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# Stare Decisis and the Constitution: Four Questions and Answers

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# STARE DECISIS AND THE CONSTITUTION: FOUR QUESTIONS AND ANSWERS

*Thomas Healy**

*This Article joins the growing debate about the relationship between stare decisis and the Constitution by addressing four important questions that have recently been raised: (1) Is stare decisis constitutionally required? (2) Is stare decisis constitutionally prohibited? (3) Can Congress abrogate stare decisis? (4) Should courts defer to the judgments of elected officials when deciding whether to adhere to precedent?*

*My answers to these questions (with some qualifications) are no, no, no, and sometimes. First, as I and several other writers have demonstrated, history does not support the claim that stare decisis is dictated by the Framers' understanding of "judicial power." Second, stare decisis does not conflict with the Supremacy Clause because the Constitution does not preclude judges from deferring to the reasonable constitutional interpretations of other governmental actors, which is what stare decisis amounts to. Third, Congress cannot abrogate stare decisis because doing so would interfere with the power of courts to choose the methodology by which they determine what the law is, which in turn would undermine their ability to justify their decisions as legitimate. And fourth, courts should defer to the views of elected officials when deciding whether a prior decision has generated significant reliance or rests on outdated facts, but only where those views are based on the superior factfinding capabilities of the other branches. Courts should also give serious weight to the thoughtful and considered judgment of elected officials that a prior decision was egregiously wrong. But courts should not defer to the views of elected officials when deciding whether a prior decision is practically unworkable or a remnant of abandoned doctrine because these are quintessentially legal questions that judges are best equipped to answer.*

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## INTRODUCTION

From the backwaters of jurisprudential theory, stare decisis has emerged as one of the most contested and interesting topics in constitutional law.[1] Ever since the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[2] legal scholars have paid increasing attention to the familiar and well-established practice of adhering to prior decisions.[3] And because *Casey* was a constitutional decision, much of that attention has focused on the relationship between stare decisis and constitutional interpretation. Some writers have argued that adherence to precedent is a constitutional requirement.[4] Others have suggested that it is *un*constitutional, at least when applied to constitutional decisions.[5] And some have argued that Congress has the power to decide when courts should follow stare decisis and when they should ignore it.[6]

The most recent line of inquiry—and the subject of this Symposium—is somewhat less grand than its predecessors. Assuming that the Constitution does not require absolute adherence to precedent,

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1 Lawrence Solum stole my opening line. In an earlier version of this Article, I had begun by stating that "stare decisis is a hot topic." I then came across a recent article by Solum that started with an almost identical statement. *See* Lawrence Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 155 (2006) ("Constitutional stare decisis is a hot topic."). Initially annoyed that I would have to rewrite my introduction, I then realized that at least I now had a citation to support my claim. So let me repeat that stare decisis is a hot topic, and if you don't believe me just ask Lawrence Solum.

2 505 U.S. 833 (1992).

3 Of the 130 articles on Westlaw with the words "stare decisis" in the title, 102 have appeared since *Casey* was decided, and fifty-six of those have appeared since the year 2000. These numbers are taken from a Westlaw search conducted on October 28, 2007.

4 *See* Anastasoff v. United States, 223 F.3d 898, 900 (8th Cir. 2000) (holding that stare decisis was implicit in the Framers' understanding of what it means to exercise "judicial power"), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 447–72 (2006) (same). *But see* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 91–106 (2001) (concluding that stare decisis is not dictated by the founding generation's understanding of "judicial power"); Thomas R. Lee & Lance S. Lehnhof, *The* Anastasoff *Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135, 166–68 (2001) (same); Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1101–13 (2003) (same).

5 *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994).

6 *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1569 (2000).

and assuming that it does not prohibit the application of stare decisis in constitutional cases, should the federal courts nonetheless defer to the judgment of elected officials when deciding whether to adhere to a prior interpretation of the Constitution? Put another way, if state legislatures, governors, Congress, or the President think a constitutional decision should be overturned, how much weight, if any, should the courts give to those views?

This is an entirely reasonable question to ask. Many scholars have criticized the Supreme Court in recent years for adopting an attitude of judicial supremacy in which the Court is the sole interpreter of the Constitution.[7] These critics argue that each branch of the government has a role to play in shaping constitutional meaning and that the judiciary should show greater deference to the constitutional interpretations of the other branches. If one accepts this argument, it would also seem reasonable for the courts to consider the judgments of the other branches[8] when deciding whether to adhere to a prior constitutional interpretation. After all, if the other branches are consulted in reaching the correct interpretation of the Constitution today, shouldn't they also be consulted in deciding whether yesterday's interpretation should stand?

The answer is yes and no. To the extent that the decision of whether to adhere to precedent turns on the underlying merits of the constitutional question, the answer is yes. One who believes in deferring to the constitutional judgments of the other branches in general should also believe in deferring to the other branches when reviewing the merits of a prior constitutional decision. But to the extent that the question of adherence turns on other factors—such as whether the prior decision is practically unworkable, has generated significant reliance, is a remnant of abandoned doctrine, or rests on outdated

7 *See, e.g.*, LARRY KRAMER, THE PEOPLE THEMSELVES 227–48 (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 6–32 (2001); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1092–93, 1106 (2001); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 302–19 (2002); Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1273–78 (2001); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1718–27 (2002); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2707–10 (2003).

8 I will use the term "other branches" to refer broadly to Congress and the President, as well as state legislators and governors. I will also sometimes use the term "elected officials."

facts—the answer is less clear.[9] It is plausible to defer to elected officials in analyzing some of these factors. But there are some factors the courts are best equipped to analyze on their own. And even where deference is plausible, there are additional concerns that may argue against it. For instance, a willingness to defer to the stare decisis judgments of elected officials may invite defiance of federal court decisions. In addition, repeated deference to the stare decisis views of the other branches could result in a series of overrulings, which might undermine the legitimacy of the courts and confidence in the rule of law.

To fully appreciate these issues, it is necessary to fill in some background. I will therefore begin in Part I by exploring in more detail the recent debates over stare decisis[10] and constitutional interpretation. Specifically, I will consider (a) whether stare decisis is constitutionally required, (b) whether it is unconstitutional when applied in constitutional cases, and (c) whether Congress can abrogate stare decisis and order the federal courts to decide cases without giving controlling weight to prior decisions.

In Part II, I will address the question on the table. I will begin by describing several possible models of stare decisis and explaining which model most accurately describes judicial practice in this country. I will then discuss the factors that are relevant to overruling precedent under that model of stare decisis and consider whether courts should defer to elected officials when analyzing any of these factors.

In Part III, I will explore two additional considerations. First, I will consider whether deference to elected officials on matters of stare decisis would invite defiance of court decisions, and if so, whether we should worry about that. Second, I will consider the effect that deference might have on courts' legitimacy and the country's confidence in the rule of law.

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9 This is not to suggest that these factors are completely unrelated to the underlying merits. If a prior decision is practically unworkable, that may be a reason for concluding that it was wrong on the merits. *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 657–58 (1999). But in the stare decisis context, these factors can also have relevance apart from the merits. For instance, a judge might refuse to overturn a precedent she thinks is wrong because it is not practically unworkable.

10 Unless otherwise noted, my use of the term "stare decisis" refers to the obligation of courts to follow their own prior decisions, which is often referred to as horizontal stare decisis. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2024–25 (1994). This should be distinguished from the obligation of lower courts to follow the decisions of higher courts, which is often referred to as vertical stare decisis. *See id.* at 2025.

## I. THE STARE DECISIS DEBATES

Debates about the role of precedent are as old as precedent itself. Justinian objected to judges consulting past decisions because he thought it undermined his power to make law.[11] Sir Edward Coke invoked the authority of precedent in the *Case of Prohibitions* to limit the King's power to decide cases.[12] And Mansfield and Blackstone clashed over the weight of prior decisions in the famous case of *Perrin v. Blake*.[13]

Until recently, however, stare decisis was not an especially controversial topic in this country.[14] Its emergence as a point of contention can be traced to two developments. First, and most obviously, is the Court's decision in *Casey*,[15] which reaffirmed the right to abortion first recognized in *Roe v. Wade*.[16] Although the authors of the *Casey* plurality opinion embraced the principles underlying *Roe*,[17] critics attacked their reliance on stare decisis to bolster their judgment. If the Justices thought *Roe* was wrong—and many critics assume they did[18]—they should not have felt obligated to follow it. Instead, they should have followed their own best understanding of the Constitution and overruled *Roe*.

The second development is the debate over citation rules in the federal circuit courts. Several decades ago, the circuit courts began to issue opinions that are not published in the Federal Reporter.[19] Many circuits also adopted rules denying precedential effect to these opinions and prohibiting litigants from citing them.[20] Judges defended

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11 *See* CARLETON KEMP ALLEN, LAW IN THE MAKING 172–73 (7th ed. 1964).

12 *See* JOHN HOSTETTLER, SIR EDWARD COKE 62–71 (1997).

13 (1769) 1 Black. W. 671, 673, 96 Eng. Rep. 392, 394 (K.B.); *see* DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED 135–40 (1989).

14 *See supra* note 3.

15 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868–78 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

16 410 U.S. 113, 158–64 (1973).

17 *Casey*, 505 U.S. at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.").

18 *See, e.g.*, Michael Stokes Paulsen, *The Worst Constitutional Opinion of All Time*, 78 NOTRE DAME L. REV. 995, 1028 (2003) (stating that the Justices in the *Casey* majority reaffirmed *Roe* "even though some of them undoubtedly believed both that *Roe* was wrong as a matter of constitutional law and that abortion is the taking of innocent human life"); Strang, *supra* note 4, at 422 (stating that *Casey* "declined to overrule *Roe v. Wade* largely on the basis of stare decisis").

19 *See* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 184 (1999).

20 *See* Healy, *supra* note 4, at 47.

these rules on the grounds that unpublished opinions do not break new ground and that the rules help courts deal with an overload of cases.[21] But many writers criticized the practice, arguing that unpublished opinions create a body of underground law that weakens predictability.[22] Some critics also argued that the practice is inconsistent with stare decisis because it permits courts to issue opinions that will not be binding in the future.[23]

The result of these developments has been an intense debate over the constitutional status of stare decisis and the role of precedent in constitutional cases. That debate has revolved around three main questions, all of which provide important background for the question at the heart of this Symposium. In this Part, I will briefly lay out each question and offer my thoughts on the correct answer.

### *A. Is Stare Decisis Required by the Constitution?*

The first question is whether courts are constitutionally required to follow precedent. The answer is important for this Article because if courts are required to follow precedent, the views of the other branches might be irrelevant.[24]

Several writers have argued that adherence to precedent is constitutionally required. In an article published two decades ago, Henry Monaghan suggested that the "principle of stare decisis inheres in the 'judicial power' of Article III."[25] Monaghan did not elaborate on this suggestion, but it was fleshed out twelve years later by the late Judge

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21 *See* Martin, *supra* note 19, at 190.

22 *See, e.g.*, Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 225 (1999) (stating that the practice creates a "vast underground body of law"); Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 247–56 (1998) (arguing that no-citation rules foster mistrust of the courts); Martha L. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 785–800 (1995) (arguing that unpublished opinions undermine stability and certainty).

23 *See* Anastasoff v. United States, 223 F.3d 898, 900–04 (8th Cir. 2000) (concluding that no-citation rules conflict with the constitutional obligation of courts to follow precedent), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000). The Judicial Conference recently approved, and the Supreme Court adopted, a rule requiring that circuit courts allow citations of unpublished opinions. *See* FED. R. APP. P. 32.1(a)(i).

24 Whether courts could still defer to the views of elected officials would depend on whether the Constitution requires absolute adherence to precedent or only presumptive adherence. *See infra* notes 57–66 and accompanying text.

25 Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754 (1988).

Richard Arnold. In an opinion striking down the Eighth Circuit's no-citation rules, Judge Arnold argued that stare decisis was such an integral feature of the common law that it was implicit in the Framers' understanding of what it means to exercise judicial power.[26] Therefore, when Article III vested the "judicial power" of the United States in the federal courts, it necessarily required them to follow precedent.[27]

Judge Arnold based his conclusion on a reading of history. He argued that in the late eighteenth century, stare decisis was regarded as "an immemorial custom, the way judging had always been carried out, part of the course of the law."[28] He also argued that the "duty of the courts to follow their prior decisions was understood to derive from the nature of the judicial power itself."[29] As support for these arguments, Judge Arnold cited a number of historical sources, including Blackstone's *Commentaries*, *Federalist No. 78*, James Kent, and Joseph Story.[30]

In an article published shortly after his opinion, I challenged Judge Arnold's historical claim on several grounds.[31] First, I argued that adherence to precedent is not an immemorial custom, but developed slowly over hundreds of years and was still unsettled even in eighteenth-century England.[32] Second, I argued that American adherence to precedent in the seventeenth and eighteenth centuries was especially weak.[33] Many colonial judges never recognized an obligation to follow precedent,[34] and post-revolutionary courts discarded numerous English and American precedents, a practice encouraged by such influential writers as James Kent.[35] Third, I argued that stare decisis did not derive from explicit theories about the nature of judicial power, but instead emerged out of a practice of following the past

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26 *See Anastasoff*, 223 F.3d at 900–04.

27 *See id.* at 904–05.

28 *Id.* at 900.

29 *Id.* at 903.

30 *See id.* at 900–04.

31 *See* Healy, *supra* note 4, at 50, 67–69, 78–91. Around the same time, Judge Arnold's claim was also challenged in an opinion by Ninth Circuit Judge Alex Kozinski. *See* Hart v. Massanari, 266 F.3d 1155, 1159–63 (9th Cir. 2001). Judge Kozinski's opinion was issued while my article was at the printers, so neither work cited the other. However, we reached similar conclusions based upon a review of the historical record.

32 *See* Healy, *supra* note 4, at 88.

33 *Id.* at 88–89.

34 *See id.* at 75–78.

