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POLYPHONIC STARE DECISIS: LISTENING TO NON-ARTICLE III ACTORS

*Kermit Roosevelt III**

INTRODUCTION

Courts say what the law is, but non-Article III actors[1] want their voices heard as well. We see this phenomenon most obviously when a court decides an issue of first impression, as litigants and amici press their views. But what about the situation where an issue has already been decided? In such cases, courts typically decline to consider the matter de novo. Instead, the doctrine of stare decisis injects other considerations. My goal here is to explore the question of whether those considerations make it more or less appropriate for courts to heed the views of non-Article III actors. That is, how much significance should a court give to these views as compared to the weight of precedent?

In order to decide this question, we need first to define the subject of the inquiry. Part I of the Article sets out its metes and bounds, describing the kind of cases and the kind of stare decisis it will discuss. In order to do this, it also sets out a more complicated vision of what goes on in deciding a constitutional case.

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1 I mean this term broadly. Recent work on constitutional theory has suggested that courts do or should give weight to the views of many sorts of non-Article III actors, governmental and nongovernmental. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES 227–48 (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 177–94 (1999); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2022–23 (2003). I use "non-Article III" rather than "nonjudicial" because, as we shall see, state courts may be among the most influential of such actors.

Having anatomized stare decisis and constitutional decisionmaking, the Article proceeds in Part II to discuss the relevance of the views of non–Article III actors to these various issues. Part III applies the analysis to two recent attempts to prompt reconsideration of precedents, the short-lived South Dakota abortion ban and the Federal Partial Birth Abortion Ban Act.

I. SETTING THE STAGE

A. *What Kind of Stare Decisis?*

Stare decisis, to start with the most general definition, is the doctrine that suggests that the fact that a particular issue has once been decided a particular way gives a court a reason to decide it the same way if it is presented again.[2] The reason can be understood as either epistemic or instrumental (or both).[3] Epistemically, the fact of the prior decision offers some reason to think that that decision is correct. Past courts are probably generally as good as present courts at making decisions, so their adoption of a particular answer is a factor weighing in favor of the correctness of that answer.[4] This is true without reference to the persuasiveness of the past opinion, though consideration of the opinion may make the factor more or less substantial.[5]

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2 The phrase "stare decisis" is shorthand for the Latin "*stare decisis et non quieta movere*," which translates as "'stand by the thing decided and do not disturb the calm.'" *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1016 (2003) (quoting James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986)).

3 There are arguments that the Constitution requires stare decisis, and if we accept these, we might also say that the practice ensures that judges act as judges, rather than legislators, or serves equality norms. *See infra* text accompanying notes 22–35. But since the constitutionally required form of stare decisis is very weak, if it exists at all, *see infra* text accompanying notes 18–25, I will largely ignore this consideration.

4 *See* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 81 (2000).

5 If the past court made an obvious error, for instance, the epistemic argument for stare decisis weakens; if the opinion is persuasive, it gains strength. We might also imagine circumstances in which a past court is either better—or worse—positioned to interpret some law. For instance, in *United States v. Morrison*, 529 U.S. 598 (2000), Chief Justice Rehnquist suggested that the Supreme Court that decided the *Civil Rights Cases*, 109 U.S. 3 (1883), was especially well placed to interpret the Fourteenth Amendment. *See Morrison*, 529 U.S. at 622 ("The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time."). A more refined analysis of historical context could be used to make the opposite argument. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitu-*

The instrumental justification for stare decisis contains several different strands. From the perspective of courts and litigants, stare decisis saves time and effort. Constitutional litigation could hardly proceed if every issue (for instance, the application of the Bill of Rights to the states) were up for grabs anew in every case.[6] From the perspective of out-of-court actors, stare decisis provides stability and more effective guidance: rather than relying on relatively vague statutes or constitutional provisions, individuals may rely on specific judicial decisions. We might also add a concern for the legitimacy of judicial review, something that has instrumental value to the Court as an institution and, on some accounts, a degree of constitutional force as well.[7] If a Court abandons precedent too readily and without adequate explanation, observers may conclude that its decisions are driven by preference rather than principle.[8]

Stare decisis may operate either vertically (when a lower court considers the effect of a higher court's decision) or horizontally (when a court considers the effect of its own prior decision). The two contexts differ with respect to the force of the doctrine; vertical stare decisis is generally considered mandatory,[9] while horizontal stare decisis is "not an inexorable command."[10] They might well also differ with respect to the appropriate role of nonjudicial actors. Even those who think that Congress has the power to abrogate horizontal stare decisis at the Supreme Court level concede that its ability to free lower courts from the obligations of vertical stare decisis is a different matter.[11]

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tional Revolution, 87 VA. L. REV. 1045, 1099 (2001) (noting that Rehnquist "neglected to mention that by the 1880s [the Justices'] understandings reflected less the vision of the Radical Republicans of 1868—many of whom also passed the Klan Act of 1871 and the Civil Rights Act of 1875—than the rapprochement between northern and southern whites that followed the Compromise of 1877").

6 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.) ("The obligation to follow precedent begins with necessity . . . ."); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 593 (2001).

7 *See infra* text accompanying notes 17–25 (discussing constitutional arguments for stare decisis).

8 *See Casey*, 505 U.S. at 866 ("There is a limit to the amount of error that can plausibly be imputed to prior Courts.").

9 *See, e.g.*, 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, 188 (2006) ("When it comes to vertical stare decisis, the conventional notion is that the decisions of higher courts are binding on lower courts.").

10 Payne v. Tennessee, 501 U.S. 808, 828 (1991).

11 *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1538 n.8 (2000).

This Article will consider only horizontal stare decisis, and it will focus on the Supreme Court level.[12]

We can also subdivide the application of stare decisis in terms of the subject matter of the decision being considered. Stare decisis is typically said to operate with greater force in statutory cases than in constitutional ones, on the theory that Congress can amend the statute if it disagrees with the Court's interpretation, and that a failure to amend thus indicates agreement.[13] One might also differentiate between statutory and constitutional stare decisis with respect to the appropriate weight of the views of non–Article III actors. The question of non–Article III input into statutory stare decisis is interesting in its own right, but it is beyond the scope of this Article.[14] I will be discussing only constitutional stare decisis.

B. What Kind of Input?

The sort of stare decisis this Article addresses is horizontal stare decisis at the Supreme Court level in constitutional cases. The sort of input from nonjudical actors it addresses is persuasive input. The question I will focus on is whether the Court ought in some cases to defer to the views of some non–Article III actors, not whether any of them have the power to bind it.

This latter question is, however, logically prior in the sense that if Congress can require the Court to follow a particular approach to

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12 As the creator of the lower federal courts, Congress may have greater control over their use of stare decisis. How far that power extends I do not attempt to answer. For a general discussion, see James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 873–76 (1998).

13 *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071–72 (codified as amended at 42 U.S.C. § 1981(b) (2000)). *See generally* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 322–23 (2005) ("The rationale that has been discussed most widely in both the cases and the commentary is . . . 'congressional acquiescence'—the belief that congressional inaction following the Supreme Court's interpretation of a statute reflects congressional acquiescence in it.").

14 For instance, Congress can certainly amend a statute, but what if it simply passes a "sense of the Congress" resolution stating that a Court decision misinterpreted a statute? What if an amendment is vetoed? With respect to the executive, how should a court reconcile stare decisis with the deference due an agency's interpretation of the statute it administers? And what happens when an agency changes its interpretation? Some of these questions are discussed in Richard J. Pierce, *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2227–37 (1997), and Rebecca Hanner White, *The Stare Decisis "Exception" to the* Chevron *Deference Rule*, 44 FLA. L. REV. 723, 746–56 (1992).

constitutional stare decisis, discussion of whether the Court would be well advised to heed a congressional suggestion is beside the point. It is thus worth spending at least a little space to consider the possibility that Congress' power extends so far. (Additionally, as we shall see, the argument for congressional control provides a convenient way to introduce the model of constitutional decisionmaking around which this Article is built.) This argument has been made at length by John Harrison[15] and Michael Stokes Paulsen,[16] and I will review it only briefly.

Both Harrison and Paulsen proceed by inquiring into the status of stare decisis. Finding it to be federal common law, and not required by the Constitution, they conclude that Congress can displace court-created rules of stare decisis as it could displace any other federal common law through the exercise of a grant of legislative authority.[17] The required grant is found in the Necessary and Proper Clause, which allows Congress to legislate in order to "carry[] into Execution" all "Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[18]

I am skeptical of this argument, for essentially the reasons offered by Richard Fallon.[19] The argument relies on a distinction between the outcome that the Constitution directs in a particular case in the absence of stare decisis (of constitutional dimension, and not subject to legislative override) and the judge-made rule of stare decisis (not of constitutional dimension, and therefore subject to displacement by legislation). But if this distinction holds, we are confronted with an interesting manifestation of the Condorcet Paradox.[20] The outcome required by the Constitution without stare decisis is superior to any federal legislation. Federal legislation is superior to a judge-made rule of stare decisis. But that judge-made rule is superior to the outcome otherwise required under the Constitution, for judges may simply decline to revisit a decision they believe erroneous.[21]

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15 *See* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 531–39 (2000).

