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Separation of Powers and the Horizontal Force of Precedent

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SEPARATION OF POWERS AND THE HORIZONTAL FORCE OF PRECEDENT

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> On the subject of the bank alone is there a colour for the charge of mutability on a constitutional question. But here the inconsistency is apparent, not real, since the change was in conformity to an early and unchanged opinion, that, *in the case of a Constitution as of a law*, a course of authoritative, deliberate, and continued decisions, such as the bank could plead, was an *evidence of the public judgment*, necessarily superseding individual opinions. There has been a fallacy in this case, as, indeed, in others, in confounding a question whether precedents could expound a Constitution, with a question whether they could alter a Constitution. This distinction is too obvious to need elucidation. None will deny that precedents of a certain description *fix* the interpretation of a law. Yet who will pretend that they can *repeal or alter* a law?[1]

INTRODUCTION

Late in his life, James Madison defended himself against the charge that he had flip-flopped on the constitutionality of the Bank of the United States by arguing that his surface inconsistency reflected a deeper and consistent allegiance to a form of stare decisis:[2] prece-

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1 Letter from James Madison to N.P. Trist (Dec. 1831), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 204, 211 (Joint Comm'n on the Libr. of Cong. ed., Phila., J.B. Lippincott & Co. 1867) [hereinafter LETTERS AND OTHER WRITINGS] (emphases added).

2 "Stare decisis" may be roughly defined to include any doctrine that imposes an obligation on courts to follow precedents because they are precedents rather than because they seem correct on their substantive merits. *Cf.* Fredrick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987) (noting that when arguing from precedent, "the fact that something was decided before gives it present value despite our current belief that the previous decision was erroneous"). Note that this definition is sufficiently

dents provide "evidence" of "public judgment[s]" that can "fix" interpretation of vague constitutional text.[3] He had abandoned his original analysis that the Bank was unconstitutional because a series of "authoritative, deliberate, and continued decisions"—by Congress, executive officials, and state legislatures, as well as the courts—signified a public judgment that disagreed with him and was plausible enough to amount to constitutional interpretation rather than alteration.[4]

To the degree Madison relied on the force of judicial precedent to justify his flip-flop, his defense was anything but novel. The major legal thinkers of the common-law tradition of his day embraced the declaratory theory of precedent, which limited judicial discretion by requiring courts to treat their earlier opinions as "evidence" of law.[5] The evidentiary force of precedents creates a presumption that they should be followed. To justify overruling a precedent, a court must overcome this presumption by offering countervailing "evidence" in the form of an explanation of why the target precedent was unreasonably and seriously mistaken.[6] Both sides in the ratification debates subscribed to this understanding and shared Madison's expectation that the new federal Constitution would, like lesser law, be subject to such precedential "fixative" effects.[7]

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broad to capture both the "strict" doctrine that precedents are "strictly binding" law that courts must follow, as well as the weaker doctrine that treats precedents as presumptively correct and requires courts to give cogent, legal reasons for abandoning them.

3 Letter from James Madison to N.P. Trist, *supra* note 1, *in* 4 LETTERS AND OTHER WRITINGS, *supra* note 1, at 204, 211.

4 *Id.*; *see also* Letter from James Madison to James Monroe, President of the United States (Dec. 27, 1817), *in* 3 LETTERS AND OTHER WRITINGS, *supra* note 1, at 54, 55–56 (noting precedential weight of congressional, executive, state, and popular judgments).

5 *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *71 ("Upon the whole, however, we may take it as a general rule, 'that the decisions of the courts of justice are the evidence of what is common law.'"). *See generally infra* Part I.A.

6 There are, of course, a number of ways to express the rough idea that courts should show substantial but not absolute deference to precedents. Insofar as the declaratory-theory requires courts to follow precedents with which they can "agree to disagree," as it were, it resembles the *Chevron* doctrine that courts must defer to "reasonable" agency interpretations of their organic statutes. *See* Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984). For an illuminating treatment of the thesis that stare decisis should be understood to require *Chevron*-like deference to earlier judicial opinions, see Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

7 *See infra* Part I.B.1 (discussing Federalist and Anti-Federalist remarks concerning expected effects of precedents on constitutional interpretation).