35 *See id.* at 78–90.

for the sake of convenience and stability.[36] Fourth, I argued that when judges attempted to justify stare decisis, the theory they settled on—that past decisions were evidence of the law but not the law itself—was rooted in a natural law perspective at odds with the concept of binding precedent.[37] Fifth, I argued that the declaratory theory also limited the practical significance of precedent.[38] Because past decisions were only evidence of the law, judges felt free to ignore opinions not published in credible law reports.[39] English reports improved dramatically in the mid-eighteenth century, but credible law reports did not appear in America until the very end of the eighteenth century.[40] This helps to explain why American adherence to precedent gradually strengthened in the first half of the nineteenth century.[41]

Based on these arguments, I concluded that stare decisis is not dictated by the Framers' assumptions about the nature of judicial power.[42] I acknowledged that this conclusion is not indisputable.[43] There is evidence that some lawyers and judges in late eighteenth-century America thought courts were obligated to follow decisions they disagreed with.[44] William Cranch, the second reporter for the Supreme Court, argued that adherence to precedent was necessary to limit the power of judges.[45] Alexander Hamilton wrote in *Federalist No. 78* that in order "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."[46] But I argued that the bulk of the evidence cuts against Judge Arnold's claim and that it therefore does not satisfy a preponderance of the evidence test.[47]

Although several scholars have reached similar conclusions,[48] at least one has sided with Judge Arnold. In a recent article, Professor

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36 *Id.* at 88–89.

37 *See id.* at 67–68.

38 *Id.*

39 *See id.* at 50, 89.

40 *See id.* at 68–69, 74, 89.

41 *See id.* at 89.

42 *Id.* at 88–91.

43 *Id.* at 89.

44 *See id.* at 77–78, 85–86.

45 *See* William Cranch, *Preface* to 5 U.S. (1 Cranch) iii, iii–iv (William Cranch ed., 1804).

46 THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

47 *See* Healy, *supra* note 4, at 90–91.

48 *See* Lee & Lehnhof, *supra* note 4, at 166–68 (stating that stare decisis was in a state of flux at the time of the Founding and that it is unlikely the Framers intended

Lee Strang surveys the historical record and concludes that the founding generation did embrace the doctrine of stare decisis.[49] Strang relies largely on the same evidence cited in my article;[50] he simply interprets the historical facts differently and thus reaches a contrary conclusion. The only significant new evidence he offers is a recent study of the early Supreme Court's use of precedent.[51] The study shows that of the 706 cases decided by the Court from 1787 to 1813, 275 included "references to legal citations."[52] Strang argues that this study supports his claim, but it is much less helpful than he suggests. "References to legal citations" do not establish that the Supreme Court felt bound, even presumptively, by decisions it disagreed with. Moreover, the study itself shows that in more than sixty percent of the cases decided during this period the Supreme Court did not cite a single precedent.[53] It is true that the early Court resolved many issues of first impression,[54] and so there may have been few precedents worth citing. Nonetheless, the study's numbers hardly support the

to freeze the doctrine in place); Murphy, *supra* note 4, at 1101–13 (stating that there is insufficient evidence to conclude that the Framers embedded the doctrine of stare decisis in Article III, but arguing that they nonetheless expected courts to treat precedent as good evidence of the law and as presumptively binding); Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 803 (2004) (concluding that "the available historical materials are simply too few and too opaque to provide an authoritative answer regarding the Framers' views of the role of precedent in judicial decision making," but arguing that this does not establish the constitutionality of no-precedent rules).

49 *See* Strang, *supra* note 4, at 447–72.

50 *See id.* (discussing precedent in England, colonial America, and post-revolutionary America).

51 James F. Spriggs, II et al., The Political Development of a Norm Respecting Precedent in the American Judiciary 9–15 (Apr. 2004) (unpublished manuscript, on file with the Notre Dame Law Review).

52 *Id.* at 12.

53 The study also shows that although Supreme Court citation to common law precedents decreased dramatically after 1800, citations to its own precedent increased. *Id.* at 13–14. Strang suggests that this shift supports his claim that the early Supreme Court accepted the principle of stare decisis. *See* Strang, *supra* note 4, at 471. But again, citation to precedent itself does not show that the Court recognized an obligation to follow decisions it disagreed with. As Professor David Engdahl has argued, the early Supreme Court's citation of precedent "was a kind of shorthand, not an ascription of authoritativeness." David Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 502 n.225 (1991).

54 *See* Lee, *supra* note 9, at 649.

claim that stare decisis was so well established at the time of the Framing that it was implicit in the phrase "judicial power."[55]

As with many historical questions, it is doubtful we will ever reach consensus on whether stare decisis is dictated by the Framers' understanding of judicial power.[56] Even so, that does not preclude us from considering whether courts should defer to elected officials on matters of stare decisis. None of the writers who claim that stare decisis is constitutionally required suggest that the Framers thought precedent was absolutely binding. Judge Arnold conceded that judges can overrule prior decisions for reasons that are "convincingly clear,"[57] and Strang agrees that judges can depart from precedent for "significant reasons."[58] Nor would it be plausible to claim otherwise. Although there may be room for debate about the original understanding of judicial power, there is no evidence that the founding generation thought judges were absolutely bound by prior decisions. Even Blackstone, one of the most ardent supporters of stare decisis, wrote that judges can disregard precedents that are "flatly absurd or unjust" or "evidently contrary to reason."[59] American advocates of stare decisis also left room for overruling. William Cranch argued that judges could not depart from precedent "without strong reasons."[60] Thus, even if one is persuaded by Judge Arnold's historical claim, the most one can conclude is that judges are presumptively bound by prior decisions. As a result, they could still defer to elected officials when deciding whether that presumption has been overcome.

Before closing this subpart, let me add a final point. My debate with Judge Arnold focused on the original understanding of judicial power. As I have suggested previously, however, that is not the only basis for asserting that stare decisis is constitutionally required.[61] One might also argue that stare decisis is essential to the legitimacy of the

55 Even the study's authors do not assert that stare decisis was established by 1789. *See* Spriggs et al., *supra* note 51, at 4 (noting that stare decisis did not exist in early American history, but "developed and matured over the 18th and 19th centuries").

56 This is why I think exclusive reliance on original understanding is misguided. It is too easy to project our own assumptions onto the past while purporting to simply apply the Framers' understandings. Better to candidly acknowledge the role that "reasoned judgment" plays in constitutional adjudication than to pass off that adjudication as predetermined by historical facts. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

57 Anastasoff v. United States, 223 F.3d 898, 905 (8th Cir. 2000), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000).

58 Strang, *supra* note 4, at 447.

59 WILLIAM BLACKSTONE, 1 COMMENTARIES *70.

60 Cranch, *supra* note 45, at iii–iv.

61 *See* Healy, *supra* note 4, at 106.

courts and is therefore a de facto constitutional requirement.[62] In fact, I think this is the stronger argument. Although I do not believe that American courts had fully embraced stare decisis by 1789, they did so over the next half century and have followed the principle for more than 150 years.[63] This longstanding practice has likely created an expectation that courts will continue to adhere to precedent. And to the extent that their legitimacy now rides on this expectation, they may not be free to abandon the doctrine.[64]

Even if true, however, this conclusion would not preclude courts from deferring to the views of elected officials on matters of stare decisis. The legitimacy of the judiciary does not depend on absolute adherence to precedent. American courts have never embraced a rigid model of stare decisis, but have instead reserved the right to overrule precedent for special reasons.[65] This means there is still room for courts to consider the views of elected officials when deciding whether those reasons are present in a given case.[66]

### *B. Is Stare Decisis Prohibited by the Constitution?*

The second question is the exact opposite of the first: instead of being constitutionally required, is stare decisis *prohibited* by the Constitution?

Gary Lawson has argued that it is, at least in constitutional cases.[67] His argument is straightforward and goes like this: the Constitution is the supreme law of the land and trumps all conflicting law.[68] Stare decisis requires courts to follow precedent even if it conflicts

62 *See* Monaghan, *supra* note 25, at 752–53.

63 *See* Healy, *supra* note 4, at 87 ("The American commitment to stare decisis gradually strengthened during the nineteenth century, due mainly to the emergence of reliable law reports and a positivist conception of law.").

64 *See id.* at 106.

65 *See id.* at 88 ("American courts never adopted the nineteenth century English rule that precedents are absolutely binding in all circumstances. They instead reserved the right to overrule decisions that were absurd or egregiously incorrect.").

66 As I explain *infra* Part III.B, however, deferring to elected officials on this question may threaten the judiciary's legitimacy in other ways.

67 *See* Lawson, *supra* note 5, at 24. Although Lawson says he believes his argument "is fully generalizable to cases involving statutory interpretation," he limits his claim "to the simpler setting of constitutional adjudication." *Id.* I will also limit my discussion to constitutional cases, although many of the arguments I make are applicable to statutory cases as well.

68 *See id.* at 25; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–78 (1803).

with the Constitution.[69] Therefore, it is unconstitutional to apply stare decisis in constitutional cases.[70]

Admittedly, there is a certain appeal to this argument. If a court cannot favor a law passed by Congress over the Constitution, how can it favor a judicial decision over the Constitution? As Lawson puts it: "If the Constitution is supreme law, it is supreme over all competing sources of law."[71] But there are two problems with his argument that, if not actually fatal, seriously weaken its force.[72]

1. Stare Decisis as a Form of Deference

First, the argument assumes that courts must always follow their own best understanding of the Constitution. Lawson acknowledges as much when he says that the "court's job is to figure out the true meaning of the Constitution, not the meaning ascribed to the Constitution by the legislative or executive departments."[73] Michael Paulsen makes

69 *See* Lawson, *supra* note 5, at 25–26.

70 *See id.* at 27–28. At least two other professors have openly embraced Lawson's argument. *See* Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 319 n.349 (1994). Professor Amy Coney Barrett has also argued that stare decisis is sometimes unconstitutional, but her argument is based on due process grounds, not Supremacy Clause grounds. *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1060–74 (2003). According to Barrett, an inflexible doctrine of stare decisis would violate due process by depriving litigants of a meaningful right to be heard on the merits of their claims. *See id.* at 1013, 1026–28. Because I do not advocate a rigid doctrine of stare decisis, I will not address Barrett's arguments in this Article.

71 Lawson, *supra* note 5, at 30.

72 Several scholars have criticized Lawson's claim on other grounds. *See, e.g.*, Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45, 50–51 (1994) (arguing that what constitutes "the Constitution" is a social and political question that cannot be answered by reference to the Constitution itself and that Lawson offers no reason for thinking that "the Constitution" consists of the words and original understanding of the founding generation but not precedent). *See generally* Akhil Reed Amar, *On Lawson on Precedent*, 17 HARV. J.L. & PUB. POL'Y 39 (1994) (describing four possible responses to Lawson's argument without committing to a final position); Charles Fried, *Reply to Lawson*, 17 HARV. J.L. PUB. POL'Y 35 (1994) (arguing that if the structure and background understanding of the Constitution can be used to shed light on its meaning there is no reason why precedent cannot also be used for this same purpose). I agree with these criticisms for the most part but think the critique I offer here is, in some ways, more obvious and straightforward.

73 Lawson, *supra* note 5, at 27. Lawson acknowledges in a footnote that "[t]his glib statement sidesteps the question whether the prior legislative or presidential determination of constitutionality is entitled to any deference—that is what *standard*

the same assumption, stating that courts are bound "to enforce and apply the Constitution (correctly interpreted) in preference to anything inconsistent with it."[74] But this is a highly debatable assumption. Many scholars have argued that courts should sometimes defer to the interpretations of the other branches even when those interpretations conflict with the courts' own best understanding of the Constitution.[75] Moreover, for a large part of our history the courts did precisely that, striking down actions of the other branches only when they clearly conflicted with the Constitution.[76] It is true that the Supreme Court has shown less deference to the other branches in recent years.[77] But this does not mean the courts are prohibited from showing deference. It simply means the Supreme Court has become more confident in its ability to correctly interpret the Constitution without input from the other branches—a development that has troubled many observers.[78]

This tradition of deference undermines the claim that stare decisis is unconstitutional. After all, stare decisis is a form of deference, albeit to earlier courts instead of Congress or the President. And if courts are permitted to defer to the constitutional judgments of the other branches, why can't they also defer to the constitutional judg-

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*of proof* a court should employ when deciding constitutional questions." *Id.* at 27 n.14. As will shortly become apparent, the question that Lawson sidesteps is key to my criticism of his claim.

74 Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005).

75 *See, e.g.*, Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 166 (2001) (arguing for a "minimal model of judicial review" where courts strike down the actions of the other branches "only where necessary"); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 126–27 (1993) (stating that "everyone would agree" that "it is sometimes appropriate for the courts to defer to the other branches"); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing that the courts should strike down laws only when Congress has made a "very clear" mistake in its interpretation of the Constitution).

76 *See* Kramer, *supra* note 75, at 119–24; Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 798–99 (1999). Judicial deference to the other branches is also reflected in the political question doctrine, which prohibits courts from exercising jurisdiction over cases presenting political questions. *See* Baker v. Carr, 369 U.S. 186, 209, 213–17 (1962). However, to the extent that the political question doctrine is constitutionally mandated, it may be distinguishable from examples of deference that are discretionary. *See* Barkow, *supra* note 7, at 246–63 (distinguishing between the constitutional and prudential aspects of the political question doctrine).

77 *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 868–71 (2005).

78 *See* sources cited *supra* note 7.

ments of earlier courts? Put another way, if the Constitution permits interbranch deference, why doesn't it also permit temporal deference?[79]

There are two possible responses to this argument. First, one might argue that the Constitution does *not* permit interbranch deference, in spite of the long and generally celebrated tradition to the contrary. Lawson himself may hold this position. In an article written with Christopher D. Moore, Lawson rejects the Thayerian view that courts should defer to the constitutional interpretations of the other branches unless clearly wrong.[80] Instead, he argues that courts have the power—and perhaps even the duty[81]—to decide cases based upon their own best judgment about the Constitution's meaning. In support of this conclusion, Lawson argues that Thayerian deference is inconsistent with (a) the postulate that all three branches are coequal; (b) the system of divided government; (c) the Anglo-American legal principle that a party should not judge its own cause; (d) the oath that judges and other officials take to uphold the Constitution; and (e) the judge's obligation to decide cases in accordance with governing law.[82] Lawson does offer one caveat to his position. If a judge believes that another official is more likely to determine the correct answer to a legal question, "the judge might well have a legal obligation to defer to the other actor's interpretation" as long as it is not clearly wrong.[83] But Lawson says this kind of deference, which he refers to as "epistemological deference," is justified by the judge's obligation to arrive at correct legal conclusions.[84] And he distinguishes it from "legal defer-

79 Akhil Reed Amar has made a related, though somewhat different, point. Noting that Lawson has not challenged vertical stare decisis (the requirement that lower courts follow the prior decisions of higher courts), Amar suggests that there may be little difference between a lower court being bound by a higher court and a later court being bound by an earlier court. Amar, *supra* note 72, at 42. In Amar's words, "If you buy the idea of vertical hierarchy, why not temporal hierarchy?" *Id.*

80 *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1274–79 (1996).