16 *See* Paulsen, *supra* note 11, at 1567–99.

17 *See* Harrison, *supra* note 15, at 506, 525; Paulsen, *supra* note 11, at 1540.

18 U.S. CONST. art. I, § 8, cl. 18; *see* Harrison, *supra* note 15, at 531; Paulsen, *supra* note 11, at 1567.

19 *See* Fallon, *supra* note 6, at 574–77.

20 *See, e.g.*, Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 VAND. L. REV. 1849, 1906–07 (2001) (describing the phenomenon of the Condorcet Paradox).

21 For Fallon's slightly different formulation of this point, see Fallon, *supra* note 6, at 574–76.

That seems odd, for one would expect transitivity in such circumstances. And since the superiority of the Constitution is axiomatic, the natural way to cut out of the circle seems to be the conclusion that judicial reliance on stare decisis to avoid an otherwise required constitutional decision is itself unconstitutional. Scholars have indeed argued that constitutional meaning *should* trump precedent[22] but the view that it *must* is neither a widely held position[23] nor a good starting place for an investigation into the appropriate role of non–Article III actors. Or not a long investigation, anyway; if stare decisis in constitutional cases is prohibited, we're done. So how can the puzzle be resolved?

One answer might be that the Constitution does in fact require some form of stare decisis (which would imply the unconstitutionality of legislation abrogating stare decisis, though not that of legislation prescribing some particular form). Paulsen rejects this view on the ground that the Constitution says nothing about the practice and the Court's frequent observations that stare decisis is not an "inexorable command"[24] "illustrate the sub-constitutional, policy-based nature of the doctrine."[25] But to say that courts are not always required to adhere to precedent ("stare decisis is not an inexorable command") is not to say that they can do without stare decisis entirely. The possibility remains that the Constitution requires some form of respect for precedent, although that form does not require adherence in every case. To put the assertion in constitutional language, it may be in the nature of the "judicial power" (and one of the things that distinguishes it from the legislative power) that departures from precedent require some justification. On this view, precedent must have *some* force.

Indeed, if one looks at what the Supreme Court has said about precedent, there are many statements to this effect. Perhaps the best evidence comes from the Court's struggles with the question of retroactivity: what to do when a judicial decision changes the law. At one

22 *See, e.g.*, Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 259 (2005) (arguing that "[a]ccepting that judicial precedent can trump original meaning puts judges above the Constitution they are supposed to be following, not making").

23 For examples, see Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25–28 (1994); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 3 n.12 (2007) (characterizing his argument as "an obligatory '*but cf.*' citation").

24 *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991).

25 Paulsen, *supra* note 11, at 1547; *see also* Harrison, *supra* note 15, at 513 (observing that the Constitution does not mention precedent).

point, the Court adopted a solution whereby it would announce a new rule in one case but then not apply that rule to cases pending on direct review in which the relevant events (typically a state court conviction) occurred before the law-changing decision.[26] But in *Harper v. Virginia Department of Taxation*,[27] the Court pronounced this "selective prospectivity" unconstitutional, stating that "the nature of judicial review" barred the Court from holding that its decision in one case should have no effect on other similarly situated cases.[28]

Other similar pronouncements from the retroactivity context abound. In *Griffith v. Kentucky*,[29] the Court stated that "after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review."[30] In *James B. Beam Distilling Co. v. Georgia*,[31] the "principle that litigants in similar situations should be treated the same" was called "a fundamental component of *stare decisis* and the rule of law generally."[32]

Those seeking constitutional homes for stare decisis beyond the "judicial power" could look to equality provisions such as the Fourteenth Amendment's Equal Protection Clause and the analogous requirements of Fifth Amendment due process. Justice Douglas, in an article entitled *Stare Decisis*, made this argument, claiming that "there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon."[33] For a court to announce with no explanation that one litigant can benefit from a particular legal rule but that another who follows him cannot does seem a literal denial of the equal protection of the laws.[34] But without stare decisis, nothing prevents the Court from treating like cases differently with no justification—or, to put it differently, without stare decisis, the Court

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26 *See generally* Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1092 (1999) (describing the Warren Court's adoption of "selective prospectivity").

27 509 U.S. 86 (1993).

28 *Id.* at 95.

29 479 U.S. 314 (1987).

30 *Id.* at 322–23.

31 501 U.S. 529 (1991).

32 *Id.* at 537. For a contrary view, see Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2056–73 (1996).

33 William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

34 On this view, presumably, the Fourteenth Amendment requires some form of stare decisis in state courts.

indicates that it is perfectly appropriate to do so. This is inconsistent with the judicial role.[35]

So there are reasonable arguments, which the Court itself appears to endorse, that some sort of respect for precedent is constitutionally required. This constitutional requirement would presumably bind both Congress and the Court, so that Congress cannot strip decisions of precedential effect, and neither can courts. This conclusion has real world significance. Congress has never tried to abrogate horizontal stare decisis,[36] but courts have,[37] and this analysis suggests that the practice of designating certain opinions as "nonprecedential" is unconstitutional.[38] Whether Congress can require a particular form is less clear.

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35 *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33–34 (1921) ("It will not do to decide the same question one way between one set of litigants and the opposite way between another.").

36 The closest it has come is perhaps 28 U.S.C. § 2254(d)(1) (2000), which restricts habeas relief, with respect to claims adjudicated in state court, to violations of "clearly established Federal law as determined by the Supreme Court of the United States." This seems to abrogate horizontal stare decisis at the circuit court level and vertical stare decisis at the district court level by instructing courts to disregard circuit law. In fact, it does something slightly different (and more severe), because it prevents district and circuit courts not merely from relying on prior circuit law, but also from deciding an issue independently and granting relief. This would raise constitutional questions if understood as an attempt to control the interpretation of federal law, though it might still be permissible given that it applies only to lower federal courts. But it is probably better understood as a limitation on the remedy of habeas corpus. At least some federal judges believe that this construction does not cure the problem. *See* Irons v. Carey, 505 F.3d 846, 856–59 (9th Cir. 2007) (Noonan, J., concurring) (arguing that § 2254(d)(1) is unconstitutional); *id.* at 859 (Reinhardt, J., concurring). For academic commentary, see, for example, Liebman & Ryan, *supra* note 12, at 873–76.

37 *See infra* Part I.C.

38 The Eighth Circuit so held, in *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000). For commentary on *Anastasoff*, see, for example, Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000); Bradley Scott Shannon, *May Stare Decisis Be Abrogated by Rule?*, 67 OHIO ST. L.J. 645, 667 (2006); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 434–35 (2006). The significance of the issue has been somewhat reduced by the promulgation of a rule allowing parties to cite any opinion issued after January 1, 2007. *See* FED. R. APP. P. 32.1. The rule does not, however, bar courts from designating some opinions as nonprecedential and ignoring citations to them, so it may prove only a cosmetic change.

Alternatively, one might argue that even if stare decisis is not constitutionally required, authority over it is given to the judiciary.[39] On this view, courts could pick whatever form they want (including abrogation), and Congress could not interfere.[40] This argument might seem impossible to maintain given the hierarchical taxonomy of federal law mentioned earlier, in which statutes are superior to judge-made federal common law. If the Constitution allows courts to choose one form of stare decisis over another, a federal statute must also be able to make that choice, and to overcome any contrary judicial preference.[41] But perhaps the hierarchy understates the complexity of the matter. Executive orders are not superior to statutes either, but sometimes they may prevail in a conflict. Sometimes, that is, when executive and legislative authority overlap, executive authority wins.[42] The same is perhaps true of legislative and judicial authority: in some core areas, the judiciary may have the power to resist legislative incursion, even if Congress has the power to regulate in the absence of judicial opposition.[43] And if such areas exist, the determination of how much weight to accord a prior judicial decision seems a plausible candidate.

The substance of my view can be assembled from these arguments. I think that the Constitution probably does require some form

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39 *See* Paulsen, *supra* note 11, at 1570–82 (considering and rejecting this argument).

40 Or it might be the case that the Constitution both requires some form of stare decisis *and* gives authority over it to the judiciary, so that no one can abrogate it and Congress cannot impose a particular form.

41 This is Paulsen's conclusion. *See* Paulsen, *supra* note 11, at 1582 (concluding that judge-made rules cannot prevail over federal statutes).

42 This "executive override" theory is now notoriously associated with the Bush Office of Legal Counsel memos on torture and other national security matters. *See, e.g.*, Christopher Kutz, *Torture, Necessity, and Existential Politics*, 95 CAL. L. REV. 235, 237 n.7 (2007) (discussing the theory). In that context it has been strongly criticized. *See, e.g., id.* at 246–47. But the basic point is sound, and even confirmed by *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court opinion that the Office of Legal Counsel memos notably failed to cite. As Justice Jackson observed, when the President acts against the expressed will of Congress, his power is "at its lowest ebb." *Id.* at 637. But the implication is that some executive power remains: sometimes, that is, Congress and the executive both possess power to act on a given subject, and sometimes, when those powers are exercised in contrary directions, executive power prevails.