But the Framers did not write this expectation into the Constitution itself, which contains no express reference to "precedent" whatsoever.[8] Indeed, neither the records of the Constitutional Convention nor the ratification debates much discuss either the nature of the "judicial power" or its mode of operation.[9] This silence has created room for roiling separation-of-powers debates regarding the scope of both judicial and congressional authority to "unfix" legal meaning by eliminating the courts' obligation to defer to their own precedents (i.e., "horizontal" stare decisis).[10] Resolving these debates leads to a conclusion which, while it may seem counterintuitive to those schooled to the idea that courts exercise absolute control over the process of legal interpretation, fits Madison's vision that the majoritarian branches of government, too, should play a role in "fixing" legal and constitutional meaning: Congress has substantial power to free the courts from the horizontal force of precedents, but the courts lack the power to free themselves.

Debate over the power of the courts to alter precedential norms has revolved around the constitutionality of circuit court rules that permit appellate court panels to issue "unpublished"[11] opinions that lack horizontal precedential force and thus do not bind later panels of the same court to any degree.[12] Judge Richard Arnold of the Eighth

8 *See* U.S. CONST. art. III, §§ 1–2 (vesting "judicial power of the United States" in the judicial department and setting forth categories of cases and controversies to which it may extend).

9 *See* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 202–03 (2001) (observing that "the 'judicial power' in 1789 was not a term with a lengthy, well-understood history" and that it did not "receive[ ] serious attention during the founding period"); *cf.* W.B. GWYN, TULANE STUDIES IN POLITICAL SCIENCE IX: THE MEANING OF THE SEPARATION OF POWERS 101 (1965) (noting that "English writers before Montesquieu's time [in the mid-eighteenth century] usually did not distinguish between executive and judicial functions in classifying governmental power").

10 Confusingly, the phrase "stare decisis" captures both "horizontal" and "vertical" restrictions on judicial decisionmaking. Horizontal norms determine how much deference courts must show to their own past decisions or those of other courts at an equivalent level within a judicial hierarchy. Vertical norms determine the obligation of courts to defer to higher courts within a given judicial system. *See infra* notes 35–41 and accompanying text. This Article will focus on the power of the courts and Congress to eliminate the *horizontal* norm that courts must defer to some degree to their own past decisions. For citations to discussions of the constitutional status of vertical stare decisis, see *infra* note 41.

11 The quotation marks refer to the fact that "unpublished" opinions are easily accessible online.

12 These rules alter the operation of horizontal stare decisis insofar as they affect panel to panel relations. Of course, as they eliminate the force of appellate opinions on district courts, they also affect operation of vertical stare decisis.

Circuit stirred controversy in 2000 in *Anastasoff v. United States*,[13] in which he held that issuance of such nonprecedents cannot be reconciled with the federal courts' Article III "judicial power," which he believes imposes on courts a duty to defer to their precedents along the lines once demanded by the declaratory theory.[14] According to Judge Arnold, a court cannot evade the force of its own inconvenient, on-point precedents by ignoring them; rather, the court should follow such a precedent unless the court can make a "convincingly clear" case why it should be overruled.[15] In 2001, Judge Kozinski of the Ninth Circuit fired back with *Hart v. Massanari*,[16] opining that the practice of issuing nonprecedents is a perfectly constitutional response to the crushing litigation burdens courts now face.[17] Scholarly commentary, by and large, has taken an anti-*Anastasoff* view.[18]

The power of Congress to regulate the operation of stare decisis has sparked recent and interesting scholarly foment. Although the Supreme Court long ago junked the declaratory theory, its shadow lives on in the doctrine that the Court will not overrule a precedent

13 223 F.3d 898 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

14 *Id.* at 899–905 (holding that Eighth Circuit Rule 28A(i), which provides that "[u]npublished decisions are not precedent," is unconstitutional); *see also* Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 261–62 (5th Cir. 2001) (dissent from denial of rehearing en banc) (describing as "questionable" the "practice of denying precedential status to unpublished opinions").

15 *Anastasoff*, 223 F.3d at 904–05.

16 266 F.3d 1155 (9th Cir. 2001).

17 *Id.* at 1180 ("Unlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority."); *see also* Symbol Techs., Inc. v. Lemelson Med., 277 F.3d 1361, 1367 (Fed. Cir. 2002) (following *Hart*).