81 I say "perhaps" because it is not clear whether Lawson is arguing simply that deference is not required or is making the broader claim that deference is prohibited. His discussion is framed as a response to the claim that deference is required. *See id.* at 1275 (stating that "many people still hold the view that the federal courts' power of constitutional interpretation is *constrained* by the actions of other departments"). But some of his statements suggest that he thinks deference is prohibited. *See id.* at 1276 ("A natural inference from [the postulate of coordinacy] is that each department must follow its own judgment as to the meaning of the Constitution.").

82 *Id.* at 1275–79.

83 *See id.* at 1279.

84 *See id.* at 1278–79.

ence," in which the views of another actor are considered authoritative simply because of that actor's status.[85]

To the extent that Lawson is simply attacking the position that courts are *required* to defer to the constitutional views of the other branches, his claim does not undermine my argument. I have not suggested that deference is required, only that if it is permissible to defer to the other branches it is also permissible to defer to earlier courts. To the extent that Lawson is saying courts are *prohibited* from deferring to the other branches (unless they have reason to think those branches are more likely to reach correct answers), his claim is unpersuasive. First, the postulate that all three branches are coequal may argue against a requirement of deference, but it does not support the claim that deference is prohibited. To be coequal means that one has the power to favor one's own judgment, not that one has an obligation always to do so. Second, the system of divided government does not mandate that courts always insist on their own interpretation of the Constitution. Divided government means that each branch has "the necessary constitutional means and personal motives to resist encroachments of the others,"[86] not that the branches must butt heads with each other at every possible turn. Third, the principle that a party should not judge its own cause may have deep roots, but to invoke it as a *constitutional* limit on deference is a stretch. It would also suggest that federal courts cannot rule on their own jurisdiction or on issues of federalism, since in any dispute between states and the federal government they are institutionally aligned with the latter.[87] Fourth, the oath may indeed limit the extent of deference that is permissible. But as I argue below, it permits much more deference than Lawson would allow.[88] And finally, although it is true that judges must decide cases in accordance with governing law, there is no reason they must rely exclusively on their own judgment about what the law is. If a legal question does not have a clear answer (and the kinds of questions decided by courts rarely do), a judge does not violate her duty to

85 *See id.* at 1278. In an article published while this Article was being edited, Lawson altered his definition of "legal deference." He now uses the term "to mean deference that is commanded by some authoritative legal source," such as the deference that judges owe acquittals by criminal juries under the Double Jeopardy Clause. Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 9 & n.32 (2007).

86 THE FEDERALIST NO. 51 (James Madison), *supra* note 46, at 349.

87 *See* Healy, *supra* note 4, at 96 (noting that Antifederalists worried that federal courts would use their discretion to expand federal power at the expense of the states).

88 *See infra* notes 96–110 and accompanying text.

decide in accordance with law by deferring to the reasonable views of the other branches.

The second response to my argument might be that even if deference to the other branches is justified, deference to earlier courts is not. The basis for this distinction might be the countermajoritarian nature of judicial review. When courts strike down legislative or executive action, they interfere with the democratic process. Therefore, they should strike down only those actions that are clearly unconstitutional.[89] A court that overrules a prior judicial decision, on the other hand, does not directly interfere with the democratic process;[90] it invalidates the ruling of an earlier court that itself may have interfered with the democratic process. Therefore, deference to earlier judicial interpretations of the Constitution is not justified on the same grounds as deference to the other branches.

The problem with this argument is that it assumes that concern for the democratic process is the only valid justification for deference. But there are other justifications for deference, as well. A court might defer to an established interpretation out of concern for certainty, equality, and the reliance interests of those who have ordered their affairs around the prior interpretation—the very concerns that underlie stare decisis.[91] Is there any reason these concerns are less valid than concern for the democratic process? One might suggest that the latter concern is rooted in the Constitution, which establishes the democratic structures through which the President and Congress are elected and carry out their functions. But although the Constitution establishes these democratic structures, it also places antidemocratic restraints on government. It prohibits Congress from exercising certain powers regardless of what a majority wants.[92] It establishes rights

89 *See* Thayer, *supra* note 75, at 139–42.

90 The overruling may have an indirect effect on the democratic process, by either prohibiting actions that were previously approved or approving actions that were previously prohibited. But that effect will vary from case to case, and it is not clear whether democratic rule will be promoted or hindered over the long haul.

91 To be clear, I do not think Lawson would accept any of these justifications for deference. Lawson appears to think deference is justified only if there is good reason to think that another interpreter is more likely to have reached the right answer. *See* Lawson & Moore, *supra* note 80, at 1301. But because other scholars have defended deference as a response to the countermajoritarian difficulty, it seems worthwhile to explain why the absence of a countermajoritarian problem does not defeat the argument for deference.

92 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (stating that "the powers of the legislature are defined, and limited").

that cannot be invaded even by the vote of a majority.[93] And of course, it establishes a federal judiciary that is unelected.[94] Furthermore, even if the Constitution does embody a norm of democratic rule, that does not establish that courts can defer only to the constitutional interpretations of the other branches. The Constitution also embodies many of the rule of law norms that underlie the doctrine of stare decisis.[95] Thus, there is no reason to conclude that the courts can show deference to the interpretations of the other branches but not to the interpretations of earlier courts.

Two questions remain. First, are there any limits on the extent of deference a court can show to the constitutional interpretations of other governmental actors? Second, must a court show the same degree of deference to the interpretations of the other branches as it does to the interpretations of earlier courts?

I think the answer to the first question is yes. Article VI requires all federal and state judges—as well as executive and legislative officers—to take an oath supporting the Constitution.[96] If this provision means anything, it must mean that there are some limits on the extent to which judges (or executive and legislative officers) can

93 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133 (1978) ("The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.").

94 U.S CONST. art. II, § 2, cl. 2 (giving the President power to appoint "by and with the Advice and Consent of the Senate . . . Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law").

95 For instance, the Fourteenth Amendment embodies a norm of equality, and one of the underlying justifications for stare decisis is that it ensures equal treatment between litigants in past and future cases. *See* Healy, *supra* note 4, at 108 ("[O]ur democracy has displayed a deep commitment to the principle of equal treatment. By adhering strictly to their own precedents, the courts help to strengthen that commitment."). This is not to say that the Equal Protection Clause requires courts to follow stare decisis any more than the democratic structure of the Constitution requires courts to defer to the judgments of the other branches. But it does suggest that the concern for equality that underlies stare decisis has constitutional significance. *See* Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 515–18 (1996) (arguing that respect for precedent furthers rule of law values such as equality and predictability).

96 *See* U.S. CONST. art. VI, cl. 3.

accede to constitutional violations by the other branches.[97] For instance, if the President issued an order disbanding Congress and creating a monarchy, a judge who had taken the oath could not in good conscience uphold the order. To do so would be to support the raw exercise of power by the President instead of the Constitution. But the oath still leaves significant room for deference. For one thing, it seems doubtful that a judge violates her oath simply by deferring to an interpretation that differs from her own best understanding of the Constitution. Many constitutional provisions do not have a clear meaning,[98] and even those provisions that seem clear on their face

97 A number of judges and scholars have suggested that the oath might limit the extent of deference that can be shown to the constitutional interpretations of other governmental actors. *See, e.g.*, South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (stating, with respect to stare decisis, "I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face"), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) (stating that a judge "remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put upon it"); Lawson & Moore, *supra* note 80, at 1277 (stating that "one can argue against Thayerian deference on the ground that officials swear an oath to uphold the Constitution, not the views of the Constitution articulated by other actors"); Paulsen, *supra* note 70, at 319 n.349 ("The Constitution and federal statutes are written law (*not* common law); judges are bound by their oaths to interpret that law as they understand it, not as it has been understood by others . . . ."); *cf.* TUSHNET, *supra* note 7, at 6 ("If legislators think the Court misinterpreted the Constitution, their oath allows them—indeed, it may *require* them—to disregard [the Court's decision].").

Richard Fallon has argued that "invocation of the judicial oath is question-begging and analytically unhelpful" because "[i]t is by no means obvious that the Constitution requires Justices to follow their personal views of how the Constitution best would be interpreted without regard to the positions taken by other Justices and other officials in reaching past decisions." Richard H. Fallon, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 583 n.59 (2001); *see also* Lee, *supra* note 9, at 709–11 (explaining that Madison rejected the oath as a limit on stare decisis). I agree that the oath does not require judges to disregard the constitutional views of other officials. But the oath would be meaningless if it placed no limits on the ability of judges to defer to constitutional interpretations that they believed to be objectively unreasonable. *See* Paulsen, *supra* note 70, at 257 (discussing Chief Justice Marshall's opinion in *Marbury* that "[j]udges would violate their oaths if they were forced to acquiesce in a violation of the Constitution by deferring to the views of Congress").

98 To offer just a few of the many examples: What constitutes an unreasonable search and seizure? What is the scope of Congress' power under the Commerce Clause? What is the scope of the President's power as commander in chief?

often contain hidden ambiguities.[99] In light of this uncertainty, a judge who defers to a constitutional interpretation that is reasonable can plausibly claim to be supporting the Constitution even if she disagrees with that interpretation.

In addition, judges (and other officials) can defer to even unreasonable interpretations if doing so is mandated or authorized by the Constitution itself. Under the political question doctrine, for example, the resolution of some constitutional questions is textually committed to either Congress or the President.[100] Because the Constitution itself specifies which branch shall resolve these questions, a judge does not violate her oath when she defers to the decision reached by another branch—even if she thinks that decision is unreasonable. Similarly, the President does not violate his oath when he enforces a court judgment he thinks is based on an unreasonable interpretation of the Constitution. By vesting the "judicial power" in the federal courts,[101] the Constitution stipulates which branch shall resolve legal disputes that give rise to cases and controversies. Therefore, a President who enforces a judicial judgment is simply supporting the Constitution's allocation of case-deciding power.[102]

As to the second question, I think the answer is no: courts do not have to show the same degree of deference to the constitutional interpretations of the other branches as they do to earlier judicial decisions. The degree of deference that is warranted depends on how confident a court is that an issue has been thoroughly and honestly

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99 For instance, Article II states that no person is eligible to become President who has not attained the age of thirty-five years. U.S CONST. art. II, § 1, cl. 5 ("[N]either shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."). This is commonly cited as one of the constitutional provisions that is absolutely clear. But even this provision is not entirely free from ambiguity. It does not clearly tell us whether a person must be thirty-five before being elected or only before being inaugurated. I am not suggesting that one could not answer this question through the normal methods of constitutional interpretation. I am simply asserting that even when a provision seems clear on its face we can often pose questions that it does not clearly answer.

100 *See* Baker v. Carr, 369 U.S. 186, 211 (1962).

101 *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

102 This is not to suggest that the President's oath requires him to follow that judicial interpretation in all future cases. The Constitution does not give any branch exclusive authority to interpret the Constitution, so the President is free to choose a different interpretation in other cases. But once a judgment is issued, he must respect it as the product of the case-deciding power vested in the federal courts.

considered.[103] For instance, a court could reasonably show more deference to a law passed by Congress after lengthy debate than to the actions of a police officer taken without any forethought.[104] For the same reason, a court could show more deference to prior judicial decisions than to the actions of the other branches. Judicial decisions are (usually) reached only after the issues have been fully briefed and argued for several years in the lower courts.[105] In addition, judges and their clerks are trained in the interpretation of legal texts and (usually) attempt to do so from a neutral perspective. Congress and the executive branch, by contrast, do not always consider the constitutional issues raised by their actions. And even when they do, this consideration takes place in the abstract before their actions have any effect on individuals.[106] In addition, because of the inherently political nature of the legislative and executive branches, there may be less reason to view their interpretations as the product of disinterested analysis.[107] Therefore, it would be reasonable for courts to show more

103 *See* TUSHNET, *supra* note 7, at 45–46 (arguing that deference to the constitutional judgments of elected officials is appropriate when they act "conscientiously," which "includes serious deliberation on the Constitution's purposes and, particularly, on the possibility that the decisionmaker's judgment may be distorted by the pressures of the moment").

104 *See id.* at 46–47 (suggesting that less deference might be owed to the constitutional judgments of "low-level bureaucrats like police officers" than to the judgments of Congress).

105 It is true that courts sometimes decide issues—even important issues—without the benefit of briefing or lower court rulings. A good example is *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See* Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 702 (1989) (book review) ("[T]he *Erie* Court overruled a century-old line of cases and decided major questions of constitutional law despite the fact that those questions were not briefed by either party and were not even presented on the railroad's certiorari petition."). But the vast majority of issues decided by courts, especially appellate courts, are thoroughly briefed and informed by lower court decisions.

106 One writer has cited the abstract nature of congressional constitutional debates as a reason to distinguish between deference in facial and as-applied challenges. *See* Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1751–52 (2006) (arguing that federal courts should show more deference to Congress in facial challenges than in as-applied challenges because courts are better at "determining whether a particular application of a particular statute is constitutional").

107 It is true that the Office of Legal Counsel produces extremely high-level constitutional analyses for the executive branch and that congressional staff lawyers frequently provide detailed constitutional analyses for members of Congress. *See* Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 703 (2005). But these analyses are usually filtered through the political perspectives of those in power and thus may not assure that the ultimate decision is disinterested. *See* Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES,

deference to prior judicial decisions than to the constitutional interpretations of the other branches.[108]

What does all this mean? It means that I agree with Lawson, but only in a theoretical way that is unlikely to have much practical significance.[109] I agree that there are some limits on the application of stare decisis in constitutional cases. If a judge believes that a prior decision is based on an objectively unreasonable interpretation of the Constitution, her oath prohibits her from deferring to that precedent (just as her oath prohibits her from deferring to congressional interpretations of the Constitution that are objectively unreasonable).[110] However, if a judge does not believe that a prior decision is objectively unreasonable, she is free to defer to that precedent even if she would have reached a different decision had she considered the issue de novo. Moreover, whether a judge thinks a prior decision is objectively unreasonable can and will depend on how strongly that judge believes in the possibility of objectively right answers. Thus, a judge who is extremely skeptical of constitutional determinacy can defer to all but

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Sept. 9, 2007 (Magazine), at 40, 40–45 (describing clashes between the Office of Legal Counsel and White House officials). I am not naïve enough to think that politics plays no role in judicial decisions. But I think one can make a strong argument that it plays less of a role in the courts than in the legislative and executive branches.