43 The Supreme Court has suggested as much. *See, e.g.*, Miller v. French, 530 U.S. 327, 350 (2000) (reserving the question of whether congressional regulation of judicial procedure might be "so severe that it implicated . . . separation of powers concerns"); Amy Coney Barrett, *A Theory of Procedural Common Law*, 94 VA. L. REV. (forthcoming 2008) (manuscript at 15 n.67), *available at* http://ssrn.com/abstract=1014661.

of stare decisis, albeit quite a weak one, and that beyond this minimal requirement authority is given to the judiciary and not Congress. But I want to suggest a different route to the conclusion. All the analysis offered so far still leaves us with the strange spectacle of a rule that, in the discretion of judges, allows them to decide cases contrary to the otherwise correct outcome under the Constitution. A judge-made rule appears to overcome the Constitution.

The puzzle can be resolved, however, if we think of stare decisis not as a judge-made rule distinct from the otherwise required outcome of a constitutional case, but rather as part of the process by which the Court determines the required outcome. Appeals to precedent are doctrinal arguments, and doctrinal argument, as Philip Bobbitt pointed out, is one modality of constitutional argument, on the same plane as appeals to text, structure, and history.[44] Thus, invocation of stare decisis is not the trumping of the Constitution by judge-made law, but one of the set of essentially hierarchically equal means by which courts decide constitutional cases.

But, one might object, simply calling something a constitutional argument doesn't make it so. There's what the meaning of the Constitution requires, and then there are other considerations, which are subconstitutional. A doctrinal argument has force only if we accept stare decisis, and stare decisis rests in large part on instrumental justifications such as judicial economy, predictability, and reliance—important factors, maybe, but not of constitutional dimension.

The problem with this objection is that it undercounts both the set of justifications for stare decisis and the range of constitutional arguments. Doctrinal arguments may ultimately rest on stare decisis, but stare decisis may rest on constitutional ground, either as part of the nature of the judicial power or via equality values. And even if it rests on nothing more than instrumental considerations, instrumental arguments can be arguments about constitutional meaning. Indeed, both Madison and Hamilton offered these sorts of arguments in the Bank debate,[45] and Philip Bobbitt's widely accepted taxonomy includes "prudential" argumentation as one of six modalities.[46] Even Justice Jackson's pithy appeal to prudence, arguing that the Constitu-

44 *See* PHILIP BOBBITT, CONSTITUTIONAL FATE 7–8, 39–58 (1982).

45 *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 29 (5th ed. 2006) (noting Madison's argument that where meaning is "doubtful, it is fairly triable by its consequences"); *id.* at 34 (excerpting Hamilton's argument that it "would be fatal to the just and indispensable authority of the United States" to conclude that chartering the Bank is outside congressional power).

46 *See* BOBBITT, *supra* note 44, at 59–73.

tion is not "a suicide pact,"[47] is a claim about the meaning of the Constitution.

What all this suggests is that the neat distinction between the judge-made subconstitutional rule of stare decisis and the pure demands of the Constitution cannot be maintained—at least, not for the purpose of arguing that the former is subject to congressional control and the latter is not.[48] Constitutional decisionmaking does not just require a court, as Justice Owen Roberts put it, "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."[49] A casual glance at any Supreme Court opinion will reveal that. Instead, as I and others have argued, what goes on is a significantly more complicated process.[50] The Court, when it is resolving an issue of first impression, must do several things.[51] First, it must determine the requirements of the Constitution—what we could call the constitutional operative proposition.[52] Second, it must decide how to implement that meaning to decide the case before it.

The implementing rule, which we can call a constitutional decision rule, may resemble the operative proposition, or it may differ in

47 Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

48 That is not to say that the distinction between the meaning of the Constitution and the rules that judges apply to decide cases is not useful for some purposes. To the contrary, I think it an immensely powerful analytic tool, and the main point of this Article is to demonstrate its utility for the analysis of the role of non–Article III actors in stare decisis analysis.

49 United States v. Butler, 297 U.S. 1, 62 (1936).

50 For much more detailed explanations of this model, see generally RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001) (describing ways in which the Court crafts doctrine to implement constitutional meaning); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 50–51 (2004) (introducing the distinction between "decision rules" and "operative propositions"); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655–58 (2005) (explaining the "Decision Rules Model").

51 My use of the word "must" is not intended to suggest that the Court is necessarily conscious of these different steps in the decision. Critics of the decision rules model sometimes point out that this reconstructed process does not resemble what courts actually do. *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873 (1999). Certainly not, if the Court is simply applying precedents. But with issues of first impression it frequently does, though admittedly the Court operates with greater or lesser degrees of self-consciousness. *See* Kermit Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193, 194–96 (2006), http://www.harvardlawreview.org/forum/issues/119/march06/roosevelt.pdf.

52 This name, and "constitutional decision rule" used subsequently, come from Berman, *supra* note 50, at 9. I will also sometimes use "doctrine" to refer to decision rules and "meaning" to refer to operative propositions.

various ways. Many factors go into the creation of a decision rule.[53] But one of the most salient, perhaps the most important, is the degree of deference that the Court grants to the government actor whose conduct it is reviewing.[54] This, I have suggested, is the best understanding of the omnipresent tiers of scrutiny—a reflection of how deferential or suspicious the Court is.[55]

Use of the decision rules model gives a more definitive answer to the question of whether Congress can control the Court's use of stare decisis. No one, I think, would claim that Congress can require the Court to exhibit a particular degree of deference to some non–Article III actor on constitutional questions.[56] Congress cannot, for instance, tell the Court to use rational basis review instead of intermediate scrutiny to evaluate sex-based discrimination by states. But the invocation of stare decisis, at least on epistemic grounds, is essentially the same thing—it is a judicial choice to defer to an earlier court. If the decision whether or not to defer to non–Article III actors is not subject to congressional control, the same decision with respect to the judiciary should be equally unconstrained.

My conclusion, then, is that adopting some form of stare decisis is part of the process of deciding cases, committed to judicial authority as part of the Article III judicial power to the same extent as the choice between different tiers of scrutiny. Congress can neither abrogate nor demand stare decisis against judicial will. Thinking of stare decisis from this perspective does not tell us whether the Court can abrogate it with respect to some cases. I am drawn to the argument that equality and the nature of judging require some form of respect for precedent, but that is not the subject of this Article and it is time to move on. Having used the decision rules model to argue that Congress cannot issue commands with respect to stare decisis, I now ask what the model's implications are for non–Article III suggestions.

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53 For a partial listing and discussion, see Roosevelt, *supra* note 50, at 1658–67.

54 *See* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM 43–44 (2006) (arguing for the centrality of deference).

55 *See id.* at 32–36.

56 The closest claim is perhaps that the Court should defer to congressional interpretations of the Fourteenth Amendment when Congress exercises its Section Five enforcement power. *See, e.g.*, Amar, *supra* note 4, at 117–18 ("The Reconstruction Republicans aimed to give Congress broad power to declare and define the fundamental rights—the privileges and immunities—of American citizens above and beyond the floor set by courts."); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 11 (2003). But the argument there is that the Constitution prescribes such deference.

C. *What Is a Precedent?*

In order to figure out what might be the stare decisis effect of a decision (and what non–Article III actors might have to say about it), we need to resolve the antecedent question of what a decision decides. By this I do not mean to invoke the conventional distinction between holding and dictum. In my experience, the distinction counts for little when judges view a precedent approvingly, and when they do not, almost anything can become dictum.[57] I agree with the commonsense view that federal judges have the power to say what the law is—jurisdiction—only in the context of deciding cases, and therefore the resolution of issues unnecessary to the decision is not a judicial statement of the law with the performative effect that accompanies the necessary utterances.[58] But my point here is that we will come up with different descriptions of the necessary part of a decision depending on how we think constitutional cases are decided.

Suppose, for instance, that we share Justice Owen Roberts' apparent belief that a court simply lays a statute next to the Constitution and determines whether the two are consistent.[59] And suppose that we are talking about the decisions in *Roe v. Wade*[60] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[61] Are they consistent? In *Roe*, a statute was struck down;[62] in *Casey*, some parts survive.[63] But the statutes were different, of course, and if all that goes on in these cases is the comparison of a statute to the Constitution, it is hard to see how any decision provides guidance for subsequent courts. Everything is, or might be, consistent if the facts are different.

More likely, though, we understand that a little more goes on. The statute is not compared to the Constitution itself but rather to the doctrine the Court has created as a way of implementing the Constitution. We consider the articulation of that doctrine to be a necessary part of the decision.

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57 Indeed, the distinction appears to be of diminishing significance in judicial opinion writing. *See, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006) ("The distinction between dictum and holding is more and more frequently disregarded.").

58 *See id.* at 1259–60.

59 United States v. Butler, 297 U.S. 1, 62 (1936); *see supra* text accompanying note 49.

60 410 U.S. 113 (1973).

61 505 U.S. 833 (1992).

62 *See Roe*, 410 U.S. at 164.

63 *See Casey*, 505 U.S. at 880, 887 (plurality opinion); *id.* at 882–83, 899–90 (joint opinion of O'Connor, Kennedy & Souter, JJ.).

