behavior effectively only if people follow the authoritative decision maker's decision even though they would have arrived at a different decision were they to consider the same factors the decision maker did. Allowing public officials to act on a constitutional interpretation different from the one provided by the Supreme Court would introduce an undesirable degree of instability into this settlement function of law: The law can perform the settlement function successfully only if there is "a single authoritative interpreter to which others must defer."[39]

Alexander and Schauer appear to argue that the rule of law requires their version of judicial supremacy in order to ensure the stability necessary to guarantee that law's settlement func-

35. *See id.*

36. *Id.* at 1360 (converting statement of the argument with which they disagree into a positive assertion).

37. *Id.* at 1371.

38. Reasonable stability is all one can reasonably ask of law because there is the possibility that courts will overrule or otherwise change their prior decisions. Such changes, however, should only occur under conditions that do not reduce the degree of stability to the point where law can no longer coordinate behavior.

39. Alexander & Schauer, *supra* note 34, at 1377-78 n.80. Alexander and Schauer are not arguing merely that there must be a decision that, at any specified instant, is taken by all to be authoritative. Coordinated behavior of the sort promoted by the law's settlement function takes place over time, and the authoritative decision must remain so long enough to allow the question to be settled in ways that allow coordination.

tion will be performed acceptably.[40] But their argument actually supports a rather different conclusion. What they establish is that the rule of law requires that a legal system have a set of institutional arrangements sufficient to ensure that degree of stability necessary to guarantee that the law's settlement function will be performed acceptably.[41] At some points Alexander and Schauer recognize this, calling the question they address one of "good institutional design."[42] It may well be true that, as stated in their conclusion, "at times good institutional design requires norms that compel decisionmakers to defer to the judgments of others with which they disagree."[43] The question regarding judicial supremacy is, "who are the decision makers and who are the others?" One might think that questions about institutional design are fundamentally empirical, although, oddly, Alexander and Schauer say that their analysis "is neither empirical nor historical."[44]

Nothing in Alexander and Schauer's formal argument precludes the conclusion that "at times good institutional design requires norms that compel [Supreme Court justices] to defer to the judgments of [Congress] with which they disagree."[45] Rather, everything would seem to turn on the question of what a good institutional design is, a question that Alexander and Schauer address only in a long footnote.[46] Their argument begins by conceding that the single authoritative interpreter *could* be Congress.[47] Alexander and Schauer offer three reasons why the Supreme Court is preferable to Congress as the single au-

40. *See id.*

41. *See id.*

42. *See, e.g., id.* at 1387 (arguing that good institutional design sometimes requires norms that encourage deference).

43. *Id.*

44. *Id.* at 1369.

45. *Id.* at 1387.

46. *See id.* at 1377-78 n.80.

47. *See id.* Some of Alexander and Schauer's discussion gets off on the wrong foot by failing to differentiate between the behavior of legal institutions, which is what their analysis is really about, and the decision-making processes of individuals within those institutions. As long as the institutions ensure reasonably stable legal decisions, it is irrelevant to their analysis whether particular individuals think that they must defer to Supreme Court constitutional interpretations or arrive at their own independent judgments about what the Constitution means.

thoritative interpreter. One simply restates the issue: "[T]here is little reason to believe that a legislature or an executive is best situated to determine the contours of the constraints on its own power."[48] True enough, but equally true for the Supreme Court.

A second reason is that the settlement function requires stability "over time as well as across institutions," and that courts respect the principle of stare decisis but legislatures do not.[49] Yet, as Alexander and Schauer realize, the Supreme Court acknowledges its power to overrule its own precedents more readily in constitutional law than elsewhere.[50] That power weakens the claim that the Supreme Court is a uniquely stable source of authoritative decisions, particularly when it is coupled with the instabilities that randomly timed appointments to the Supreme Court introduce. In addition, Alexander and Schauer assert that legislatures and executives are less bound by principles of precedent.[51] That assertion may be true, although it probably underestimates the possibility that legislatures are regulated by norms that encourage maintaining the status quo.

In any event, the question for institutional design is not what *principles* govern the institutions, but what *practices* they engage in. Here, Alexander and Schauer's inattention to empirical questions seems particularly damaging to their argument. Legislative inertia is a powerful force in general, which means that once a legislative solution is reached, it is likely to persist for a reasonably long time. Of course, there are examples of short-term oscillations in legislative policy, but then, there are also examples of short-term oscillations in judicial doctrine.[52] Only an empirical investigation could tell us whether such oscillations, particularly on fundamental questions, are more common in courts or legislatures. Partly because of Congress's deference

48. *Id.* at 1378 n.80.