108 I am not arguing that courts *must* show more deference to prior judicial interpretations than to the interpretations of other branches, only that it would be reasonable to do so.

109 Lawson recently updated his argument, but not in a way that affects my analysis. His current position is that judges may defer to a prior interpretation of the Constitution if there is good reason to believe that the earlier interpretation is reliable. *See* Lawson, *supra* note 85, at 18–22. But he believes that will only be true where (a) the earlier interpretation was reached by asking how the Constitution would have been understood by a hypothetical reasonable observer at the time of ratification; (b) there is reason to believe the earlier interpreter was in a better position to answer this question than the current judge; and (c) there is reason to believe that the earlier interpreter pursued this inquiry honestly and was not motivated to skew the result. *Id.* at 18–19. As Lawson acknowledges, the chances of identifying a prior interpretation that meets all three conditions is about as likely as all three professional Seattle sports teams winning championships in the same year. *Id.* at 19.

110 Does the oath also prohibit a lower court judge from enforcing the constitutional interpretation of a higher court that she thinks is objectively unreasonable? At least when it comes to Supreme Court precedent, I think the answer is no. Because the Constitution itself establishes a hierarchical relationship between the Supreme Court and inferior federal courts, a lower court judge who adheres to Supreme Court precedent is simply respecting the position of her court in the constitutional scheme. *See generally* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 865–67 (1994) ("[L]ower court obedience to Supreme Court precedent is driven by Article III's command of a centralized decisionmaker within a system of decentralized access, coupled wih the values of interpretive uniformity.").

the most egregiously incorrect precedents.[111] In addition, a judge can show more deference to the decisions of prior courts than to the interpretations of the other branches. I therefore disagree with Lawson's claim that "[s]o far as the Constitution is concerned, the cases for judicial review and against precedent stand or fall together."[112] There is no reason a judge cannot strike down a statute that conflicts with her own best understanding of the Constitution and yet adhere to precedent she disagrees with. If the precedent resulted from a decision-making process that the judge thinks is more thorough and disinterested, she is entitled to give it more deference than the statute.

2. The Historical Ratification of Stare Decisis

The second problem with Lawson's claim is that it conflicts with history. Although I argued above that stare decisis was not so well established at the time of the Framing that it was implicit in the founding generation's understanding of judicial power, that does not mean courts never adhered to decisions they disagreed with. To the contrary, by the middle of the eighteenth century most judges in England agreed that precedent should be followed in cases involving property or contracts.[113] Some American judges and scholars also embraced stare decisis, both before and after the Founding. As noted above, William Cranch wrote that judges could not overrule earlier decisions without "strong reasons,"[114] and Hamilton wrote that courts must "be bound down by strict rules and precedents."[115] Neither Cranch nor Hamilton suggested that precedents should only be followed in nonconstitutional cases. Nor did judges make this distinction.[116] In *Ogden v. Saunders*,[117] Justice Washington wrote that he was bound by an earlier decision interpreting the Bankruptcy Clause even though he thought it was wrong.[118] And in *Boyle v. Zacharie*,[119] Chief

111 One result of this analysis is that the degree of deference that is permissible will vary from judge to judge. A judge who thinks the Constitution is largely indeterminate will have more leeway to defer to other interpretations than a judge who thinks the Constitution provides objectively right answers in most cases. I do not find this result problematic. It simply means that judges are free to pursue whatever jurisprudential philosophy they find most appropriate, which is what judges have always done.

112 Lawson, *supra* note 5, at 32.

113 *See* Healy, *supra* note 4, at 69.

114 *See* Cranch, *supra* note 45, at iii–iv.

115 *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 46, at 529.

116 *See* Lee, *supra* note 9, at 708–12 (noting that the founding generation did not distinguish between stare decisis in constitutional and statutory cases).

117 25 U.S. (12 Wheat.) 213 (1827).

118 *Id.* at 263–64 (opinion of Washington, J.).

Justice Marshall wrote that a constitutional principle agreed to by a majority of the Court in *Ogden* was "no longer open for controversy, but the settled law of the court."[120] It seems highly unlikely that these Justices would have given binding weight to earlier constitutional decisions if the founding generation thought courts were forbidden from applying stare decisis in constitutional cases.[121]

In addition to this evidence from the founding period, there is also the evidence from the past two centuries. In 1833, Justice Story maintained that adherence to precedent was a central feature of American jurisprudence,[122] and American courts have followed a principle of stare decisis for at least the past 150 years. It is true that the Supreme Court has suggested that precedent carries less weight in constitutional cases than in statutory cases.[123] But it continues to rely

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119 31 U.S. (6 Pet.) 348 (1832).

120 *Id.* at 348.

121 This is not to suggest that Marshall thought he was *constitutionally* required to follow precedent. As other scholars have observed, Marshall often showed a "marked disdain for reliance on precedent." David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 661, 676, 701 (1982); *see also* Lee, *supra* note 9, at 667 ("An argument could be made that Chief Justice Marshall's opinions indicate that he attached little significance to precedent."). But it does show that he did not think he was forbidden from giving dispositive weight to precedent in constitutional cases.

Admittedly, Lawson might not give much weight to this evidence because he embraces a form of originalism that is not based on direct historical evidence of founding-era beliefs. Instead, he asks a hypothetical question: "[w]hat would a fully informed public at the time of ratification, knowing everything that there is to know about the Constitution and the world around it, have understood a particular term or clause to mean?" Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 196 n.20 (2001). Other originalists, however, look to the public understanding that actually existed at the time of the Framing, not to a hypothesized public understanding. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 35–36 (1999) ("The critical originalist directive is that the Constitution should be interpreted according to the understandings made public at the time of the drafting and ratification."); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 246 (1988) (suggesting that original intent must be determined by referencing those responsible for a constitutional provision's consideration and approval).

122 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 377, at 349–50 (photo. reprint 1991) (1833).

123 *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–08 (1932) (Brandeis, J., dissenting) (noting that, while stare decisis is the Court's general policy, constitutional cases have frequently been overturned), *overruled in part by* Helvering v. Bankline Oil Co., 303 U.S. 362 (1938), *and* Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938); *see also* Lee, *supra* note 9, at 703–30 (tracing the historical treatment of constitutional precedent); *c.f.* Neal v. United States, 516 U.S. 284, 295–96

on precedent in interpreting the Constitution, and neither the President nor Congress has objected to this longstanding practice.[124] Of course, this evidence does not shed light on the original understanding of the Constitution. But for those who do not place exclusive reliance on original understanding, this evidence certainly makes it more difficult to conclude that the Constitution forbids the application of stare decisis in constitutional cases.

In short, while I do not believe there is enough evidence to conclude that stare decisis is implicit in the "judicial power," I think there is enough evidence—both from the founding period and the practice of courts over the past two centuries—to conclude that stare decisis is not prohibited by the Constitution.

### *C. Can Congress Abrogate Stare Decisis?*

The third question is whether Congress can abrogate stare decisis. Of course, this question is relevant only if the answer to the first two questions is no. For if stare decisis is constitutionally required, Congress would have no power to abrogate it. And if stare decisis is constitutionally prohibited, there would be no need for a statute abrogating it. But assuming that the Constitution neither requires nor prohibits stare decisis, the question arises: can Congress order the courts to ignore the principle of stare decisis and decide all or some cases without giving presumptive force to precedent?[125]

Michael Paulsen argues that it can.[126] Maintaining that stare decisis is a judicial policy "not grounded in the Constitution," Paulsen argues that it can be abrogated by Congress like any other common law principle.[127] He says Congress possesses this power by virtue of the Necessary and Proper Clause,[128] which authorizes Congress to pass all laws necessary and proper for carrying into execution the pow-

(1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*.").

124 *See* Stephen G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 338–40 (2005).

125 *See* Monaghan, *supra* note 25, at 754–55 (posing this question, though not answering it).

126 *See* Paulsen, *supra* note 6, at 1537–40.

127 *See id.* at 1543–67; *see also* Murphy, *supra* note 4, at 1138–54 (agreeing generally with Paulsen).

128 *See* U.S. CONST. art. I, § 8, cl. 18 (giving Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof").

ers vested in any department of the federal government.[129] And he argues that a law abrogating stare decisis would not intrude on the "judicial power" to say what the law is or undermine the separation of powers.[130] As support for this claim, he cites numerous other ways in which Congress regulates the case-deciding process: the Rules of Decision Act, the Full Faith and Credit Act, the Anti-Injunction Act, the Federal Rules of Evidence, congressional control over prudential standing, and congressional limits on appellate review of lower court decisions and administrative adjudications.[131]

Paulsen acknowledges that his argument "may seem counterintuitive at first blush" and that it will strike many lawyers and judges as radical.[132] But he asks that it be judged by the soundness of its reasoning, "not its conformity with present convention."[133] This request is certainly reasonable, but it is also reasonable to ask why his argument seems radical and counterintuitive. When an argument strikes us as inherently wrong, there is often a reason, even if it is not immediately clear. So let me offer an impressionistic response to Paulsen's argument and then try to back up that impression.

The initial impression that I, and probably many others, had upon reading Paulsen's argument was that a law abrogating stare decisis impermissibly interferes with the judicial power. The courts don't tell Congress how to decide on legislation, nor do they tell the President what criteria he should use in deciding whether to veto a bill or initiate a prosecution. Similarly, Congress and the President should not tell the courts how to go about deciding a case that is before them. This is judicial business that is beyond the reach of the other branches.

Now, how do we put this impressionistic response into legal terms? I think we start with the text of Article III, which vests the "judicial Power of the United States" in the federal courts.[134] The Constitution does not define the judicial power, but I think we can agree that it entails the power to decide cases that are properly within

129 *See* Paulsen, *supra* note 6, at 1567–70; *see also* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 94–104 (arguing that Congress' power to regulate the design and practices of the federal courts derives from, and is limited by, the Necessary and Proper Clause).

130 *See* Paulsen, *supra* note 6, at 1570–82.

131 *See id.* at 1583–90.

132 *See id.* at 1542–43.

133 *Id.* at 1543.

134 U.S. CONST. art. III, § 1.

a court's jurisdiction.[135] Moreover, in order for courts to *decide* cases—as opposed to simply implementing decisions made elsewhere—they must also have the power to interpret the law that applies to a case.[136] In the words of *Marbury*, courts must have the power to "say what the law is."[137] So Congress would certainly interfere with the exercise of judicial power if it prohibited the courts from reaching particular conclusions about what the Constitution means.[138]

Admittedly, Paulsen's proposed statute does not go this far. As he correctly notes, a law abrogating stare decisis would not preclude a court from reaching any legal conclusion it otherwise might have reached.[139] In the abortion context, for instance, a law abrogating stare decisis would prohibit a court from giving controlling weight to *Roe* and *Casey*. But it would not prevent a court from concluding that the Constitution guarantees a right to abortion. If a court found *Roe* persuasive or otherwise thought the Constitution protected a right to abortion, it would be free to reach that conclusion.[140] In other words, his proposed law would not limit the range of conclusions a court might reach about the meaning of a constitutional provision.[141]

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135 *See* Lawson & Moore, *supra* note 80, at 1273–74 ("The judicial power is the power to decide cases or controversies in accordance with governing law.").

136 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

137 *Id.*

138 I limit this assertion to the Constitution because Congress' power to create substantive law does enable it to limit the conclusions a court can reasonably reach about the meaning of federal statutes. Although the extent to which Congress can use the substantive law to direct specific judicial outcomes is unclear, *see* RICHARD H. FALLON JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 99–105 (5th ed. 2003), it is conceivable that a statute abrogating stare decisis in statutory cases could be seen simply as a redefinition of the substantive law. However, it seems clear that an attempt by Congress to limit the conclusions a court could reach about the meaning of the Constitution would interfere with the judicial power to say what the law is. *See* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 712 (1995) ("Congress may not dictate to the federal courts how to interpret the Constitution.").

139 *See* Paulsen, *supra* note 6, at 1540, 1541 & n.16, 1590–92; *see also* Murphy, *supra* note 4, at 1128 ("Congressional abrogation of horizontal stare decisis would not enable Congress to control case outcomes directly by issuing judgments itself or to force the courts to adopt any given interpretation of the Constitution.").

140 *See* Paulsen, *supra* note 6, at 1540, 1541 & n.16, 1590–92.

141 His statute would limit the *likelihood* of a court reaching certain conclusions, which Paulsen candidly admits is his motivation for proposing it: he wants the Supreme Court to overturn *Roe v. Wade*. *See id.* at 1539. One might argue that this effect on the likelihood of certain outcomes would itself impermissibly interfere with

But the statute would interfere with the judicial power in another way. It would prevent a court from using a particular methodology to determine what the law is, thereby limiting the grounds it could rely on to justify its conclusion. Paulsen acknowledges this, noting that one might object to his proposed statute because it would impair the "power of the judiciary to decide *how to decide* 'what the law is.'"[142] Paulsen also acknowledges that "one might reasonably conclude that the general principles of separation of powers and an independent judiciary support the structural inference that this ancillary power of the judiciary—the power to decide how to decide—must be wholly exempt from congressional regulation."[143] I will return in a moment to Paulsen's use of the word "ancillary" and to the reasons he offers for rejecting what he concedes is a reasonable conclusion. But first I want to explore further the idea that the power to say what the law is includes the power to choose the methodology for making that determination—what we might call "interpretive methodology."[144] Because although Paulsen and at least one other writer have suggested this possibility, neither has fully explained why we might think the latter power is inherent in the former.[145]

The explanation, I think, lies in the concept of legitimacy. The federal courts have the power to decide cases within their jurisdiction and to interpret the laws that apply in those cases.[146] In order for this power to be effective, the courts must have the power not only to reach whatever conclusions they think are required by law, but also to justify those conclusions as legitimate. After all, the power to decide cases would not mean much if courts could not explain why those decisions were legitimate and entitled to respect. This is especially true in light of the courts' lack of power to enforce their decisions. Because they rely on the legislative branch for funding and on the executive branch for enforcement, courts can ensure the effectiveness of their decisions only by offering justifications that will legitimize

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the judicial power to say what the law is. But my argument here will focus on a different objection to his proposal.

142 *See id.* (emphasis altered).

143 *Id.*

144 *See id.* at 1599 n.157.