18 *See, e.g.*, R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in* Anastasoff v. United States, 3 J. APP. PRAC. & PROCESS 355, 356–60 (2001) (concluding that Judge Arnold's analysis of the constraining effects of precedent on courts fails to give due consideration to the unsettled nature of the judicial power at the time of the founding); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 525 (2000) (concluding that "[i]t is highly unlikely that when the Constitution was adopted Americans believed that the principle of stare decisis was hard-wired into the concept of judicial power"); Thomas R. Lee & Lance S. Lehnhof, *The* Anastasoff *Case and the Judicial Power To "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135, 140 (2001) (concluding "that the founding-era conception of precedent cannot be reconciled with the historical model proposed by Judge Arnold"). *But see* Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 83 (2000) (defending *Anastasoff* on nonoriginalist grounds and arguing that the "core meaning of judicial power" requires some measure of respect for precedent on equal-justice grounds).

absent a "special justification" beyond mere disagreement.[19] The Court sometimes invokes this doctrine to justify adhering to precedents while at the same time hinting they are wrong on their merits.[20] Professor Michael Stokes Paulsen provocatively argues that the Constitution's silence on precedent leaves room for Congress to strip targeted Supreme Court opinions of any such force.[21] He directs his ire at *Roe v. Wade*[22] and *Planned Parenthood v. Casey*,[23] but no doubt persons from all ideological corners could identify opinions they would like to subject to this treatment. Professor John Harrison balks at the claim that Congress may manipulate precedential force to attempt to affect constitutional doctrine but concludes that most stare

19 *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443 (2000) (observing that "[w]hile *stare decisis* is not an inexorable command, particularly when we are interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification'" (citations and internal punctuation omitted)); Planned Parenthood v. Casey, 505 U.S. 833, 863–64 (1992) (stating that a court should have "some special reason over and above the belief that a prior case was wrongly decided" to justify overruling). For discussion of the Court's statements of the level of justification required to overrule precedent, see Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 667–81 (1999).

20 Precedential force may have been dispositive in at least two important, relatively recent decisions. Given the current conservative makeup of the Court, it seems likely that, absent stare decisis effects, it would have overruled rather than reaffirmed *Miranda* in *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now."). Likewise, the joint opinion in *Planned Parenthood v. Casey* purported to rely on stare decisis to justify reaffirming *Roe*. *See Casey*, 505 U.S. at 861 (1992) ("Within the bounds of normal *stare decisis* analysis . . . the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have . . . ."); *see also* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey?, 109 YALE L.J. 1535, 1539 n.12 (2000) (identifying Supreme Court opinions that may have turned on application of stare decisis).

21 *See* Paulsen, *supra* note 20, at 1538–43. More specifically, Professor Paulsen argues: (1) the Supreme Court describes stare decisis as merely a matter of "policy" rather than "an inexorable command"; (2) Congress is in charge of policymaking; and therefore concludes (3) Congress has authority to strip individual cases of their precedential force. *Id.*; *see also* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754 (1988) (posing the question "whether Congress could demand that the Court reconsider its precedents, free of any supposed compulsion introduced by stare decisis").

22 404 U.S. 113 (1973).

23 *Casey*, 505 U.S. at 833; *see also* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003).

decisis norms are best characterized as creatures of general and statutory law, which leaves space for Congress to legislate "any norm of stare decisis that a court reasonably could recognize."[24] By way of contrast (and in direct response to Paulsen) Professor Richard Fallon maintains that stare decisis must enjoy constitutional status "[i]n light of longstanding acceptance and considerations of justice and prudence"—and that to conclude otherwise requires adoption of an unrealistic methodology for constitutional interpretation.[25]

All of these courts and scholars are both right and wrong after a fashion. Those who, like Judge Arnold, claim that separation-of-powers principles block the courts from abandoning their traditional respect for precedent are correct but fail to appreciate the true source of this requirement and its limits. Those who, like Paulsen, contend or assume that stare decisis has no constitutional import are not looking quite hard enough for it, but the claim that Congress may legislate away the horizontal, coercive force of precedent is nonetheless at least partially correct. The key to reconciling these inconsistent-sounding claims is to recognize and harmonize two competing separation-of-powers principles: (1) the rule of law forbids officials from seizing more power than the law grants them; and (2) Congress, the lawmaker, has considerable discretion to delegate discretionary power to the executive and judicial branches (collectively, the "enforcing branches").[26] The first of these principles compels the conclusion that *courts* cannot constitutionally eliminate their obligation, deeply rooted in common law, to show measured (though not absolute) deference to their own precedents. The second, however, suggests that Congress possesses power to release the courts from this constraint. Separation of powers permits Congress to *grant* a power that the courts may not legally *seize*.[27]

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24 Harrison, *supra* note 18, at 540 (concluding that Congress may regulate stare decisis to achieve systemic ends (for example, to enhance stability, predictability, and judicial economy) but that it may not manipulate precedent to force courts to adopt congressionally favored interpretations of the Constitution).

25 Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 596 (2001).