49. *Id.*

50. *See id.* at 1372-73 (discussing the Court's principles for overruling).

51. *See id.* at 1373-76.

52. Alexander and Schauer's discussion of stare decisis uses *Payne v. Tennessee*, 501 U.S. 808 (1991), as its source for the Court's constitutional stare decisis principles. *Payne*, however, overruled a decision the Court made only four years earlier, and that the Court had reaffirmed just two years before *Payne* was decided. *See Payne*, 501 U.S. at 817-30.

to the Supreme Court, we have relatively few examples of statutes addressing fundamental constitutional questions. My guess, however, is that any such statutes would have at least as long a shelf-life as the Supreme Court's constitutional decisions. I doubt, for example, that Congress would have revisited RFRA's fundamental principles within a few years. To pick a not-so-random number, would Congress have reconsidered RFRA within twelve years?[53]

Alexander and Schauer's third reason for preferring the Supreme Court to Congress as the single authoritative interpreter is that "constitutions are designed to guard against the excesses of majoritarian forces that influence legislatures and executives more than they influence courts."[54] Although I disagree with the comparative assertion here,[55] the important point in the present context is that this assertion provides an argument for preferring the Supreme Court to Congress with respect to resolving issues where there is a majoritarian difficulty. That, however, is not an apt description of the federalism issue on which the Court based its ruling in *Flores*.[56] At their most intense, federalism issues pit a majority constituted in one form—represented in the national legislature—against a majority constituted in another form—represented in the various state legislatures.[57]

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53. That is the period it took the Supreme Court to reconsider *Aguilar v. Felton*, 473 U.S. 402 (1985), which was overruled by *Agostini v. Felton*, 117 S. Ct. 1997 (1997). Congress might tinker at the edges if, for example, it believed that courts had inappropriately applied RFRA in cases involving prison rules. But, again, the Supreme Court tinkers at the edges of the doctrines it articulates. Indeed, in *Agostini* the Court said that it had tinkered so much with the principles articulated in *Aguilar* that it had itself undermined those principles. *Id.* at 2001.

54. Alexander & Schauer, *supra* note 34, at 1387.

55. I believe that majoritarian forces influence courts in a different way and on a somewhat different schedule from the way they influence legislatures and executives, but that majoritarian forces do not influence courts *less*.

56. Justice Stevens would have held RFRA unconstitutional as an establishment of religion. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997) (Stevens, J., concurring). That holding would implicate the antimajoritarian concerns Alexander and Schauer identify.

57. In less intense forms, federalism conflicts pit local majorities that in the aggregate are a national minority against a national majority. Whatever one might say about these conflicts, they cannot coherently be analyzed solely with reference to majoritarianism; what is at issue is precisely the specification of the jurisdiction within which a majority's views are to control. Ordinarily, we rarely have reason to

As I have noted, there may be a *self-interestedness difficulty* associated with national legislative action, but that is not a *majoritarian* difficulty: State legislators seeking to expand their power by limiting Congress's power are no less self-interested than members of Congress seeking to extend *their* power by limiting the power of state legislatures.

What, then, does "good institutional design" require from institutions to ensure the degree of stability needed to guarantee that law's settlement function will be performed acceptably across institutions and over time? It almost certainly does not *require* judicial supremacy in any strong form. As Jeremy Waldron has put it, what reason could we have to think that a rule requiring deference to the judgments of five people, who are replaced at random intervals, produces more stability than a rule requiring deference to the judgments of a majority of the House of Representatives and the Senate, ordinarily concurred in by the President?[58] If one is bothered by the (unrealistic) prospect of dramatic short-term shifts in a purely majoritarian system—in which power is divided among several institutions whose members are elected by majorities, or, sometimes, pluralities, and serve varying terms of office—consider the following rule of institutional design: The Supreme Court's interpretations of the Constitution's federalism requirements prevail in general, unless they are rejected by wide majorities in both houses of Congress. This rule rejects judicial supremacy in one area and to some extent, but there is no reason whatever to think that it fails to satisfy the requirements of the rule of law as Alexander and Schauer describe them. Under such a rule, of course, RFRA is constitutional.

We can deepen our understanding of Alexander and Schauer's argument by considering another possibility, more in the domain of political science than law.[59] The argument begins by noting

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think that majorities constituted in state legislatures actually disagree with Congress's actions. As in *Flores*, individual states and local governments assert general federalism interests, sometimes supported by amicus briefs filed by attorneys general from some other states. *See id.* at 2160.