145 *See id.* at 1579; *see also* Lawson, *supra* note 121, at 210 ("The judicial power of course includes the power to reason to the outcome of a case.").

146 *See* Lawson & Moore, *supra* note 80, at 1273–74.

those decisions.[147] Hamilton made this clear when he said that the courts "have neither Force nor Will, but merely judgment."[148]

So how does this lead to a conclusion that courts must have the power to choose the interpretive methodology by which they decide cases? The answer is that methodology is the key to legitimacy. In any field of rational inquiry where one wants to ensure the legitimacy of one's conclusions, control over methodology is essential. Consider the sciences. A researcher attempting to answer a question will devote considerable energy to determining the proper methodology.[149] And when she reports her results, she will often spend as much time explaining and defending that methodology as the actual results. Or consider historical research. If a historian deviates from accepted methodology, her conclusions are not likely to be accepted as legitimate by other historians.[150]

The same principle applies to legal inquiry. A court that wants to ensure the legitimacy of its legal conclusions will pay particular attention to the interpretive methodology it uses to generate those conclu-

147 I am not suggesting that judicial decisions are legitimate only if courts offer some justification. Although courts have a long and distinguished tradition of giving reasons, many legal decisions—jury verdicts, denials of certiorari, rulings on objections—are not accompanied by any explanation. *See generally* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (exploring the practice of giving reasons for legal decisions). My point is that courts must have the *power* to justify their decisions as legitimate in order to ensure the effectiveness of those decisions. If a court does not feel the need to justify a decision—either because it is inconsequential or uncontroversial or for some other reason—it may choose not to offer any explanation. But I think it is telling that federal courts usually do attempt to justify their decisions, either orally or in writing. Even summary dispositions by the Supreme Court usually include a citation to a prior case that makes clear why the Court has vacated the lower court decision. *See, e.g.*, Arnold v. United States, 544 U.S. 1058, 1058 (2005) (mem.) (vacating judgment and remanding for further consideration in light of United States v. Booker, 543 U.S. 220 (2005)); Florida v. Rabb, 544 U.S. 1028, 1028 (2005) (mem.) (vacating judgment and remanding for further consideration in light of Illinois v. Caballes, 543 U.S. 405 (2005)).

148 THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 46, at 523; *see also* Schauer, *supra* note 147, at 636–37 (explaining that those without power usually feel the need to offer reasons, while those with power do not).

149 *See* Bertrand Russell, *Preface* to HENRI POINCARE, SCIENCE AND METHOD 5, 6 (Nelson & Sons eds., Francis Maitland trans., 1914) ("But it is not results, which are what mainly interests the man in the street, that are what is essential in a science: what is essential is its method . . . .").

150 *See* ANTHONY BRUNDAGE, GOING TO THE SOURCES 2 (3d ed. 2002) ("This should not be taken to mean that every person can fashion whatever he or she wishes and call it history. There are rigorous procedures to be observed in the framing of historical questions, in the selection and interpretation of sources, and in the presentation of one's findings.").

sions. This helps explain why Supreme Court Justices expend so much energy debating the proper method of constitutional interpretation.[151] They recognize that the perceived legitimacy of the Court's interpretations depends upon its choice of methodology. And because the effectiveness of the power to decide cases depends upon the perceived legitimacy of those decisions, courts must have the power to choose the interpretative methodology they think will maximize legitimacy.[152] It is therefore an understatement to say that "the power to decide how to decide" is "ancillary" to the judicial power. The former power is instead central to the latter power.

Paulsen might respond that his proposed statute would not undermine the legitimacy of the courts' decisions. In fact, he might say that his statute would enhance the legitimacy of those decisions because courts would be forced to decide cases based upon their own best understanding of the Constitution rather than on the basis of what a prior court said. That is a debatable point, however. Paulsen clearly thinks reliance upon precedent is an illegitimate method for deciding constitutional questions. But many other scholars disagree.[153] More importantly, the question of which interpretative methodology best legitimizes a particular decision must be answered by the courts, just as the question of which decision is reached must be left to the courts. To prevent a court from justifying a decision on grounds it

151 *Compare* STEPHEN BREYER, ACTIVE LIBERTY 5 (2005) ("My thesis is that courts should take a greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts."), *with* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 38 (Amy Gutman ed., 1997) (arguing that the Constitution should be interpreted according to the original understanding of the text).

152 This does not mean there are no limits on the choice of interpretive methodology. A court that decided a case based upon a coin flip would certainly violate due process. I am not prepared at this point to define the precise limits that due process places on the choice of methodology, but I feel confident that it would invalidate the most egregious methodologies. In addition, a court is constrained by the need to ensure the legitimacy of its decisions. *See* Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1350 (1990) (arguing that legitimacy is crucial for reducing "countermajoritarian suspicions"). Indeed, the need to ensure legitimacy is why courts must have the freedom to choose interpretive methodology in the first place.

153 *See, e.g.*, Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1175–76 (2006) (arguing for a strong version of stare decisis); Merrill, *supra* note 95, at 511, 514, 516 (discussing how precedent can be used to help determine the present-day conventional interpretation); David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 300 (2005) (discussing reliance on precedent and its effect on the moral judgments of constitutional interpreters).

thinks will provide maximum legitimacy is to interfere with the power to effectively decide the case.

To see the point from another perspective, imagine that Congress passes a law prohibiting the courts from relying upon original understanding in interpreting the Constitution. The law directs the courts to decide cases based upon their own best understanding of the Constitution, not the best understanding of people in 1789.[154] This law would not prohibit courts from reaching any particular conclusions about the meaning of the Constitution. But it would prohibit them from relying upon a particular method of constitutional interpretation, which would not only affect the likelihood of reaching certain conclusions, but also would undermine their ability to ensure the legitimacy of their conclusions. Indeed, if one thinks originalism is the only legitimate method of constitutional interpretation, this law would delegitimize judicial review entirely. Yet there is no difference between this law and the one Paulsen proposes.[155]

The analogy to originalism helps answer another argument Paulsen makes. One premise of his argument is that stare decisis is not constitutionally required, but is instead a common law principle rooted in policy judgments.[156] If this is correct, Paulsen says, Congress must have the power to abrogate stare decisis since it is well established that the common law can always be abrogated by statute.[157] The mistake Paulsen makes is in assuming that stare decisis must fit within some category of law, be it constitutional, statutory, or common. But stare decisis is not so much a type of law as it is an interpretive methodology—like originalism, textualism, or structuralism.[158] And just as Congress could not prohibit the courts from using

154 A judge might insist that her own best understanding is informed by original understanding and that this statute would therefore prohibit her from reaching her own best understanding. But of course, one could say the same thing about precedent.

155 One might attempt to distinguish the two statutes by arguing that stare decisis is not a methodology that is mandated by the Constitution. But unless one is prepared to argue that the Constitution itself mandates originalism, this distinction will not work. Not surprisingly, Paulsen has made this argument. *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1129 (2003).

156 *See* Paulsen, *supra* note 6, at 1579.

157 *See id.* at 1540–41 & n.14.

158 *See* Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 700–51 (1980) (identifying six modalities—or methods—of constitutional interpretation: historical, textual, doctrinal, prudential, structural, and ethical). If stare decisis is not a law, one might ask, why did the members of the *Casey* plurality feel bound to reaffirm *Roe*?

any of these methodologies to interpret the Constitution, so it cannot prohibit them from relying upon stare decisis.[159]

Having fleshed out the argument that the judicial power entails the power to decide how to decide what the law is, let me now consider the reasons Paulsen gives for rejecting that argument. First, Paulsen says that such a conclusion would leave the courts entirely unchecked, which he says is pushing "structural inferences" from the separation of powers too far.[160] Second, he says the argument is at odds with a long tradition of statutes that have interfered with the judicial decisionmaking process.[161]

Paulsen's claim that control over interpretive methodology would leave the courts entirely unchecked is puzzling. The political branches have numerous mechanisms to control the judiciary—the appointment process, congressional control over jurisdiction and funding, the impeachment power, and power over the enforcement of court decisions.[162] One might argue that these mechanisms are insufficient to rein in a renegade court. But if so, we should worry not only about methodology but also about the courts' power to say what the law is in the first place. In other words, it is not clear why Paulsen thinks judicial control over interpretive methodology will lead to an unchecked judiciary while the power to say what the law is will not.

As to Paulsen's claim that tradition and practice are at odds with the argument for exclusive judicial control over interpretive methodology, his claim is vastly overstated. With one exception—the Federal Rules of Evidence—none of Paulsen's examples intrude on the power

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The answer is that they were committed to stare decisis as an interpretive methodology. And under their reading of that methodology, they were required to follow *Roe*.

159 The fact that the Supreme Court has developed a set of rules for applying stare decisis does not undermine my conclusion that it is primarily an interpretive methodology. Proponents of originalism and textualism have also articulated rules for applying those methodologies. *See, e.g.*, Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 77 (1992) ("Justice Scalia has sought to bring positivist rules to originalism's rescue."); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 530–31 (1997) (book review) (arguing that Justice Scalia's interpretive rules are founded in textualism).

160 *See* Paulsen, *supra* note 6, at 1581–82. I should point out that my argument does not rely on a "structural inference." It relies on an inference from the text of Article III, which vests the "judicial power" in the federal courts. *See* U.S. CONST. art. III, § 1. This may not make much difference to Paulsen, however, so I will respond to his argument on its face. For a critique of Paulsen based upon structural inferences, see Lawson, *supra* note 121, at 204–07.

161 *See* Paulsen, *supra* note 6, at 1582–90.

162 *See* Healy, *supra* note 4, at 97–101 (describing the checks on the judicial branch); Lawson, *supra* note 121, at 227–29 (arguing that the other branches can check the courts through impeachment and refusal to enforce their decisions).

of the courts to decide how to decide in the same way as his proposed statute. Take the Rules of Decision Act, which provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[163] This Act tells the courts what source of substantive law to apply in deciding a particular set of cases; it does not tell the courts what methodology to use in interpreting that law.[164] There is a significant difference between the two. The legislative power necessarily includes the power to define the law that applies in particular categories of cases.[165] When Congress passes laws regulating the purchase and sale of securities, it is directing the courts to apply those laws in cases involving securities transactions. The Rules of Decision Act has a similar effect. It defines the applicable law in cases where the Federal Constitution, treaties, and laws are silent.[166]

Several of the laws Paulsen cites limit the remedies that courts may order. For instance, the Anti-Injunction Act does not tell the courts how to go about deciding what the law is; it tells the courts that the remedy of an injunction is not available when a plaintiff challenges an ongoing state judicial proceeding.[167] The same is true of

163 28 U.S.C. § 1652 (2000).

164 The same is true of the Full Faith and Credit Act, which states that the "Acts, records and judicial proceedings" of any state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738 (2000). The Act requires federal courts to ordinarily apply state preclusion law when determining the res judicata effect to be given a state court judgment. *See* 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4469, at 71–72 (2d ed. 2002). But it does not tell federal courts what methodology to use in interpreting a state's preclusion law.

165 *See* Redish, *supra* note 138, at 719 (stating that Congress has the power to "enact a general rule of decision to be employed in relevant litigation").

166 Paulsen argues that just as the Rules of Decision Act forbids federal courts "from relying on legal rules of their own creation, rather than on state law . . . . [s]o, too, a statute abrogating stare decisis would forbid federal courts from relying on legal rules of their own creation, rather than on the Constitution." Paulsen, *supra* note 6, at 1584. But this is a false analogy. A court that follows stare decisis is not relying on legal rules of its own creation in place of the Constitution. It is deferring to an earlier court's interpretation of the Constitution, which, as I explained above, is perfectly acceptable. *See supra* notes 89–95 and accompanying text. And a law that abrogates stare decisis in constitutional cases does not define the law that applies to a particular category of cases. It tells the courts how to go about deciding what the applicable law—the Constitution—means.

167 *See* 28 U.S.C. § 2283 (2000) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of

various standards of appellate and administrative review.[168] These laws instruct the courts not to provide relief unless a certain set of circumstances obtains. Congressional control over the remedies that are available for violations of federal law does not justify congressional control over the methodology of constitutional interpretation.[169]

Paulsen argues that congressional control over the prudential rules of standing is particularly strong support for his claim,[170] but it is actually one of his weakest examples. Standing is a jurisdictional doctrine, and the Constitution itself gives Congress control over the jurisdiction of the federal courts.[171] It is no surprise, therefore, that Congress should also have the power to override judicially imposed prudential limits on jurisdiction.

What about the Federal Rules of Evidence, which were adopted pursuant to the Rules Enabling Act?[172] Like a statute abrogating stare decisis, the Rules of Evidence do interfere with the power of courts to

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Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.").

168 *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) (2000) ("On complaint . . . the court shall determine the matter de novo . . . . [T]he burden is on the agency to sustain its action."); Administrative Procedure Act, 5 U.S.C. § 706(2)(e) (2000) (directing the reviewing court to set aside certain agency actions, findings, and conclusions, if it finds them to be "unsupported by substantial evidence"); FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

169 There is some debate about the extent to which Congress can limit the remedies traditionally available to courts. *See* FALLON ET AL., *supra* note 138, at 1350–51; Engdahl, *supra* note 129, at 105, 170–72; Edward A. Hartnett, *Congress Clears Its Throat*, 22 CONST. COMMENT. 553, 563 n.47 (2005); Lawson, *supra* note 121, at 217, 226. I will not enter that debate here because I think the distinction between congressional control over remedies and control over interpretive methodology is sufficiently clear to make my point. But the issue of remedies raises an interesting question: could Congress use its control over remedies to indirectly abrogate stare decisis, say by amending 42 U.S.C. § 1983 to provide for relief only when a plaintiff proves that a state official has violated the original understanding of the Constitution? I am not sure. There may be a point at which the manipulation of remedies interferes with the power to say what the law is, though I am not prepared to identify that point now. In any case, I do not think my hypothetical statute would accomplish Paulsen's goals because it would not change constitutional law; it would merely change the remedies available for constitutional violations.

170 *See* Paulsen, *supra* note 6, at 1585–86.

171 *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512–15 (1868) (upholding a congressional limit on the Supreme Court's appellate jurisdiction under the Exceptions and Regulations Clause of Article III); Sheldon v. Sill, 49 U.S. (8 How.) 441, 448–49 (1850) (holding that Congress' power to create lower federal courts includes the power to control the jurisdiction of those courts).