From this perspective, we would probably say that what *Casey* stands for is the "undue burden" test.[64] This is the level at which we usually teach students to read cases—to extract what are sometimes called the "black letter" rules. Viewed in this light, *Roe* and *Casey* are inconsistent in some very substantial ways. *Roe* uses the strict scrutiny test and imbeds it in a trimester framework.[65] *Casey* gives us a different test, undue burden, and abandons the trimester framework.[66] The black letter rules have changed, which is why the dissents find something ironic in the paean to stare decisis and the plurality's claim to reaffirm the "essential holding" of *Roe*.[67]

But where do these tests—strict scrutiny and undue burden—come from? What the preceding subpart has argued is that deciding constitutional cases is best understood neither as a simple process of laying statutes next to the Constitution nor a mysterious process of drawing doctrine out of the Constitution. Rather, it has basically three steps. First, the Court decides the meaning of the Constitution. Second, it crafts doctrine to implement that meaning, a process that draws on many considerations. Third, it applies that doctrine to a particular case.

In the abortion context, that process would require the Court to confront three questions. First, what does the Constitution mean about abortion: is there some sort of constitutional protection for a woman's choice to terminate a pregnancy, or isn't there? Second, if such a right exists, how is it to be implemented: to what test should the Court subject abortion restrictions? And third, how does the statute under examination fare under the test enunciated at the second step? (Note that judges may agree or disagree in different combinations at any stage, so that more precise specification of the analysis may reveal disagreements, and less fully theorized opinion writing may mask this.)

The *Casey* joint opinion's professed fidelity to the essential holding of *Roe* becomes somewhat more explicable from this perspective. What the plurality was saying was that they believed that *Roe* was right to recognize that the Constitution gives some sort of special protection to the decision to choose an abortion. (*Roe* is right in its analysis of the constitutional operative proposition.) But they also believed that the doctrine the *Roe* Court had fashioned—the conventional

64 *See, e.g., id.* at 895 (plurality opinion).

65 *See Roe*, 410 U.S. at 164–65.

66 *See Casey*, 505 U.S. at 872, 874 (joint opinion of O'Connor, Kennedy & Souter, JJ.).

67 *See id.* at 846 (plurality opinion); *id.* at 954 (Rehnquist, C.J., dissenting); *id.* at 993–94 (Scalia, J., dissenting).

strict scrutiny that accompanies fundamental rights—was inappropriate, because it failed to give proper weight to the states' legitimate interests in protecting potential life. (*Roe* made a mistake in constructing its decision rule.) In fact, the *Casey* plurality makes this point quite clearly when they characterize the judicial task as "draw[ing] a specific rule from what in the Constitution is but a general standard"[68] and later note that they have concluded that the trimester framework and strict scrutiny are not "necessary to accomplish this objective" (of protecting the woman's right to choose).[69]

So *Casey* adheres to *Roe* in terms of its analysis of operative propositions, but revises the decision rules crafted to implement those operative propositions. There remains the third step, the application of decision rules to a concrete case. Here the comparison breaks down; because *Casey* has changed the relevant decision rule, the question of whether its application of that rule is consistent does not arise.

What the preceding analysis shows is that a more complex picture of the components of constitutional decisionmaking likewise complicates our analysis of stare decisis. Any one of these three steps can be the site of adherence to precedent or of its rejection. In consequence, it is only sometimes appropriate to speak of adhering to or overturning precedent as a unitary phenomenon. If a court leaves a decision entirely undisturbed, that is adherence; if it rejects the decision's account of constitutional meaning, that is overturning. But the *Roe*/*Casey* relationship illustrates a more complicated possibility: adherence at the level of operative proposition but rejection at the level of decision rule.

The *Casey* analysis of the factors that strengthen or weaken the force of precedent offers other examples. One such factor, the plurality suggests, is "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[70] As illustrations of overrulings based on this factor, the plurality adduces the repudiations of *Lochner v. New York*[71] and *Plessy v. Ferguson*[72] in *West Coast Hotel Co. v. Parrish*[73] and *Brown v. Board of Education*,[74] respectively.[75] What is interesting about these examples is that in each case, the later decision adhered to the earlier one at the

68 *Id.* at 869 (joint opinion of O'Connor, Kennedy & Souter, JJ.).
69 *See id.* at 872.
70 *Id.* at 855 (plurality opinion).
71 198 U.S. 45 (1905).
72 163 U.S. 537 (1896).
73 300 U.S. 379 (1937).
74 347 U.S. 483 (1954).
75 *See Casey*, 505 U.S. at 861–69 (plurality opinion).

level of meaning, and even, I will argue, at the level of decision rule. The operative proposition the *Lochner* Court was enforcing was that legislation must be in the public interest,[76] while *Plessy* asserted that the Equal Protection Clause allowed only such discrimination as was "enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[77] *Plessy* approved the segregation of railroad cars because it denied that this amounted to a state-sponsored attempt to "stamp[] the colored race with a badge of inferiority."[78]

Neither "overruling" decision disputes these accounts of the relevant operative proposition. *West Coast Hotel* notes explicitly that the power to restrict freedom of contract "may be exercised in the public interest with respect to contracts between employer and employee."[79] Nor does it notably change the decision rule; in both cases the Court seems simply to be deciding for itself whether a given law promotes the public interest. (The modern "rational basis" decision rule emerges more clearly in *United States v. Carolene Products Co.*[80]) *West Coast Hotel* departs from *Lochner* only in its realization that legislation that appears redistributive by reference to a common law baseline may be in the public interest[81]—that is, the application of a particular test to a concrete case.

Brown, likewise, largely adheres to the *Plessy* understanding that discrimination that stigmatizes is prohibited, and as a decision rule simply asks whether the Court finds discrimination stigmatic.[82] Again, the difference between the two cases comes mostly at the final stage, where *Brown* takes a more realistic view of social meaning. (The rejec-

76 More precisely, *Lochner* was patrolling the boundaries of the police power. The *Lochner* Court would have upheld the New York limitation on bakers' hours if it could be justified as a measure to protect health; but since the Court found that justification unavailable, the relevant question was whether the law promoted the public interest. *See Lochner*, 198 U.S. at 57.

77 *Plessy*, 163 U.S. at 550.

78 *Id.* at 551.

79 W. Coast Hotel v. Parrish, 300 U.S. 379, 392–93 (1937).

80 304 U.S. 144, 152 (1938) (enunciating the "rational basis" standard for due process challenges).

81 *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 876 (1987) (discussing the Court's changing view of redistributive legislation).

82 *Brown* itself purported to turn not on the state's intent to stigmatize but on the mere existence of stigma. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (finding that segregation promotes notions of inferiority but not attributing this intent to the states). This moderation was undoubtedly a product of Chief Justice Warren's desire to write an opinion that was "above all, non-accusatory." RICHARD KLUGER, SIMPLE JUSTICE 699 (2004).

tion of *Plessy*'s view of constitutional meaning—and also that of *Brown*—comes with the ascendancy of the idea that what the Equal Protection Clause prohibits is not invidious or stigmatic discrimination but racial discrimination.[83]) One might, then, plausibly argue that *Brown* and *West Coast Hotel* depart from *Plessy* and *Lochner* to a lesser extent than *Casey* departs from *Roe*.

The larger point is simply this: to determine the proper role of non–Article III actors in a stare decisis analysis, we cannot treat overruling or adherence as unitary. A later court needs to ask whether it should adhere to or reject prior decisions at each of the different stages of the decision rules model, and we need to ask what non–Article III actors have to offer with respect to each of those stages.

II. THE ROLE OF NON–ARTICLE III ACTORS

Having elucidated the structure of a constitutional decision, I now go on to consider what non–Article III actors can contribute. The analysis will have a common structure at each step. With respect to the epistemic aspect of stare decisis, there are three relevant actors: the past Court, the present Court, and the non–Article III actor whose views are offered. The epistemic case for stare decisis will be stronger or weaker depending on how the past Court compares to the present Court in its ability to get the right answer, and the appropriate input of the non–Article III actor will depend on its relative competence. With respect to the instrumental aspect, the only question is how the present Court compares to the non–Article III actor in weighing the instrumental considerations.

A. Finding Meaning

The first step in the model I have set out requires a court to determine the meaning of the relevant constitutional provision to identify the relevant constitutional operative proposition. Stare decisis at this stage gives some presumptive weight to the decision of an earlier court as to meaning—either because the decision is epistemically probative, or because there are instrumental reasons not to announce a different view of constitutional meaning.

The appropriate significance of the views of non–Article III actors depends on their relative competence, as compared to courts,

83 For the most recent example, see *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2768 (2007) (explaining that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

with respect to these two justifications. If they are better than courts at determining meaning or assessing the instrumental factors, deference is appropriate. If not, it is not.

Some constitutional theorists believe that courts should defer to nonjudical actors—Congress, the states, or the people—in determining constitutional meaning in at least some circumstances.[84] I have some sympathy for this argument; at the least, I agree that it would be desirable for those non–Article III actors to take their constitutional obligations seriously rather than agreeing to leave the Constitution to the courts. But the merits of the departmental or popular constitutionalist claim are irrelevant to the point of this Article. Here I assert only that *if* the Court defers to non–Article III actors on constitutional meaning, then the views of these actors should overcome the deference to the views of a prior Court that provides the epistemic justification for stare decisis.