58. *See* Jeremy Waldron, *Legislation, Authority, and Voting*, 84 GEO. L.J. 2185, 2187-88 (1996).

59. Again I note that I elide a question, here whether an analysis of incentives

the inaccuracy in saying, as Alexander and Schauer do, that the Supreme Court is the single authoritative decision maker that their account of the rule of law requires.[60] Of course, "the Supreme Court" is actually an institution, whose decision-making rule is that a majority of nine individual members prevails. In addition, the authoritativeness of the Court's decisions is often a matter of degree. On the most limited level, Alexander and Schauer themselves note that the Supreme Court has suggested that decisions made by a bare majority may be less authoritative than others.[61] To know what in a decision is authoritative, and to what degree, we have to know what distinctions the holding rationally would support, whether those distinctions will in fact be found sufficient to justify refusing to apply the decision in a later case, and the like. There may *be* a single authoritative decision maker nonetheless, but that decision maker is actually a complex set of institutions, not a reified Supreme Court.[62]

The more general idea is that *Flores*'s assertion of judicial supremacy is just that—an assertion. Alexander and Schauer's conceptual analysis establishes the need for an institution of authoritative decision making. Institutions, however, are complex patterns of regular behavior, not single individuals—as their example of the Supreme Court demonstrates—or even aggregates of individuals who happen to work in the same building. Whether the Court actually is supreme will be determined by a complex and extended process of interbranch interaction, and it is that interaction that constitutes the single, authoritative decision-making institution that Alexander and Schauer's rule of law requires.[63]

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properly lies in the legal domain.

60. *See* Alexander & Schauer, *supra* note 34, at 1377-78 n.80.

61. *See id.* at 1372 n.54 (citing 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1511 (1996)).

62. Alexander and Schauer acknowledge that their "argument . . . can accept all of these modifications and complications regarding the identity" of the single authoritative constitutional interpreter. *Id.* at 1377-78 n.80. It does so at the cost of denying their article's main rhetorical claim, the case for judicial supremacy.

63. Alexander and Schauer's analysis properly recognizes the need for a single, authoritative decision-making institution, but does not appear to recognize that the interaction between the Court and Congress can be the institution they seek. *See id.* at 1377.

Flores said that Congress may enforce only rights the courts identify.[64] What the courts identify as rights, however, may be influenced by how Congress acts.[65] Further, *Flores* itself said that Congress may act prophylactically: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . ."[66] Such legislation would be justified "to respond to . . . widespread and persisting deprivation of constitutional rights."[67] Congress, in turn, can establish such widespread deprivation of constitutional rights either by a legislative record showing such violations, or, by the Court's own judgment, presumably based on the Justices' sense that such violations do exist.[68] This leaves much room for Congress to act, albeit in a way more focused than RFRA. Finally, new appointees to the Court may have a different view both of the proper scope of judicial supremacy and of the substantive constitutional rights that Congress might attempt to enforce. The actual effects of *Flores*'s declaration of judicial supremacy will be determined not by legal doctrine or by preconstitutional presuppositions, but by the outcome of this extended process of interaction.[69]

Flores provides no real argument for its assertion of judicial supremacy. If, as I have claimed, scholars as accomplished as

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64. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2162-64 (1997).

65. Daniel Conkle argued, for example, that RFRA was unconstitutional, but that the fact that Congress expressed its views about what the Constitution means was a reason for the Court to reconsider *Smith*. *See* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 40 (1995).

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

67. *Id.* at 2167.

68. *See id.* at 2170 ("As a general matter it is for Congress to determine the method by which it will reach a decision."). The Court found the record compiled in the hearings on RFRA inadequate because the record did not focus on violations of free exercise rights using the Court's definition, which would invalidate "generally applicable laws passed because of religious bigotry." *Id.* at 2169. Rather Congress focused on "anecdotal evidence" regarding "laws of general applicability which place incidental burdens on religion," *id.*, but that do not violate the Constitution as the Court interpreted it in *Smith*.

69. *See generally* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) (describing constitutional interpretation as an "elaborate dialogue" among the three branches of government).

Alexander and Schauer do not provide one, then there may well be none. The interactive view of courts and other decision makers suggests, however, that the phenomenon of judicial supremacy does not exist either. Cases like *Flores* obviously have short-term effects on the rights Congress sought to protect in RFRA, but the Court's insistence on its primacy is unlikely to have long-term effects. We may end up living in a system with judicial supremacy, but only because we have decided to do so, not because the Constitution or the rule of law requires it.