172 *See* 28 U.S.C. §§ 2071–2074, 2077 (2000).

decide how to decide. They tell the courts what evidence to consider when making factual determinations and how much weight to give various types of evidence.[173] They also preclude certain methodologies for reaching a decision, like the consideration of hearsay evidence.[174] Thus, one might argue that they interfere with the power to say what the facts are in the same way that a statute abrogating stare decisis would interfere with the power to say what the law is.

But I do not think the Rules of Evidence establish the constitutionality of Paulsen's proposed statute. For one thing, it is not clear that the Rules are themselves constitutional. David Engdahl has argued that they exceed Congress' power under the Necessary and Proper Clause because they do not carry into execution the judicial power.[175] Moreover, the Rules of Evidence interfere with the power of the courts to decide facts, not law. And the Constitution itself places limits on the factfinding process of the courts, guaranteeing trial by jury in criminal and civil cases and constraining the ability of federal courts to reconsider the factual findings of juries on appeal.[176] Thus, one might conclude that there is more support for interfering with the factfinding process of the courts than with the lawfinding process.[177]

To sum up, Paulsen's proposed statute sounds radical because it is radical. It would interfere with the power of the courts to ensure the effectiveness of their decisions by choosing whatever methodology they think will maximize the legitimacy of their legal determinations. Congress has regulated the case-deciding process in other ways—by

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173 *See, e.g.*, FED. R. EVID. 401 (defining "relevant evidence"); FED. R. EVID. 402 ("Evidence which is not relevant is not admissible."); FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."); FED. R. EVID. 404(a) (providing that, although the rule allows for some exceptions, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion"); FED. R. EVID. 406 (prescribing the uses of "habit" evidence); FED. R. EVID. 408 (discussing the uses of "offers to compromise" as evidence).

174 *See* FED. R. EVID. 801–807.

175 *See* Engdahl, *supra* note 129, at 172–74; *see also* Lawson, *supra* note 121, at 224–25 (reaching the same conclusion).

176 *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury . . . ."); *id.* amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

177 *Cf.* Lawson, *supra* note 121, at 223 (tentatively rejecting a distinction between congressional interference with the factfinding process and the law-finding process, "but with a sense of unease that might prompt reconsideration").

defining the applicable law, available remedies, and jurisdiction. But it has not previously interfered with the power of the courts to decide how to decide what the law is.

## II. STARE DECISIS AND DEFERENCE TO ELECTED OFFICIALS

So far, I have argued that stare decisis is neither required nor prohibited by the Constitution and that Congress cannot order the courts to decide cases without regard to precedent. But is there another role for elected officials to play in the evaluation of precedent? Put more directly, if elected officials support overruling a prior decision, should the courts defer to that judgment?

To answer this fourth question, we must first define stare decisis, because the meaning we settle on will determine the level of deference that is permissible. I will therefore begin this Part by describing the various possible definitions of stare decisis and explaining which definition is most consistent with the practice of American courts. I will then describe the factors that are relevant to an evaluation of precedent under this definition of stare decisis. Finally, I will consider whether courts should defer to the views of elected officials when analyzing those factors in a given case.

### *A. Four Models of Stare Decisis*

Lawyers and judges often use the term stare decisis as though it has a fixed meaning. But there are at least four possible meanings we might ascribe to the principle.

First, stare decisis might mean that precedent is absolutely binding and can never be overruled, regardless of how strongly a court disagrees with a prior decision or how impracticable it has become. Although not the original meaning of stare decisis, English courts adopted this absolute model in the nineteenth century and followed it until the latter half of the twentieth century.[178] As noted above, however, American courts have never embraced such a rigid view of stare decisis.[179] Even the most committed adherents to precedent in this country have agreed that a court should be free to overrule a prior decision in exceptional circumstances.[180] And the Supreme Court has frequently stated that stare decisis is not an "'inexorable command,'"

178 *See* Healy, *supra* note 4, at 51–52, 73; Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 114 (2000).

179 *See supra* note 65 and accompanying text.

180 *See supra* notes 57–60 and accompanying text.

but instead requires a pragmatic weighing of the "respective costs of reaffirming and overruling a prior case."[181]

Second, and at the other end of the spectrum, stare decisis might mean that courts must begin their analysis with precedent but are under no obligation to adhere to decisions they disagree with.[182] English courts followed this "starting point" model of precedent until roughly the eighteenth century.[183] They looked to past cases for guidance and stability, but did not feel bound by decisions they thought incorrect.[184] However, the prevailing view today is that stare decisis must entail more than an obligation merely to begin with precedent. If courts are not bound, even presumptively, by decisions they disagree with, then precedent has no authority and courts are simply resolving cases on the merits.[185] Moreover, American courts have treated precedent as presumptively binding since at least the mid-nineteenth century.[186] And the Supreme Court has made clear that a decision to overrule must be supported by some special reasons, not mere disagreement with the prior decision.[187]

That leaves us with possibilities three and four, which fall between the absolute model and the starting point model. The third possibility is what I will call a strong presumption. Courts must follow precedent unless there are special reasons for overruling, and the extent of disagreement with the earlier decision is never a relevant considera-

181 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting)); *see also* Agostini v. Felton, 521 U.S. 203, 235–36 (1997) (noting that the doctrine of stare decisis is not an absolute command and that precedent may be overruled "where there has been a significant change in or subsequent development of, our constitutional law" (citing United States v. Gaudin, 515 U.S. 506, 521 (1995))); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231–35 (1995) ("'[*S*]*tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision . . . when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.'" (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940))).

182 *See* Price, *supra* note 178, at 84.

183 *See* Healy, *supra* note 4, at 69.

184 *See id.* at 60–61, 64–69.

185 *See* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 52–53 (1961); Monaghan, *supra* note 25, at 755; Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987).

186 *See* Healy, *supra* note 4, at 88.

187 *See* Dickerson v. United States, 530 U.S. 428, 443–44 (2000); Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

tion. In other words, the reasons a court gives for overruling cannot include an assertion that the earlier decision was egregiously wrong. If a court wants to overrule, it must rely on factors entirely unrelated to its views about whether the earlier decision was correct.

The fourth possibility, which I will call a moderate presumption, fits between the starting point model and the strong presumption model. It differs from the starting point model in that mere disagreement with an earlier decision is not enough to overrule. There must be some special reasons beyond mere disagreement. But in contrast to the strong presumption model, the extent of disagreement with the earlier decision can be taken into account. That is, one of the special reasons that will justify the overruling of precedent is a conviction that the earlier decision was egregiously wrong.[188]

So which model most accurately describes the practice of American courts? Although we may like to think that courts apply the strong presumption, in practice they likely follow the moderate presumption. For one thing, it is implausible to believe that judges will not be influenced by how strongly they disagree with an earlier decision. If a judge thinks a prior decision is not just wrong, but egregiously wrong, it is hard to believe she will not be more inclined to overrule that decision. Moreover, the Supreme Court often relies upon the wrongness of a prior decision to support its conclusion that the decision should be overruled.[189]

Even if courts have not traditionally followed the moderate presumption, my discussion in Part I.B.1 indicates that they may be required to. As I explained there, a judge does not violate her oath when she adheres to a prior decision that she believes is a reasonable interpretation of the Constitution, even if it conflicts with her own

188 *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting) (stating his willingness to overrule a prior decision that "can be properly characterized as 'egregiously incorrect'"); *see also* Nelson, *supra* note 185, at 7–8 (defending a model of stare decisis in which judges are free to overrule prior decisions that are "demonstrably erroneous").

189 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986), saying that "*Bowers* was not correct when it was decided, and it is not correct today" and thus "[i]t ought not to remain binding precedent"); Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), concluding "that *Union Gas* was wrongly decided and that it should be, and now is, overruled"); United States v. Dixon, 509 U.S. 688, 711 (1993) (overruling Grady v. Corbin, 495 U.S. 508 (1990), acknowledging that it was "compellingly clear [that] *Grady* was a mistake"); Payne v. Tennessee, 501 U.S. 808, 830 (1991) (overruling Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989), determining "that they were wrongly decided and should be, and now are, overruled").

best understanding of the Constitution. But she does violate her oath when she adheres to a prior decision that she believes is objectively unreasonable. Thus, in order to honor her oath, a judge must consider whether she thinks the prior decision was unreasonable—in other words, whether the prior decision was not just wrong, but egregiously wrong.

### *B. The Factors Relevant to Overruling*

Having defined stare decisis as a moderate presumption, the next question is what factors are relevant to the evaluation of precedent under this model. We can then ask whether it makes sense to defer to the judgments of elected officials in considering each of these factors in a given case.

The plurality opinion in *Casey* identified four factors that are relevant to determining whether the rule announced in a prior decision should be overruled: (1) whether it "has proven to be intolerable simply in defying practical workability"; (2) whether it "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation"; (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; and (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[190] Each of these factors had been present, to varying degrees, in earlier stare decisis discussions, and they have been relied upon by the Court in decisions since *Casey*.[191] Therefore, although one might take issue with one or more of these factors, I will build my analysis around them. In addition, because I am working from the premise that courts follow a moderate presumption, I will add a fifth factor: whether the prior decision was egregiously incorrect.

Before proceeding, I want to clarify one point. In his article arguing that Congress has the power to abrogate stare decisis, Paulsen engaged in a similar analysis of the *Casey* factors.[192] My analysis is different in two respects. First, Paulsen was primarily concerned with showing that each of these factors is policy oriented and that Congress

190 *Casey*, 505 U.S. at 854–55.

191 *See, e.g.*, *Lawrence*, 539 U.S. at 568–78 (2003) (stating that *Bowers* was based on a false understanding of history, had been undermined by subsequent doctrinal developments, and had not induced detrimental reliance); Agostini v. Felton, 521 U.S. 203, 236 (1997) (relying in part on the "remnant of abandoned doctrine" factor to overrule Aguilar v. Felton, 473 U.S. 402 (1985)).

192 *See* Paulsen, *supra* note 6, at 1551–67.

could therefore insist that the courts disregard them.[193] Because I reject Paulsen's claim that Congress can abrogate stare decisis, I also reject his claim that Congress can eliminate one or more of the *Casey* factors. Instead, I will consider whether the courts should defer to elected officials—including members of Congress—in evaluating the application of each of these factors in a given case. In other words, I will ask whether it makes sense for the courts to defer to the judgment of elected officials in determining whether a prior decision has proved unworkable, has induced significant reliance, and so on.[194] Second, to the extent that Paulsen's analysis might be seen as addressing the same question, my conclusions differ. Paulsen sees no reason for courts not to defer to the other branches,[195] whereas I conclude that deference is only appropriate with respect to some factors. And even then, I argue that there are significant risks to deference that may make it inappropriate in some cases.

### 1. Practical Workability

The first *Casey* factor is whether the rule announced in the prior decision "has proven to be intolerable simply in defying practical workability."[196] Although the *Casey* plurality did not elaborate on this factor, other cases make clear that it focuses on the extent to which courts have been able to understand and apply the prior decision. For instance, in *Garcia v. San Antonio Metropolitan Transit Authority*,[197] the Court overruled its decision in *National League of Cities v. Usery*[198] that Congress could not use its commerce power to regulate the traditional functions of state and local governments.[199] According to the majority in *Garcia*, the "traditional governmental functions" test had proved unworkable because courts could not readily distinguish between governmental functions that were traditional and those that were not.[200] Similarly, in *Swift & Co. v. Wickham*[201] the Court over-

193 *See id.* at 1543–67.

194 Stephen Calabresi has taken an initial stab at this analysis. *See* Calabresi, *supra* note 124, at 336–40. But Calabresi only considered one *Casey* factor—whether the prior decision has induced significant reliance. *See id.* He did not consider any of the other *Casey* factors.

195 *See* Paulsen, *supra* note 6, at 1582–94.

196 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

197 469 U.S. 528 (1985).

198 426 U.S. 833 (1976).

199 *Garcia*, 469 U.S. at 530–31.

200 *See id.* at 541–42.

201 382 U.S. 111, 126–29 (1965).

ruled *Kesler v. Department of Public Safety*,[202] which held that federal law required three-judge panels to hear Supremacy Clause challenges to state statutes unless a case involved significant statutory construction.[203] Although *Kesler* had been decided only three years earlier, the *Swift* Court held that it had proved unworkable because courts could not determine how much statutory construction was needed to trigger the *Kesler* rule.[204]

Should courts defer to elected officials when deciding whether a prior decision is practically unworkable? I don't think so. As *Garcia* and *Kesler* demonstrate, this factor focuses on the doctrinal workability of the prior decision, not its social workability. The question is whether courts can work with and make sense of the prior decision. In many cases, elected officials will not have strong opinions on this question.[205] And even when they do, there is no reason courts should defer to those opinions. Courts are the ones that must work with the decision and build a coherent doctrine out of it. They are therefore most likely to know whether the decision is workable. This is not to say that government lawyers cannot argue that a prior decision is unworkable by pointing to lower court decisions struggling to make sense of it. But these arguments should carry no more weight than if they were made by any other litigant. When it comes to deciding whether a precedent is unworkable, the courts should be the final arbiter. This is precisely the kind of technical, doctrinal question they are best equipped to answer.

### 2. Remnant of Abandoned Doctrine

Taking the questions out of order,[206] the next *Casey* factor is "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."[207]

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202 369 U.S. 153 (1962).

203 *Id.* at 157.

204 *Swift*, 382 U.S. at 124; *see also* California v. Acevedo, 500 U.S. 565, 576–80 (1991) (overruling Arkansas v. Sanders, 442 U.S. 753 (1979), because it had created confusion about whether a warrant was required in searches of containers found within cars).

205 There are some cases in which elected officials might care about the workability of precedent. For instance, if the Department of Justice cannot make sense of a key criminal procedure decision, the President might favor overruling that decision.

206 I do this because my analysis of these first two questions—whether the prior decision has proved practically unworkable and whether it is a remnant of abandoned doctrine—is similar.

207 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

Paulsen criticizes this factor, arguing that it is simply a "grandiloquent" way of saying that "[i]t is okay to overrule precedent if you do it in two (or more) steps."[208] He also claims that this factor is a "disguised inquiry into whether or not the prior decision was correct or, rather, *which* of two cases or lines of cases is correct."[209] Properly applied, however, this factor does not permit courts to overrule a precedent simply because it conflicts with a later case. It permits overruling only when the precedent has been so outstripped by doctrinal developments that it has become an outlier.[210] Thus, *Plessy v. Ferguson*[211] became a remnant of abandoned doctrine after the Court struck down segregation in public schools,[212] on public beaches[213] and buses,[214] and at public golf courses,[215] parks,[216] and restaurants.[217] And *Lochner v. New York*[218] became a remnant of abandoned doctrine after the Court upheld price caps,[219] minimum wage laws,[220]

208 Paulsen, *supra* note 6, at 1557.

209 *Id.* at 1561.