There remain the instrumental considerations. These resemble the factors that the Court set out in *Casey*—workability, reliance, doctrinal change, and factual change[85]—but not every factor will be relevant to every stage of constitutional decisionmaking. Workability and factual change, for instance, have no obvious bearing on the Court's first-stage assessment of constitutional meaning.

At the stage of determining meaning, the relevant instrumental factor from the *Casey* list is reliance. As Justice Rehnquist's dissent pointed out, this is an unusual kind of reliance.[86] The relevant question is whether the constitutional interpretation announced by the earlier decision has become part of American culture to such an extent that overruling it would disrupt our self-conception as a people.[87] We might also add *Casey*'s concern for legitimacy: when the Court reverses itself on the level of constitutional meaning, it is most vulnerable to the charge that what has prompted the changed interpretation is nothing more than changed membership, since few other explanations exist.[88]

I do not mean to suggest that either reliance or legitimacy is easy to assess, only that they are the relevant questions. Because the assessment is hard, input from non–Article III actors might well be useful. But, again because the assessment is hard, an instruction that courts

84 *See* sources cited *supra* note 1.

85 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (plurality opinion).

86 *See id.* at 956 (Rehnquist, C.J., dissenting) ("[A]ny traditional notion of reliance is not applicable here.").

87 *See id.* at 856 (plurality opinion).

88 *See id.* at 865–66.

should defer, rather than merely give respectful consideration, to the views of non–Article III actors seems implausible.[89] The Court should also be mindful of the question of whether there exist reasons to doubt that some non–Article III actor will give an unbiased analysis. In the end, analysis of instrumental factors for adhering to a prior view of constitutional meaning is quite indeterminate.

B. Crafting Doctrine

When the question is what decision rule will best implement an operative proposition, the epistemic argument for stare decisis becomes more complicated. There is no objectively right answer to this question, so it makes little sense to defer on the grounds that the earlier Court is just as likely to be right.[90] One might say that the earlier Court is just as likely to have exercised wise judgment, but in fact a subsequent Court has the advantage of seeing how the decision rule has worked in practice, and practical consequences are the measure by which decision rules should be judged. For these reasons I would expect the epistemic component of stare decisis to operate less strongly with respect to the creation of decision rules: that is, a Court should be relatively more willing to abandon a prior decision rule than a prior statement of an operative proposition.[91]

By itself, this point suggests a greater role for non–Article III actors, since the prior Court is a less significant rival. The argument for consideration of their views becomes even stronger when we consider the factors by which a court should evaluate a prior decision rule.[92] To start with *Casey*'s list of factors, workability and factual change are relevant at this stage. Workability—by which *Casey* seems to mean administrability by courts[93]—is one of the chief considerations in crafting decision rules. If a rule has proved impossible for courts to administer, that is a strong reason not to adhere to it.

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89 Steven Calabresi argues for a form of deference on the reliance question more generally in Steven 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, 341–47 (2005). But this argument seems to be directed more to reliance on particular decision rules, a topic I consider in the following subpart. *See infra* Part II.B.

90 *See* ROOSEVELT, *supra* note 54, at 44–45.

91 *Cf.* Berman, *supra* note 50, at 100 (suggesting lesser stare decisis force for decision rules).

92 Because the issue here is whether the prior decision was correct (in terms of articulating a desirable decision rule), I consider these factors as part of the epistemic analysis, even though the factors that go into the evaluation are largely instrumental.

93 *See Casey*, 505 U.S. at 855 (plurality opinion).

Factual change is relevant because it may cause a rule to lose fit.[94] This is one way of describing the change between *Lochner* and *West Coast Hotel*: rules that had made sense for a largely agrarian society of largely self-sufficient individuals lost fit as America industrialized.[95] As the Court put it in *Home Building & Loan Ass'n v. Blaisdell*,[96]

> Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.[97]

Relevant factual changes may also include institutional reactions to existing decision rules. The Court's Commerce Clause jurisprudence illustrates this possibility. "Uphold a federal law if the regulated activity in the aggregate might rationally be thought to substantially affect interstate commerce"[98] is a very workable decision rule, essentially equivalent to "uphold all federal laws purportedly based on the commerce power." If we suppose that the relevant operative proposition is actually something like the substantial effects test ("Congress can regulate any activity substantially affecting interstate commerce"), perhaps with a pretext carve-out ("so long as it does so in order to protect interstate commerce"),[99] this decision rule will also do a good job of reaching accurate results as long as Congress seriously considers whether the required effects exist and does not use the power pretextually. In such circumstances, compliance with the operative proposition is maximized by a very deferential decision rule.

Matters appear differently if Congress begins to rely reflexively on ritualistic invocations of the Commerce Clause in order to justify the exercise of a federal police power. At this point, the decision rule has lost fit because greater judicial supervision is needed. Some form of

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94 *See generally* Roosevelt, *supra* note 50, at 1686–89 (describing loss of fit).

95 *See* Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 988–89 (2006) (describing the loss of fit of *Lochner*-era rules).

96 290 U.S. 398 (1934).

97 *Id.* at 442.

98 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 128–29, 133 (1942).

99 *See* Mitchell N. Berman, Guillen *and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1489 (2004); Roosevelt, *supra* note 50, at 1673–76, 1699.

revision—though not necessarily the one the Court chose—is therefore justified.[100]

Moving beyond the *Casey* factors, we may also include a broader assessment of how well a decision rule has worked in guiding courts to strike down unconstitutional acts and uphold constitutional ones, without reference to factual change. Courts may simply make mistakes; they may create decision rules that produce low accuracy. And we should include how workable the rule has proved for the governmental actors subject to it, both in terms of their ability to comply and the extent to which observing the decision rule hampers them in a way the operative proposition might not. For instance, an analysis of the success of *Miranda v. Arizona*[101] must take into account how well it has worked in terms of allowing the admission of voluntary but not coerced confessions, and also what the effects of administering *Miranda* warnings have been on police work.

In evaluating these factors, the input of non–Article III actors can have substantial value. (Judicial workability is an exception, since courts are clearly better at assessing their own experience applying a rule.[102]) On the question of whether police departments are hampered by *Miranda* warnings, a court should almost certainly defer to the statements of police rather than try to determine the matter for itself. (It might, however, rely on other experts if it believes that police are likely to be disingenuous.)

On the question of whether a rule has lost fit, non–Article III actors may also have a particularly good vantage point. Equal protection doctrine provides a ready example. A court that believes that the Equal Protection Clause prohibits unjustified discrimination at the level of operative proposition might adopt a decision rule that discrimination against women need not meet any heightened form of scrutiny for a variety of reasons. It might think that women's status as a majority of the voting-age population ensures that the political process will be adequately responsive to their interests. Or it might believe that most discrimination against women was justified, because women differed substantially from men in their aptitudes, preferences, and proper roles. (It might believe similar things about blacks and homosexuals.)

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100 *See generally* Roosevelt, *supra* note 50, at 1693–1700 (describing the loss of fit of Commerce Clause decision rules and the Court's reaction).

101 384 U.S. 436 (1966).

102 *See* Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1171, 1209–10 (2008).

A court would be justified in taking this view, in the sense that we could hardly expect it to do anything else, if those sentiments about women were dominant enough to be conventional wisdom. And indeed they once were; when Justice Bradley wrote in a concurring opinion that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life" and that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother,"[103] he was not impeached, as a Justice surely would be today.

Conventional wisdom changes. Courts might recognize this on their own, but typically they do so in response to the prodding of social movements or other non–Article III actors. When the Court announced heightened scrutiny for sex discrimination, it relied in part on congressional action: by including a prohibition on sex discrimination in Title VII, the Court said, Congress had announced its conclusion that such discrimination was "inherently invidious."[104]

The example of Title VII suggests two further points. First, non–Article III actors may be in a good position to offer alternative decision rules, and the Court should give these respectful consideration.[105] Second, non–Article III actors can have substantial input even—perhaps especially—when the actor seeking to have its views heard is not the one whose actions are under review.

The obvious examples here feature Congress expressing its views about the permissibility of state action through its power to enforce the Fourteenth Amendment. Suppose that the Equal Protection Clause is understood to forbid unjustified discrimination, meaning roughly discrimination that does not accord equal weight to the interests of those it burdens.[106] (This could be formulated as a simple cost-benefit test: does the discrimination give society benefits in excess of the burdens it imposes?) Making this determination, generally speaking, is within legislative rather than judicial competence, and the Supreme Court, generally speaking, has reacted by deferring to legis-

103 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

104 *See* Frontiero v. Richardson, 411 U.S. 677, 687 (1973) (plurality opinion).