26 Both the executive and the judicial branches carry out the "executive" function of enforcing the law, albeit the judiciary does so in the limited context of meting out judgments in cases and controversies initiated by either the executive or private parties. *See infra* text accompanying note 166. I refer to both as "enforcing branches" to capture this commonality because using the phrase "executive branches" would be confusing for obvious reasons.

27 Note: this Article confines its attention to the *separation-of-powers* concerns raised by the elimination of the horizontal force of precedents. Some have suggested or argued that "nonprecedents" also raise equal protection and due process concerns.

The primary thrust of separation of powers is to forestall tyranny by ensuring that enforcement officials with the power to act directly on the governed (i.e., hurt them) find their discretion to do so limited by law.[28] Such a scheme cannot work if officials are free to expand their powers by changing the law that limits their authority. It should obviously follow that judges may not legally "make up" new laws that increase their discretionary power. The deference to precedent demanded by the declaratory theory operated as a substantial, albeit fuzzy, legal constraint on judicial discretion.[29] The tempting mistake

See, e.g., Price, *supra* note 18, at 83 (arguing that abandoning respect for precedent "would mock the notion of equal justice"); Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional*, 50 U. KAN. L. REV. 195, 211 (2001) ("Denying precedential value to unpublished opinions offends both procedural due process and equal protection."). The gist of such arguments seems to be that freeing the courts from precedents creates the danger that they will treat similarly situated parties dissimilarly and might unfairly deny litigants the clarifying effects of precedents on indeterminate laws. By way of a tentative response: with regard to equal-treatment concerns, although the law condemns invidious discrimination, it does not require that every effort be made to ensure that all litigants receive identical treatment. Circuit court splits are commonplace; different juries may find different facts on the same evidence. Equality of treatment is one value among many prized by the adjudicative process; getting the law right is another. It is not obvious that these competing values should be balanced in a way that requires courts to follow precedents they deem incorrect. With regard to due process, to the degree stripping opinions of their precedential force makes laws less clear, this practice could in theory cause an especially vague statute to violate the void-for-vagueness principle. This muddled doctrine is chiefly concerned with constraining police discretion to enforce criminal laws arbitrarily or impinge on First Amendment rights. *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 604 (1997). To survive a due-process vagueness challenge, a law prohibiting conduct need only create "minimal guidelines to govern law enforcement." *See* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983). It need not be as specific as possible. *See* Village of Hoffman Estates v. Flipside, 455 U.S. 489, 495 n.7 (1982) (finding that absent a claim of impingement on constitutional rights, a vagueness challenge requires proof that enactment specifies "no standard of conduct"); *cf.* Nash v. United States, 229 U.S. 373, 377 (1913) (upholding Sherman Act standard that "unreasonable" restraints of trade are criminal against vagueness challenge). It should follow that there are many contexts in which Congress could strip the precedential force from various opinions and still leave the law with more than enough clarity to survive this form of due-process challenge.

28 *See, e.g.*, Plaut v. Spendthrift Farms, 514 U.S. 211, 241 (1995) (Breyer, J., concurring) (noting the role of separation of powers in preserving "impartial rule of law" and ensuring that "even an unfair law at least will be applied evenhandedly according to its terms"); GWYN, *supra* note 9, at 104–06 (discussing the rule-of-law rationale underlying Montesquieu's and Blackstone's discussions of separation of powers).

29 But is stare decisis a constraint? Some contend that stare decisis is too fuzzy and easily manipulated by judges to carry much real force—especially at the Supreme

is to conclude that, because courts created the norms of common-law precedent in the first place, they retained the power to abandon them. The source of stare decisis in "judge-made" law (to use the modern idiom) does nothing, however, to alter application of the separation-of-powers principle that forbids judicial power grabs. The federal courts have always operated under a constitutional obligation to enforce the law; the law at their inception required them to have a substantial justification for departing from or ignoring their own precedents, and the courts lack the constitutional power to change that law in a way that increases their discretion.

The rule-of-law principle that courts (and the executive, for that matter) cannot seize discretionary power does not, however, prevent Congress from granting it—provided doing so falls within one of its enumerated powers and does not otherwise violate any other separation-of-powers principles. Congress has at least some power to eliminate the horizontal force of precedent pursuant to its Sweeping Clause authority to enact laws that are "necessary and proper" for "carrying into execution" the judicial power.[30] Reaching this conclusion requires analysis of two separation-of-powers concerns that are intertwined with Sweeping Clause analysis. First, it obviously cannot be "proper" for Congress to enact laws that usurp rather than "carry[ ] into execution" the judicial power.[31] The line between the two is not clear. That said, congressional elimination of horizontal stare decisis should not amount to usurpation because it would not enable Congress to force its legal views on the courts; rather, it would merely enable courts to revisit their interpretations of law without giving distorting weight to their past decisions.