210 In fact, it is Paulsen who would turn this factor into a disguised inquiry into "which of two cases . . . is correct." *Id.* He argues that *Roe* and *Casey* should be overruled because they have been called into question by *Washington v. Glucksberg*, which stated that a right is not fundamental unless, after a "careful description," a court finds that it is "objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* at 1557 (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)). According to Paulsen, this statement undermines *Roe* because the specific right to have an abortion is not "objectively, deeply rooted" in this country's history or tradition. *See id.* at 1558. But "the abandoned doctrine" factor requires more than a single case contradicting the precedent. Otherwise, it would be unclear whether the later case represents a doctrinal shift or simply reflects continued disagreement and shifting alliances among the current justices. Indeed, it now appears that *Glucksberg* was of the latter description. In *Lawrence v. Texas*, the Court appeared to move away from *Glucksberg*'s approach to substantive due process. *See* Lawrence v. Texas, 539 U.S. 558, 571–72 (2003) (stating that "our laws and traditions in the past half century are of most relevance here").

211 163 U.S. 537 (1896).

212 Brown v. Bd. of Educ., 347 U.S. 483, 495–96 (1954).

213 Dawson v. Mayor & City Council of Balt. City, 220 F.2d 386, 386–88 (4th Cir. 1955), *aff'd mem.*, 350 U.S. 877 (1955).

214 Browder v. Gayle, 142 F. Supp. 707, 717 (M.D. Ala. 1956), *aff'd mem.*, 352 U.S. 903 (1956).

215 Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir. 1955), *vacated mem.*, 350 U.S. 879 (1955).

216 New Orleans City Park Improvement Ass'n v. Detiege, 252 F.2d 122, 123 (5th Cir. 1958), *aff'd mem.*, 358 U.S. 54 (1958).

217 Turner v. City of Memphis, 369 U.S. 350, 353 (1962) (per curiam).

218 198 U.S. 45 (1905).

219 Nebbia v. New York, 291 U.S. 502, 538–39 (1934).

220 W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399–400 (1937).

maximum hour laws,[221] and other pervasive economic regulation.[222] It is also an oversimplification to describe this factor as permitting the overruling of a case "in two (or more) steps." Instead, this factor reflects the common law tradition in which the law is "fined and refined" until it works itself pure.[223]

Should the courts defer to elected officials when considering whether a precedent has become a remnant of abandoned doctrine? Again, I think the answer is no. As with the workability factor, there is no reason to think elected officials will have strong views on this issue. There is also no reason to defer to any views they do have. Whether a precedent has become a doctrinal outlier is a quintessentially legal question. Answering it requires an understanding of doctrinal developments and an ability to determine when the foundation of a case has been substantially eroded. This is the stuff of lawyering, not policymaking. It therefore makes sense for courts to answer this question without deferring to elected officials.

### 3. Reliance

The third *Casey* factor is whether the prior decision "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation."[224] Unlike the first two factors, which help identify cases that are ripe for overruling, this factor is largely geared toward identifying cases that should not be overruled. The reliance factor is also grounded more firmly in the underlying justifications for stare decisis, which include stability, predictability, and fairness.[225] If people have come to rely on the existence of a particular rule, it would undermine stability, predictability, and fairness to change that rule. For this reason, the reliance factor is most relevant in commercial cases involving property, contracts, or torts.[226] But the Court has made clear that reliance also

221 Muller v. Oregon, 208 U.S. 412, 423 (1908).

222 *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 732–33 (1963); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–91 (1955); United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938).

223 *See* 7 EDWARD COKE, THE REPORTS OF SIR EDWARD COKE 6 (London, Joseph Butterworth & Son 1826); *see also* Solum, *supra* note 1, at 191 (arguing that "one way that a binding precedent can be changed is through the force of other precedents").

224 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

225 *See* Healy, *supra* note 4, at 108–11.

226 *See Casey*, 505 U.S. at 855–56 (stating that "the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context" (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991))).

plays a role in noncommercial cases. In *Casey* itself the plurality opinion cited reliance on the right to abortion as a factor supporting adherence to *Roe*. According to the plurality, people had "ordered their thinking and living around" *Roe*, and "[t]he ability of women to participate equally in the economic and social life of the Nation" had been facilitated by the availability of abortion.[227] Therefore, the Court held, the cost of overruling *Roe* could not be "dismissed."[228]

Should courts defer to the judgment of elected officials when considering the issue of reliance? Stephen Calabresi argues that they should. In a recent article, Calabresi rejects Paulsen's argument that Congress can abrogate stare decisis and direct the courts to decide cases without giving decisive weight to precedent.[229] But Calabresi nonetheless thinks the states and other branches of the federal government have a role to play in deciding whether precedent is overruled. According to Calabresi, the question of whether to overrule involves weighing the costs the precedent is currently imposing on society against the reliance interests that have grown up around it.[230] These are empirical determinations, Calabresi argues, and are best answered by elected officials because they have (a) superior resources for gathering empirical data,[231] and (b) the political capital needed to legitimately conduct this kind of balancing.[232] Therefore, Calabresi concludes, when one of the branches of the federal government or a majority of the states challenge a precedent, the Court should ignore stare decisis and decide whether the precedent is consistent with the original understanding of the Constitution.[233]

I am sympathetic to the premise underlying Calabresi's argument. The Supreme Court's analysis of reliance interests has fre-

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227 *See id.* at 856.

228 *See id.*

229 *See* Calabresi, *supra* note 124, at 314–15, 338–40.

230 *See id.* at 340.

231 *See id.* at 341 (noting that Congress can hold hearings and commission national studies by the General Accounting Office, while the President can instruct agency officials to gather information and conduct investigations).

232 *See id.* at 344; *see also* Richard W. Murphy, *The* Brand X *Constitution*, 2007 BYU L. REV. 1247, 1296–315 (arguing that Congress should be able to trump judicial interpretations of the Constitution because it has greater political legitimacy and factfinding capabilities than the federal courts).

233 *See* Calabresi, *supra* note 124, at 347. Calabresi does not say what should happen if there is disagreement among elected officials about whether a precedent should be reconsidered. For instance, what if a majority of states urge reconsideration of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which held that the federal government can regulate the states as economic actors, *id.* at 554–57, but Congress and the President urge that it be followed?

quently seemed ad hoc and speculative. For instance, it offered little support for its assertion in *Casey* that the social and economic equality of women had been facilitated by the availability of abortion.[234] This may well be true, but it would certainly have bolstered the Court's judgment had it cited significant empirical data or other research to support its conclusion. Likewise, in *Lawrence v. Texas*,[235] the Court casually dismissed the claim that state governments had relied upon *Bowers v. Hardwick*[236] in writing their criminal codes.[237] This conclusion would have been more persuasive if supported by some evidence. And I agree that Congress, the President, and state legislatures are better equipped to conduct this research than the courts.

But I have several concerns. First, I am not confident that the other branches will actually conduct the necessary research before encouraging the Court to overrule a prior decision. To the extent they consider the issue of reliance at all, I think it is likely they will rely upon the same general impressions and speculation that have characterized the Court's reliance analysis. For instance, Calabresi argues that the Court should have reconsidered the merits of *Roe* after the executive branch requested that it be overruled five separate times during the presidencies of Ronald Reagan and George H.W. Bush.[238] Calabresi apparently believes these efforts were motivated, at least in part, by an empirical judgment that the societal costs of *Roe* outweighed any reliance interests it had generated. But there is no evidence that the executive branch conducted any research or considered the issue of reliance at all. Instead, the decision to challenge *Roe* was almost certainly based on moral disapproval of abortion and a conviction that its interpretation of the Constitution was seriously mistaken. As I explain below, I agree that the Court should consider the views of the other branches when deciding whether a prior decision is egregiously wrong.[239] But this is different than deferring to the views of the other branches on the question of reliance. And without some evidence that the other branches have actually con-

234 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

235 539 U.S. 558 (2003).

236 478 U.S. 186 (1986).

237 *See Lawrence*, 539 U.S. at 589 (2003) (Scalia, J., dissenting) (arguing that "[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation").

238 *See* Calabresi, *supra* note 124, at 345.

239 *See infra* notes 257–58 and accompanying text.

ducted empirical or other research relevant to this question, the Court should not assume they have done so.[240]

Second, even if the other branches have conducted research, it may not always be appropriate to defer to their judgment that the costs of a prior decision outweigh any reliance interests. Many judicial decisions identify constitutional limits on the powers of Congress, the President, and the states. It would seem odd to reconsider these decisions simply because elected officials had determined that the costs they imposed outweighed the reliance interests they had generated. Consider *Texas v. Johnson*[241] and *United States v. Eichman*,[242] which struck down state and federal bans on flag burning.[243] Politicians of all stripes have criticized these decisions,[244] and numerous members of Congress have called for a constitutional amendment to overrule them.[245] There is no evidence that these calls are based upon empirical research or a weighing of costs and benefits. But even if they were, that would not be a sufficient reason to ignore stare decisis and reconsider the merits of these decisions. Where the courts have identified constitutional limits on the power of elected officials, those officials are in no position to weigh the costs and benefits of those limits.[246] Their self-interest in the matter disqualifies them from making a disinterested judgment on the matter.[247] In these cases, the courts must ultimately decide whether a decision has induced such reliance that it should not be reconsidered.

### 4. Changed Facts or Circumstances

The fourth *Casey* factor is "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of signif-

240 *See* Murphy, *supra* note 232, at 1254–57 (arguing that the courts should allow Congress to trump judicial interpretations of the Constitution, but only when Congress expresses its constitutional judgments explicitly and in narrowly focused legislation).

241 491 U.S. 397 (1989).

242 496 U.S. 310 (1990).

243 *See id.* at 318–19; *Johnson*, 491 U.S. at 420.

244 *See* Carl Hulse, *Flag Amendment Narrowly Fails in Senate Vote*, N.Y. TIMES, June 28, 2006, at A1.

245 *See House Backs Ban on Flag Burning*, N.Y. TIMES, June 23, 2005, at A16.

246 *See* Murphy, *supra* note 232, at 1308–09 (suggesting that there may be less room for deference to the constitutional interpretations of elected officials when fundamental rights or the interests of discrete and insular minorities are involved).

247 And as pointed out above, see *supra* note 233, the self-interest of the different branches will sometimes conflict, as it does when the states and Congress disagree about the scope of federal control over state activities.

icant application or justification."[248] The Court cited this factor to justify reconsideration of the "separate but equal" doctrine in *Brown v. Board of Education*.[249] According to the Court, that doctrine rested upon an assumption that de jure segregation did not stamp blacks with a badge of inferiority, an assumption that had been rejected by the time *Brown* was decided in 1954.[250] "Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896."[251]

Like the issue of reliance, this factor turns on an underlying empirical judgment: the extent to which facts—or society's understanding of them—have changed since the earlier rule was announced. For that reason, some deference to elected officials seems appropriate. As explained above, elected officials are better equipped to make empirical judgments than courts and may also be more in tune with societal understandings than unelected judges.[252] Therefore, if Congress, the President, or a large number of states have concluded on the basis of research that the facts supporting an earlier decision have changed, it would make sense for the courts to defer to that judgment.

But I would add a caveat. As with the issue of reliance, courts should not defer to the judgment of elected officials without evidence that it is based upon their superior factfinding capabilities. In other words, the uninformed opinion of elected officials that facts have changed should carry no special weight.

### 5. Egregiously Wrong

The last factor to be considered is whether the earlier decision is egregiously wrong. One might object that wrongness is not a relative attribute—decisions are either right, or they are wrong. But legal outcomes frequently depend on the extent to which a decision conflicts with what another judge views as the correct answer. The standard for appellate review is one example. An appellate judge cannot reverse a

248 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

249 347 U.S. 483, 495 (1954).

250 *Casey*, 505 U.S. at 862–63.

251 *Id.* at 863. The *Casey* plurality also cited the overruling of *Lochner* as an example of a case that had been undermined by changed facts or circumstances. *See id.* at 861–62. But as Chief Justice Rehnquist pointed out in dissent, this was not a very persuasive account of the reasons the Court had offered for overruling *Lochner*. *See id.* at 959–62 (Rehnquist, C.J., dissenting).

252 *See supra* notes 227–32 and accompanying text.

trial court's factual findings just because she disagrees with them; she can do so only if the findings are clearly erroneous.[253] Nor is this practice limited to questions of fact. Federal courts are prohibited from granting writs of habeas corpus to state prisoners unless the state court's judgment was "contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court."[254] This means that habeas relief cannot be granted just because the state court decision was wrong; it must be so clearly wrong as to be "objectively unreasonable."[255]

A similar logic operates within the doctrine of stare decisis. As explained above, courts cannot overrule precedent on the basis of mere disagreement; to do so would deprive precedent of all authority and permit the later court to decide the case de novo.[256] But under the moderate presumption, judges can take into account whether a decision is egregiously wrong, meaning that the decision is not just wrong, but objectively unreasonable.

In evaluating whether a precedent is egregiously wrong, should a court defer to the judgment of elected officials? This question is closely related to the question of whether a court should defer to the constitutional interpretations of the other branches in general. If one believes that courts are the supreme and exclusive interpreters of the Constitution, there can be little reason for deferring to the other branches on the question of whether a prior decision is egregiously wrong. But if one believes that the other branches have a role to play in constitutional interpretation, then courts have an obligation to take seriously their view that a precedent is egregiously wrong.

There is a longstanding debate on the general question of deference, and I will not review here the many arguments that have been made on either side.[257] My own position is that courts should seriously consider the views of the other branches when there is evidence that they have thoughtfully and honestly considered the constitutional issue at hand. Thus, if Congress holds hearings and issues reports explaining why it thinks a law is constitutional, that judgment should carry significant weight with the courts. This does not mean the

253 *See* 2A FEDERAL PROCEDURE, LAWYER'S EDITION § 3:800 (2003) ("Review of findings of fact by the courts of appeals is governed by FRCP 52(a), under which findings of fact are not to be set aside unless clearly erroneous.").