105 In practice, the Court sometimes accepts alternatives. *See, e.g.*, Smith v. Robbins, 528 U.S. 259, 269–76 (2000) (accepting an alternate procedure to protect a criminal defendant's right to counsel on appeal). Sometimes it does not. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 432 (2000) (rejecting an alternative to *Miranda* warnings); City of Boerne v. Flores, 521 U.S. 507, 512–16 (1997) (rejecting an alternative to Employment Div. v. Smith, 494 U.S. 872, 879–81 (1990)).

106 This is a relatively common view of equal protection, though certainly not the only one. Different views will produce different nuances; my use of this one is for illustrative purposes.

latures.[107] Most discrimination, including discrimination based on age and disability, is reviewed under the deferential rational basis standard.[108] Unsurprisingly, rational basis review tends to uphold these forms of discrimination.[109]

Suppose, however, that Congress surveys the evidence and concludes that state discrimination on the basis of age or disability tends to be unjustified. Suppose it expresses this view, perhaps through legislation prohibiting such discrimination in some contexts, or requiring a showing of justification beyond what the rational basis test demands. (I am, of course, loosely describing the Americans with Disabilities Act (ADA)[110] and the Age Discrimination in Employment Act (ADEA)[111] as applied to the states.) The same reasoning that supports deference to state legislatures with respect to the justification for discrimination supports deference to Congress on this question. Should the Court be willing to revisit its earlier decisions about state age- and disability-based discrimination?

There are three possible reactions. First, the Court might conclude that it should defer to the evident congressional view that age- and disability-based discrimination is highly likely to be unjustified and change its own decision rules in response, increasing the level of scrutiny it applies. It would not strike down the federal law; in fact it would change its own decision rules to bring them closer to the law. (This is how the *Frontiero* Court responded to Title VII.[112]) Second, the Court might conclude that the federal antidiscrimination laws are appropriate for Congress to adopt as a means to enforce the Equal Protection Clause but, for some reason, inappropriate for courts to use as a means to enforce that Clause. It would not strike down the federal law, but it would not change its decision rules. (This is what the Court typically did in pre-Rehnquist Court Section Five cases.[113]) Last, the Court might reason that because a particular decision rule is appropriate for courts, that choice substantially limits Congress in its choice of enforcement mechanisms. It would not change its decision rules; in fact it would strike down the federal law for differing too

107 *See* ROOSEVELT, *supra* note 54, at 25.

108 *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) ("Petitioners are correct to assert their challenge at the level of rational basis. This Court has said repeatedly that age is not a suspect classification under the Equal Protection Clause.").

109 *See id.* at 473.

110 42 U.S.C. §§ 12,101–12,213 (2000 & Supp. IV 2004).

111 29 U.S.C. §§ 621–634 (2000 & Supp. IV 2004).

112 *See* Frontiero v. Richardson, 411 U.S. 677, 687 (1973) (plurality opinion); *supra* text accompanying note 104.

113 *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 648–52 (1966).

greatly from the decision rules. (This is how the Court responded to the ADA and the ADEA in *Board of Trustees of the University of Alabama v. Garrett*[114] and *Kimel v. Florida Board of Regents.*[115])

Of these possible reactions, the third is the least defensible. The Court clearly has plausible justifications, many of which sound in institutional competence, for not adopting heightened scrutiny for age- or disability-based discrimination as an initial matter.[116] And it may well have justifications for declining to follow Congress' lead. But the idea that Congress must view state discrimination through the deferential lens that the Court has adopted because it is a court and not a legislature makes very little sense.[117] At the least, congressional enforcement mechanisms are owed respectful consideration as alternate decision rules, and to the extent that congressional institutional competence exceeds judicial, deference is the sensible response. Reconsidering the precedents establishing rational basis review for age- and disability-based discrimination would have made far more sense than striking down the federal laws.

Congress is not the only non–Article III actor that might play this sort of role. Andrew Jackson's message accompanying the veto of the Second Bank of the United States presents a very similar situation.[118] In *McCulloch v. Maryland,*[119] of course, the Supreme Court rejected a constitutional challenge to the First Bank of the United States.[120] Thirteen years later, in 1832, a bill rechartering the Bank reached President Jackson's desk and met his veto.[121]

Jackson's veto rested on constitutional grounds, namely that in his view the creation of the Bank was not sufficiently "necessary" to come within the Necessary and Proper Clause.[122] But had *McCulloch* not decided that precise issue? No, said Jackson: what *McCulloch* had decided was that necessity was primarily a question for the legislature. His veto message quotes the opinion, which stated that "'to undertake

114 531 U.S. 356, 374 (2001).

115 528 U.S. 62, 91 (2000).

116 Institutional competence is not the only justification for deference; there is also a process-based argument that legislators who discriminate against the elderly will someday live under those rules.

117 *See generally* Roosevelt, *supra* note 50, at 1710–13 (discussing *Garrett* and *Kimel*).

118 Calabresi, *supra* note 89, at 315–25, gives a substantial discussion of Jackson's veto, though he reads it as a more general rejection of the authority of precedent.

119 17 U.S. (4 Wheat.) 316 (1819).

120 *See id.* at 427.

121 *See* Calabresi, *supra* note 89, at 321.

122 Andrew Jackson, Veto Message (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 576, 583 (James D. Richardson ed., Wash., D.C., Gov't Printing Office 1896).

here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground.'"[123] As President, Jackson believed he was not similarly constrained. If the degree of necessity was a political judgment, he was as capable as Congress of making it, and more capable than the Court.

Jackson's veto obviously prevented the issue of constitutionality from coming before the Court, but if it had, the same deference to political actors that restrained the *McCulloch* Court from inquiring into the degree of necessity would support Jackson's judgment. The Court would be required to make a difficult choice between the view of the President and that of Congress, but the one resolution that would not make sense would be to follow *McCulloch* and consider the matter closed.

The examples of enforcement legislation and Jackson's veto present instances in which one non–Article III actor holds the view that conduct the Court has allowed is in fact unconstitutional. The opposite situation can also occur—a non–Article III actor can seek to authorize conduct that the Court has struck down. Generally, however, this will amount to expressing the view that a particular act should survive, not that the Court's decision rules should change, and so I save it for the next subpart.[124] The key point to take from this subpart is that in circumstances where the Court would have deferred to a non–Article III actor if it were reviewing that actor's conduct, it should be more willing to reconsider precedents at that actor's urging.

Thus, the epistemic basis for stare decisis suggests that the views of non–Article III actors should frequently carry significant weight with respect to the reconsideration of decision rules. The instrumental basis suggests the same in some circumstances.

The key instrumental factor is reliance. Individuals or state actors rely on decision rules in a more obvious sense than they rely on statements about operative propositions: decision rules tell them what conduct will subject them to legal liability. It is at this point that Steven Calabresi's argument for deference has force: non–Article III actors

123 *Id.* (emphasis omitted) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 423).

124 *See infra* Part II.C. An example of an attempt to change decision rules would be Section Five legislation purporting to overrule *Roe*, something that has been debated. *See* Steven L. Carter, *The* Morgan *"Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 821–23 (1986) (discussing a proposed statute). I will consider this sort of legislation in greater detail in Part III. The short answer is that the appropriate weight to be given such a statute depends on the degree of deference given to Congress in its own dealings with the subject.

are probably better placed than the Court to evaluate the significance of that reliance.[125] The key question is whether those actors can be trusted. If the Court has adopted a deferential decision rule, it should likewise defer to the regulated actors on the issue of their reliance. If, however, the Court has adopted a nondeferential decision rule out of distrust (rather than for reasons purely of institutional competence), that distrust should extend to a non–Article III actor's assessment of reliance.

C. Applying Doctrine to Cases

What about application of a particular decision rule to a particular set of facts? Non–Article III input here will amount to disagreement with the Court as to whether a particular government act meets the relevant test: whether it is narrowly tailored to serve a compelling interest, for example, or rationally related to some legitimate state purpose. Once again, we should consider the epistemic and instrumental aspects of stare decisis separately.

From an epistemic perspective, there are two important points. First, one of the main desiderata for a decision rule is that it be susceptible to application by courts: tests take the form they do in part to place the key questions within judicial competence. As a general matter, then, a court's application of a decision rule in a particular case should have significant epistemic weight as compared to the assessment of a non–Article III actor. Second, there are nonetheless issues on which we might expect non–Article III actors to have greater competence. What constitutes a compelling state interest, for instance, or how feasible alternatives are in a narrow tailoring analysis are questions more easily answered by those actually implementing programs. Deference might well make sense in such cases if the non–Article III actor whose views are offered can be trusted. Unfortunately, strict scrutiny is frequently employed precisely because the Court distrusts the political process.[126] In such cases, non–Article III actors may have greater institutional competence, but the Court cannot assume that they will deploy it in good faith. The Court cannot apply strict scrutiny because it is suspicious of bad motives but at the same time defer to an institution's views on what counts as a compelling interest or a

125 *See* Calabresi, *supra* note 89, at 335–45.

126 *See, e.g.*, Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 438–39 (1997) (describing the cost-benefit and smoking-out functions of strict scrutiny).

feasible alternative.[127] In consequence, an earlier decision should generally epistemically outweigh the contrary views of a non–Article III actor.