254 28 U.S.C. § 2254(d)(1) (2000).

255 *See* Williams v. Taylor, 529 U.S. 362, 409 (2000).

256 *See supra* note 185 and accompanying text.

257 *See, e.g.*, Hartnett, *supra* note 106; Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941 (1999); Thayer, *supra* note 75, at 144.

courts must necessarily accept that view. If they conclude that the other branches have made a "clear mistake," they should rule otherwise.[258] But if Congress passes a law without seriously considering the constitutional issues it raises, I see no reason to defer to that judgment.

When it comes to stare decisis, I support a similar approach. If the other branches have seriously considered a prior decision and concluded that it was egregiously wrong, the courts should be inclined to reconsider that decision. But I do not think the courts have an obligation to reconsider a prior decision simply because the other branches believe it is costly or limits their power.

6. Summary

To sum up, courts should defer to some, but not all, of the judgments of elected officials when considering whether to adhere to a prior decision. When deciding whether a prior decision is practically unworkable or a remnant of abandoned doctrine, courts owe no deference to elected officials. These are quintessentially legal questions that courts are in the best position to answer. Courts should defer to the judgments of elected officials when deciding whether a precedent has generated individual or societal reliance, but only if those judgments are supported by empirical evidence or other research. Moreover, where a prior decision limits the power of a particular branch of government, courts should not defer to that branch's judgment that the costs of the decision outweigh the reliance it has generated. Similarly, courts should defer to the judgment of elected officials that the facts underlying a decision have changed, but only if that judgment draws on the superior factfinding capabilities of the other branches. Finally, when considering whether a prior decision is egregiously wrong, courts should defer to elected officials to the same extent they would in constitutional cases generally. In my view, that means courts should give serious weight to a thoughtful and considered judgment unless it appears clearly wrong.

One objection to my approach might be that it artificially carves up the stare decisis analysis into discrete units. In practice, one might argue, decisions about whether to overrule do not turn on such minute analytical steps. Instead, a court looks at the entire picture and makes a general judgment about the costs and benefits of overruling. That may be true, and one of the risks of doctrinal analysis is that it misses the forest for the trees. But what I hope I have illustrated by

258 And in fact may be obligated to by their oath, as I suggested above. *See supra* notes 96–103 and accompanying text.

dividing the analysis into separate units is that the decision of whether to overrule turns on both legal and policy considerations, and that while elected officials may be best equipped to evaluate the latter, courts are best equipped to address the former.

## III. Two Additional Considerations

In addition to the factors that are relevant to the stare decisis analysis, there are two other considerations that should be taken into account. First, would deference to the stare decisis views of elected officials invite defiance of Supreme Court decisions? Second, would deference undermine the legitimacy of the judicial branch or confidence in the rule of law?

### *A. Inviting Defiance*

Imagine the following scenario: The Supreme Court accepts Calabresi's argument and makes clear that in deciding whether to reconsider precedent it will defer to the views of elected officials.[259] The Court then issues a decision that limits government power in some way, say by striking down campaign finance laws under the First Amendment. A number of state legislatures and governors disagree with the decision, so they pass laws that directly conflict with the Court's opinion. Their hope is that passing these laws will demonstrate that they think the costs of the decision outweigh any reliance interests it has generated, thereby leading the Court to reconsider its decision. The states do not actually enforce the laws, but their existence on the books deters some campaign spending that is protected under the Court's interpretation of the First Amendment. The affected individuals file suits challenging the laws, but the states argue that they lack standing because they have not suffered an injury-in-fact and the subjective chilling of speech is not a concrete injury for purposes of Article III.[260] The laws thus remain on the books, unenforced but nonetheless deterring the exercise of arguably protected First Amendment activity.

Is this a plausible prediction of what might happen if the courts defer to elected officials on matters of stare decisis? I think so. If legislators want to express their disagreement with a federal court precedent, they have three options. They can make speeches criticizing the decision, they can approve a resolution calling for it to be overruled, or they can pass legislation that directly conflicts with the deci-

259 *See supra* text accompanying notes 229–233.

260 *See* Laird v. Tatum, 408 U.S. 1, 11 (1972).

sion. Although it is possible that officials will limit themselves to the first two options, it seems likely that they will also pursue the third. The most powerful way to signal disagreement with a decision is to openly defy that decision. This is what the South Dakota legislature did recently when it approved a ban on all abortions except those necessary to save the life of the pregnant woman.[261] It is also what Governor Faubus did when he called out the Arkansas National Guard to keep black students from attending white schools.[262] And given that legislators have absolute immunity from lawsuits for money damages,[263] there is little to discourage them from taking such actions. As long as the voters support their position, they will pay no price for defying the courts and may even reap some benefits.

The next question is whether this matters. Should we be concerned by the prospect of open and regular defiance of federal court precedent or should we welcome it? There has been much written in recent years about the benefits of dialogue between the courts and the other branches,[264] and I am not questioning those benefits. But there is a difference between dialogue and defiance. When elected officials express their views on constitutional questions, they provide the courts with an alternative perspective that is arguably more in tune with public sentiment. When officials defy judicial precedent, however, they undermine the stability and predictability of the law, promote disrespect for the judiciary, and generate duplicative and wasteful litigation. Defiance can also undermine individual rights. In my example above, the campaign finance laws would deter First Amendment activity without providing the affected individuals a way to challenge those laws. Of course, one might dispute my description of how that particular scenario would play out. Prosecutors might choose to enforce the campaign spending laws, thereby giving the affected individuals standing to mount a challenge. Or the courts might grant standing even though the laws are not being enforced. But defiance would still be costly, requiring lower courts to adjudicate an issue that had already been decided by the Supreme Court. And it

261 *See* Monica Davey, *South Dakota Bans Abortion, Setting Up a Battle*, N.Y. TIMES, Mar. 7, 2006, at A1.

262 *See* Cooper v. Aaron, 358 U.S. 1, 11–12 (1958).

263 *See* Tenney v. Brandhove, 341 U.S. 367, 372–76 (1951).

264 *See* NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 29–52 (2004); Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1174–79 (2006); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653–55 (1993); Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 977–98 (2005).

is possible that this cycle could be repeated more than once, especially if additional states decide to express their disagreement with the initial decision.

Admittedly, there is a fine line between dialogue and defiance. I have characterized the South Dakota law and the Faubus incident as examples of defiance. But what about the Religious Freedom Restoration Act,[265] which attempted to undo the effect of *Employment Division v. Smith*?[266] Or 18 U.S.C. § 3501, Congress' attempt to eliminate the requirement of *Miranda* warnings?[267] Or the federal flag burning law[268] that Congress passed in response to *Texas v. Johnson*?[269] I would argue that these are examples of dialogue because in each case there was a colorable argument that Congress' action was not foreclosed by Supreme Court precedent. But I recognize that the distinction is not always clear, so I do not want to overstate my position. I am not suggesting there is anything wrong with attempts by elected officials to persuade the courts to reconsider their decisions. However, I do think that open and regular defiance of precedent is undesirable. And to the extent that deferring to elected officials on matters of stare decisis would invite defiance, courts should proceed cautiously before accepting Calabresi's position.[270]

### *B. Legitimacy and Confidence in the Rule of Law*

Now return to the scenario above and imagine the following twist. After the Supreme Court strikes down the campaign finance laws, Congress, the President, or a significant number of states express their disagreement with that decision, either through speeches, legislation, or resolutions. The Court defers to their judgment, reconsiders the decision, and overrules it. A few months later, the pattern repeats itself. In response to a decision they dislike, elected officials express

265 42 U.S.C. § 2000bb to 2000bb-4 (2000), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

266 494 U.S. 872, 872–81 (1990).

267 *See* Dickerson v. United States, 530 U.S. 428, 432 (2000) (holding that the *Miranda* warnings are grounded in the Constitution and thus cannot be eliminated by Congress).

268 *See* Flag Protection Act of 1989, Pub L. No. 101-131, 131 Stat. 777 (codified at 18 U.S.C. § 700 (2000)), *invalidated by* United States v. Eichman, 496 U.S. 310 (1990)).

269 491 U.S. 397, 406 (1989).

270 One possibility is to indicate that they will defer only to the views of elected officials expressed in resolutions and declarations, thereby giving elected officials an incentive to avoid the more drastic step of passing laws that conflict with precedent. *See supra* text accompanying notes 229–233.

their disagreement and the Court again overrules itself. One can imagine this pattern becoming common. In fact, looking back over the past few decades, there are many decisions that might be overruled if the Supreme Court were to defer to the stare decisis views of elected officials. Think of the cases mentioned in the preceding subpart—*Texas v. Johnson*,[271] *Employment Division v. Smith*,[272] and *Miranda v. Arizona*.[273] Or think of *Kelo v. City of New London*,[274] *United States v. Booker*,[275] *Reno v. ACLU*,[276] *Lorillard Tobacco Co. v. Reilly*,[277] *United States v. Morrison*,[278] *Clinton v. New York*,[279] *United States v. Lopez*,[280] *INS v. Chadha*,[281] or *Buckley v. Valeo*.[282] All these decisions have been criticized by either the President, Congress, or a significant number of states. Under Calabresi's approach, therefore, all of them would be ripe for overruling.

This leads to another concern with Calabresi's argument. If deference to the stare decisis views of elected officials resulted in frequent overrulings, what effect would that have on the Supreme Court's legitimacy and the public's confidence in the rule of law? Admittedly, this is a speculative question. We can not know for sure

271 491 U.S. at 406, 420 (reversing a defendant's conviction for flag burning on First Amendment grounds).

272 494 U.S. 872, 879–81 (1990) (holding that the Free Exercise Clause does not prohibit generally applicable laws that incidentally burden religious exercise).

273 384 U.S. 436, 473 (1966) (holding that the Fifth Amendment Self-Incrimination Clause requires police to inform suspects of their constitutional rights prior to conducting custodial interrogations).

274 545 U.S. 469, 477–90 (2005) (holding that a city's exercise of eminent domain in furtherance of an economic development plan satisfied the "public use" requirement).

275 543 U.S. 220, 267 (2005) (holding that the Federal Sentencing Guidelines are subject to Sixth Amendment jury trial requirements).

276 521 U.S. 844, 874 (1997) (striking down provisions of the Communications Decency Act on First Amendment grounds).

277 533 U.S. 525, 556–66 (2001) (holding that the First Amendment was violated by regulations prohibiting specified advertising of cigars or smokeless tobacco within 1000 feet of a school or playground).

278 529 U.S. 598, 607–19 (2000) (striking down the civil remedy provision of the Violence Against Women Act as exceeding Congress' power under the Commerce Clause).

279 524 U.S. 417, 421 (1998) (holding that the Line Item Veto Act violates the Presentment Clause).

280 514 U.S. 549, 567 (1995) (striking down a provision of the Gun-Free School Zones Act as exceeding Congress' power under the Commerce Clause).

281 462 U.S. 919, 958–59 (1983) (striking down a one-house veto as inconsistent with the bicameralism and presentment requirements).

282 424 U.S. 1, 39–51 (1976) (holding that expenditure limits on political campaigns violate the First Amendment).

how the public would react to this hypothetical situation until it becomes reality. But we can make an educated guess based upon history and contemporary attitudes.

One possibility is that deference to the stare decisis views of elected officials would increase the courts' legitimacy by making them appear more responsive to the constitutional judgments of the people's representatives. History offers some support for this prediction. The Court improved its standing in the late 1930s when it repudiated its expansive interpretation of the Due Process Clause and its narrow interpretation of the Commerce Clause. In addition, one of the Court's finest moments—*Brown v. Board of Education*—was a repudiation of an earlier decision, although not one driven primarily by criticism from elected officials.

But another possibility is that a series of overrulings triggered by elected officials might make constitutional interpretation appear even more political than it already does. Legal scholars generally accept the proposition that constitutional law is heavily influenced by politics.[283] But I am not sure most citizens share this view or, if they do, are so nonchalant about it. My impression—based upon the students I teach and the nonlawyers I talk to—is that many people view the Constitution as a quasi-sacred document that is (or at least should be) beyond the reach of ordinary politics and that the Supreme Court is the guardian of that document. If my impression is accurate, then to acknowledge so starkly that constitutional meaning can be changed whenever enough politicians disagree with a Court ruling could significantly undermine the public's confidence in the rule of law and the legitimacy of Supreme Court decisions. After all, if the Court will overrule a decision at the request of elected officials, why respect those decisions that have not yet been overruled? They would appear to be no more than tentative rulings awaiting approval by politicians.

It is also not clear that the public wants the Court to follow the constitutional views of elected officials. According to one recent poll, forty-nine percent of Americans think the Court should consider only the legal issues when deciding important constitutional questions, while forty-two percent think it should also take into account the public's views.[284] Of course, a poll cannot decide the matter for us. But it

283 *See, e.g.*, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742, 1786 (2007) (observing that "split[s] between the movement and the party system made the transaction of constitutional politics into constitutional law an especially tricky business").

284 *See* Pollingreport.com, Judiciary, http://www.pollingreport.com/court2.htm (last visited Mar. 21, 2008) (presenting a CBS News Poll conducted from July 25 to August 2, 2005).

does suggest that a large segment of the public wants the Court to be an independent interpreter of the Constitution, not simply a barometer of public opinion.

## CONCLUSION

In recent years, a number of strong claims have been made about stare decisis and the Constitution. We have been told that the Constitution requires adherence to precedent, that it forbids adherence to precedent, that Congress can order the courts to ignore precedent, and that the courts should defer to the stare decisis views of elected officials. My response to these claims may seem timid and boring by comparison. No, stare decisis is not constitutionally required, but neither is it unconstitutional. And no, Congress cannot order the courts to ignore stare decisis. The courts are free to defer to the stare decisis judgments of elected officials, but they should do so only with respect to some issues, and even then they should proceed cautiously.

The reason for my pragmatism about stare decisis lies in its history. Stare decisis did not originate as an inflexible rule built upon grand principles; rather it developed as a tool by which judges could provide stability and predictability without compromising the common law's great advantage: its adaptability.[285] The Constitution is not the common law,[286] but it must also achieve a balance between rigidity and flexibility if it is to survive in the long run. Stare decisis can help achieve this goal, but only if we treat it as the instrumental doctrine it has always been. When we burden it with grand theories and radical proposals, we undermine its value.

285 *See* Healy, *supra* note 4, at 65–66, 88–89.

286 *But see* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).