Where one non–Article III actor is suspect and another trusted, however, the difficulty disappears. In such cases the Court should be very willing to reconsider a decision striking down the act of a suspect non–Article III actor if a trusted actor seeks to authorize the action.

We do find this pattern in constitutional law. In the context of the dormant Commerce Clause, for instance, Congress can not merely abrogate stare decisis but effectively overrule a Supreme Court decision by authorizing a state action that the Court has previously held to be constitutionally precluded.[128] Admittedly, such a situation would probably not ordinarily be conceptualized as presenting a question of stare decisis. Doctrine tells us that a particular state action may be unconstitutional in the absence of congressional authorization and constitutional with such authorization, so the two decisions might seem unrelated. But we can also understand it as the extreme version of a situation in which constitutional requirements do not change, but the Court believes that Congress is better at determining whether some state action complies with those requirements.

We might take a similar view of any area of law in which the Court is suspicious of the states but deferential to Congress. We might imagine, for instance, that the Court had continued to view federal use of racial classifications as less suspect than similar acts by states, for the historical and structural reasons Justice Scalia offered in *City of Richmond v. J.A. Croson Co.*[129] It might then strike down a particular state law but uphold a relevantly identical federal one. What if a similar state law comes up for review in the future? The federal determination that such a law complies with equal protection should have

127 Surprisingly, *Grutter v. Bollinger*, 539 U.S. 306 (2003), appears to do just that. *See id.* at 380 (Rehnquist, C.J., dissenting) (noting the odd coincidence of deference and strict scrutiny).

128 *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154 (1982) ("Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause."); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 422 (1946) (rejecting the proposal that "neither Congress acting affirmatively nor Congress and the states thus acting coordinately can validly impose any regulation which the Court has found or would find to be forbidden by the commerce clause, if laid only by state action taken while Congress' power lies dormant").

129 488 U.S. 469, 523–24 (1989) (Scalia, J., concurring) (arguing that the federal government is more trustworthy than states based on its history and its status as a larger political unit).

enough weight, at least, to make the Court consider the matter afresh.[130]

If, however, the Court views the federal government with equal suspicion, federal authorization should cut no ice. In *Mississippi University for Women v. Hogan*,[131] for instance, the University attempted to justify its exclusion of men from the nursing school on the grounds that Congress had authorized exclusion by exempting from the antidiscrimination requirements of Title IX "institutions 'that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex.'"[132] If this is to be taken as authorization, about which the Court was properly skeptical, the Court was still justified in giving it no weight, since it would not have granted any more deference to sex-based discrimination by the federal government.

As noted in the preceding subpart, changed facts may also be relevant from an epistemic perspective, and non–Article III actors may be well placed to draw the Court's attention to them. In deciding whether a ban on sodomy was rationally related to a legitimate state interest, for instance, the Court in *Lawrence v. Texas*[133] was surely influenced by the fact that in the years following *Bowers v. Hardwick*,[134] a substantial number of states repealed their sodomy bans or saw them struck down by state courts applying state constitutions.[135] To the extent that judgments about reasonableness and legitimacy are influenced by the prevailing social climate (and can we imagine that they are not?) non–Article III actors clearly have substantial influence.[136]

Indeed, in some cases the views of non–Article III actors will be the relevant changed facts. The fact that a majority of states did not impose the death penalty on those who were mentally retarded or

130 Because the federal determination is about compliance with the meaning of the Constitution, rather than whatever test the Court is applying, this is not quite an example of a non–Article III actor disagreeing with the application of a test. But it is closer to that than to the subject of any other section.

131 458 U.S. 718 (1982).

132 *Id.* at 732 (quoting 20 U.S.C. § 1681(a) (2000)).

133 539 U.S. 558 (2003).

134 478 U.S. 186 (1986).

135 *See Lawrence*, 539 U.S. at 570–71.

136 Characterizing *Lawrence* as a response to changed facts might be controversial; there is also an argument that developments in the states showed that *Bowers* was wrong when decided. My opinion is that a sufficiently well-accepted view, even if subsequently considered an irrational prejudice, is a legitimate justification while well-accepted. At least, we cannot expect judges to say otherwise without asking them to become moral philosophers, which strikes me as undesirable. *See* Roosevelt, *supra* note 51, at 200–01.

juveniles at the time of their crime was not merely evidence that such punishments were "unusual" for the purposes of Supreme Court decisions forbidding them.[137] It *was* that unusualness. In that circumstance, which is perhaps limited to the Eighth Amendment context, the Court should obviously not only be willing to reconsider its precedents; it should reach a decision based on the new state of affairs.

The instrumental aspect of stare decisis is essentially the same as in the preceding subpart. A prior decision establishes that some state act is permitted or forbidden, and both individuals and state actors rely on the Court's demarcation of zones of individual liberty and state authority. Reliance is an important consideration, and as before, there is certainly an argument that non–Article III actors are better at assessing its significance. But as above, deference on the grounds of institutional competence can be overcome by distrust of good faith, so a court should not defer unless it is confident that it is getting an unbiased assessment.

III. CASE STUDIES

Having developed this model, we can now apply it to some recent controversies featuring attempts by non–Article III actors to get the Court to reconsider its abortion jurisprudence. The first, and the simpler one, is the South Dakota abortion ban.

In 2006, the South Dakota legislature adopted a very broad ban on abortion,[138] allowing the procedure only when necessary to save the life of the mother.[139] The measure was referred to voters and defeated at the ballot box, so it was never tested in court.[140] But how should the Supreme Court have responded?

In its breadth, the South Dakota law is hard to understand as anything other than a challenge to the judicial determination that the Constitution protects a right to abortion at all. It should thus fall into the first category considered in the previous Part: a challenge to a prior decision (*Roe* and/or *Casey*) at the level of constitutional meaning. The appropriate treatment of such a challenge, I have said, depends in large part on how much weight we assign to the views of

137 *See* Roper v. Simmons, 543 U.S. 551, 575 (2005) (forbidding the execution of juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (forbidding the execution of mentally disabled offenders).

138 *See* South Dakota Women's Health and Human Life Protection Act, 2006 S.D. Sess. Laws 171, 171–72 (repealed by referendum Nov. 7, 2006).

139 *See* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 992 (discussing the enactment and rejection of the ban).

140 *See id.*

the relevant non–Article III actor in constitutional interpretation generally. Assuming that the Court did not see a reason to defer to the South Dakota legislature (and such a reason is hard to imagine), rejection of this challenge seems appropriate. (Amicus participation by other non–Article III actors might make the challenge stronger.)

Are there any arguments in favor of reconsideration? The legislative history accompanying the ban did implicitly assert that new facts should change our view of constitutional meaning. It claimed that "'the new recombinant DNA technologies indisputably prove that the unborn child is a whole human being from the moment of fertilization'"[141] and thus, presumably, that science had overtaken *Roe* by demonstrating that the fetus does enjoy Fourteenth Amendment rights. This argument might be effective if we suppose that the framers of the Fourteenth Amendment intended "person" to mean any entity possessing a full set of chromosomes and were mistaken about whether fetuses fell within that category.[142] But it seems unlikely that "possessor of a full set of chromosomes" was the operative concept.

Perhaps the most notable feature of the ban was its justification by reference to what Reva Siegel calls woman-protective arguments, which assert that abortion harms women, either because it carries previously unrecognized health risks or because women tend to regret abortions and suffer psychological harm.[143] Relatedly, the legislative history argued that many women reported being coerced or misled into choosing abortions.[144] These are arguments about the existence of interests in regulation unseen or slighted by the prior Court. They might prompt reconsideration at the level of crafting a decision rule or applying it to particular facts. But the South Dakota ban could realistically have survived judicial review only if the Court reconsidered *Casey* at the level of meaning, and South Dakota by itself could not provide an adequate reason to do so.

The Federal Partial-Birth Abortion Ban Act of 2003[145] is somewhat more interesting. In *Stenberg v. Carhart*,[146] the Supreme Court

141 *Id.* at 1008 (quoting REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 5 (2005), *available at* http://www.voteyesforlife.com/docs/Task_Force_Report.pdf).

142 For further explanation of this method of constitutional interpretation, which I have called "meaning originalism," see, for example, ROOSEVELT, *supra* note 54, at 47–58; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. (forthcoming 2008) (manuscript at 2–11), *available at* http://ssrn.com/abstract=987060.

143 *See* Siegel, *supra* note 139, at 993, 1001.

144 *See id.* at 1006–14.

145 18 U.S.C. § 1531 (Supp. IV 2004).

146 530 U.S. 914 (2000).

struck down a Nebraska law that generally prohibited what it called "partial-birth abortion,"[147] statutorily defined as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."[148] The law had no health exception; it permitted the procedure only when "necessary to save the life of the mother."[149]

The *Stenberg* majority found two flaws in the statute: vagueness (because it could have been interpreted to ban common abortion procedures)[150] and the lack of a health exception, which *Casey* required for post-viability restrictions and, a fortiori, for previability regulation.[151] Nebraska argued that no health exception was required because partial-birth abortions were never necessary to protect health, but the Court rejected this argument on the grounds that "the record shows that significant medical authority supports the proposition that in some circumstances, D & X would be the safest procedure."[152]

The Federal Partial-Birth Abortion Ban Act sought to cure the vagueness problem via a different definition of the prohibited procedure. The federal statute applied to cases in which the person performing the abortion:

> (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
>
> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus . . . .[153]

The revised definition solved the vagueness problem without requiring any reconsideration of *Stenberg*; the statute was different. But the federal statute, like the Nebraska one, lacked a health exception, and so Congress had to deal with the part of *Stenberg* that found a health exception was required. It did so by making factual findings designed to overcome that aspect of *Stenberg*. It found that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-

147 I will use "partial-birth abortion," "dilation and extraction" ("D & X"), or "intact dilation and evacuation" ("intact D & E") interchangeably.

148 *Stenberg*, 530 U.S. at 922 (quoting NEB. REV. STAT. § 28-326(9) (2000)).

149 *Id.*

150 *See id.* at 938–39.

151 *See id.* at 930.

152 *Id.* at 932.

153 18 U.S.C. § 1531(b)(1)(A)–(B) (Supp. IV 2004).

birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[154]

The Court was therefore forced to resolve an apparent conflict between its holding in *Stenberg* that a health exception was required and the contrary congressional determination. This is best characterized as a stage three determination, the application of a decision rule (the *Casey* "undue burden" test) to a particular factual setting. In such cases, I have said, non–Article III actors may have a considerable amount to offer the Court. The key, however, is deciding whether they can be trusted.

The assertion that Congress is a superior factfinder, at least with respect to legislative facts, is commonplace in judicial opinions.[155] On the question of whether partial-birth abortion is ever medically necessary, Congress is probably better at getting the right answer than the Court. The Court must rely on the arguments of parties and the submissions of amici; Congress can call witnesses and examine each individually.

But *having* institutional competence is one thing; *using* it is another. How can the Court decide whether Congress has used its expertise objectively rather than attempting to create a record in support of a predetermined conclusion? The Court might simply try to evaluate the process by which Congress arrived at its findings, or evaluate the findings themselves to the extent that it can.[156] But this asks judges to do just what Congress may not be able to: evaluate evidence objectively in a politically charged context. A better solution is to look at the decision rule that the Court is applying and ask what guidance it gives on the question of whether the political branches are trustworthy.

Here, undue burden analysis is a form of heightened scrutiny—nondeferential review. It remains to ask why nondeferential review is being used. One answer might be that the choice to have an abortion is a highly important liberty, so that laws restricting abortion place a

154 Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1201 (codified at 18 U.S.C. § 1531 note (Supp. IV 2004)), *quoted in* Gonzales v. Carhart, 127 S. Ct. 1610, 1624 (2007).

155 *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 & n.10 (1974) (describing Congress' superior factfinding capabilities).

156 As the Court noted, some of the congressional findings were factually incorrect. *See Gonzales*, 127 S. Ct. at 1637–38 (offering, as two examples, the findings that "no medical schools provide instruction on the prohibited procedure" and that "there existed a medical consensus that the prohibited procedure is never medically necessary"). The dissenting Justices also criticized the process. *See id.* at 1643–44 (Ginsburg, J., dissenting).

heavy burden on those they affect. (This is the sense one gets from reading *Roe*.[157]) If this is the only justification, deference on factual questions on grounds of institutional competence would make sense, since there is no reason to suppose that political actors would not act in good faith.

But if high cost is the only justification, it is hard to understand why heightened scrutiny is used at all, since weighing costs and benefits is one of the areas in which legislative competence is generally thought to exceed judicial. (This is one of the reasons that *Roe* is widely considered an unconvincing opinion.[158]) It makes more sense to suppose that nondeferential review is justified at least in part by a concern that legislatures will not weigh the liberty interests of pregnant women as highly as they do those of their constituents generally—a concern that finds some support if we compare the life/liberty tradeoff implicit in an abortion restriction to that implicit in the refusal to, for instance, require blood donation or postmortem organ donation.[159]

One might attempt to rebut this argument, as John Hart Ely did, by arguing that the interests of women are nonetheless likely to be weighed more heavily than those of fetuses. "I'm not sure I'd know a discrete and insular minority if I saw one," Ely wrote, "but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I'd expect no credit for the former answer."[160] But this counter works only if legislatures have a constitutional obligation to weigh the interests of fetuses equally. The obligation of equal concern and respect comes from the Fourteenth Amendment via either equal protection or due process, and in either case it flows only to "persons." We may assume for the purposes of this discussion that a

157 *See* Roe v. Wade, 410 U.S. 113, 152–55 (1973).

158 For evidence, consider the existence of WHAT *ROE V. WADE* SHOULD HAVE SAID (Jack M. Balkin ed., 2005) (collecting essays that rewrite the *Roe v. Wade* opinion).

159 There are several elaborations on this argument. *See generally* ROOSEVELT, *supra* note 54, at 123–30 ("[T]he question comes down to whether we trust legislatures to weigh appropriately the interests of young, poor, unmarried women."); Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 91–97 (1991) (suggesting that "an anti-abortion law might readily survive . . . if the legislature also required all 'expectant fathers' or all men who engaged in sex to make available *their* bodies . . . if needed to save lives"). This analysis suggests another way in which non–Article III actors can influence decisions: a state legislature could change the legal landscape to make credible its claim that an abortion restriction reflected a sincere and unbiased assessment of the relative importance of life and liberty.

160 John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935 (1973).

fetus is not a Fourteenth Amendment person—because, if it were, there could be no question of a constitutional right to abortion; permitting abortion would be a rather clear equal protection violation.[161]

So deferring to Congress on the necessity of a health exception is probably not a good idea, because the heightened scrutiny of abortion restrictions is plausibly understood as reflecting a distrust of the political process.[162] What about other non–Article III actors? The Attorney General's brief in *Gonzales v. Carhart*[163] also urged deference to Congress, but that endorsement should bear little weight for the same reasons applicable to Congress.[164] (Indeed, under a different President, the United States filed an amicus brief arguing that the Nebraska law was unconstitutional because it "endanger[ed] the health of some women."[165] Deciding which position to credit would raise its own problems.) The same is true of the states. There remain medical organizations. If any non–Article III actor deserves deference on the necessity of a health exception, it should be doctors. But again, the Court would face the task of distinguishing unbiased expert opinion from issue advocacy, something for which it is not institutionally very well suited.

The *Gonzales* Court did not reach a definite answer. While giving some deference to Congress, it acknowledged that the Court "retains an independent constitutional duty to review factual findings where constitutional rights are at stake."[166] Its independent review left it in the same place as *Stenberg*: facing a division of expert authority it could not resolve.[167]

Thus, the congressional attempt to overcome *Stenberg* at stage three failed. Nonetheless, *Gonzales* came out differently because the Court changed the decision rule. Where *Stenberg* held that a health exception is necessary if "substantial medical authority supports the proposition that banning a particular procedure could endanger

161 *Roe*'s arguments on this point are probably the most convincing part of the opinion. *See Roe*, 410 U.S. at 156–59.

162 Disclosure: I signed an amicus brief in *Gonzales v. Carhart* arguing that the Court should not defer on this issue. *See* Brief of Constitutional Law Professors, David L. Faigman et al., as Amici Curiae in Support of Respondents, Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (No. 05-380), 2006 WL 2345931.

163 127 S. Ct. 1610.

164 Brief for the Petitioner at 21–30, *Gonzales*, 127 S. Ct. 1610 (No. 05-380), 2006 WL 1436690.

165 *See* Brief for the United States as Amicus Curiae Supporting Respondent at 22–29, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 353087.

166 *Gonzales*, 127 S. Ct. at 1637.

167 *See Stenberg*, 530 U.S. at 937.

women's health,"[168] *Gonzales* decided that the division of expert opinion means that a facial attack must fail, though the possibility of as-applied challenges remains open.[169]

The relationship between *Stenberg* and *Gonzales* thus also presents an issue of stare decisis at stage two, the crafting of decision rules. Indeed, it is at this stage that *Gonzales* departs from *Stenberg*. This departure does not seem to be the result of the input of any non–Article III actor with respect to the stare decisis effect owed *Stenberg* on this point. We might describe it as the product of such input by saying that the Court has decided that the government interest in expressing respect for life deserves greater weight and has recognized a new interest in protecting women from regret (perhaps the most controversial aspect of the opinion).[170] But this description suggests that minds have changed, which they have not. The reason that *Gonzales* came out differently from *Stenberg* is clear: Justice O'Connor was replaced by Justice Alito. And that, to be realistic, is probably the appropriate conclusion to draw about the topic of this Symposium. Non–Article III actors have their greatest influence over the extent to which the Court adheres to prior decisions through the appointment process.

168 *Id.* at 938.

169 *See Gonzales*, 127 S. Ct. at 1638.

170 *See id.* at 1633 ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman"); *id.* at 1634 ("[I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."). For this latter point, the Court did invoke an amicus brief. *See id.* (citing Brief of Sandra Cano et al. as Amici Curiae in Support of the Petitioner at 22–24, *Gonzales*, 127 S. Ct. 1610 (No. 05-380), 2006 WL 1436684).