A second separation-of-powers concern is that releasing the courts from the constraining effects of stare decisis could conceivably

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Court level. It is certainly true that one cannot take judicial discussions of stare decisis at face value—for one thing, given the complexity of cognitive processes that occur in judicial (and other) brains, it is safe to hazard that judges themselves do not understand the full effects of stare decisis on their decisions. In any event, this Article will accept as an axiom that judicial commitment to stare decisis sometimes affects case outcomes. For a recent, nuanced, empirical analysis that concludes that precedents do in fact significantly constrain later Supreme Court decisionmaking and explores how they do, see Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 315–16 (2002). For examples of Supreme Court cases in which precedential force may have played a dispositive role, see *supra* note 20.

30 U.S. CONST. art. I, § 8, cl. 18.

31 *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271–72 (1993) (discussing the "propriety" requirements of the Necessary and Proper Clause).

increase their discretion in some contexts to arbitrary (in other words, "legislative") levels, and a law that has such an effect would not carry into execution a properly "judicial" power. Analysis of this point is complex and necessarily somewhat speculative because the relationship between stare decisis and the constitutional limits on enforcement-branch discretion has not been much explored. In theory, the nondelegation doctrine blocks Congress from granting full-blown, legislative discretion to enforcement-branch officials. The courts have found it impossible to delineate meaningful limits on how much discretion may be exercised consistent with this principle and, in the past, have ceded almost plenary authority to Congress to delegate as much discretionary power as it sees fit.[32] The nondelegation doctrine's current, dead-letter form suggests that it would be almost impossible for Congress to grant the courts an unconstitutional amount of power by releasing them from the discretion-reducing effects of stare decisis.

Such analysis, however, fails to consider that the nondelegation doctrine evolved into its current weak form in a system that expects stare decisis to ratchet down judicial discretion over time. By operating as a mechanism that automatically tends to reduce judicial discretion to "safe" levels, stare decisis perhaps relieved the pressure on the courts to confront seriously the problem of determining how much discretion they may constitutionally exercise. Strip this mechanism away, and the pressure may build. The pragmatic upshot: were Congress to take a blunderbuss approach to depriving judicial precedents of the power to narrow vague statutes over time, the courts might respond by trying to put teeth into the nondelegation doctrine and striking as unconstitutionally vague statutes that pose no problem whatsoever under that doctrine in its current form.

Of course, it should not be surprising that the limits of congressional power in an unexplored area of constitutional law are murky. This murk duly noted, the long history of permitting both executive and judicial officials to wield substantial discretion at congressional behest suggests that Congress has ample authority to take relatively "modest" steps to limit the horizontal force of precedent. For example, it could target select constitutional precedents as Paulsen suggests, or it might adopt more systemic reforms, such as depriving all future five-to-four Supreme Court opinions of their horizontal force

32 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (setting forth examples of extremely broad and vague delegations that the Court has approved; noting that, "[i]n the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes").

on the ground that such splintered opinions should not purport to "settle" the law.

The plan: Part I of this Article will explore the Framers' views concerning the legal and constitutional status of the declaratory theory of precedent. Contrary to *Anastasoff*, there is insufficient evidence to justify the conclusion that they believed that any given doctrine of stare decisis necessarily inhered in the definition of Article III's "judicial power." Nonetheless, it seems quite clear that the Framers expected the new federal courts to treat their past decisions as evidence of law and to adhere to them absent a strong justification to the contrary. This expectation was rooted in their understanding that this approach to precedent was settled *law*, and they would have rejected out of hand the notion that judges might possess the legislative power to rewrite this law to increase their own power. With this historical analysis as backdrop, Part II offers a separation-of-powers analysis of the scope of judicial and congressional authority to change this law by eliminating the force of horizontal stare decisis. The principle that courts may not seize power for themselves prevents them from abandoning this constraint of their own accord. Congress, however, has substantial power to release the courts from the horizontal force of (many) precedents. In light of these lessons, Part III concludes that rules authorizing courts to issue "nonprecedents" of the sort condemned in *Anastasoff* do not violate separation-of-powers principles provided that Congress has authorized them; and, in a rather hypertechnical sense, perhaps it already has by way of the Rules Enabling Act.[33] Lastly, Part IV briefly ruminates on the normative import of the most controversial implication of this analysis—that Congress may strip Supreme Court constitutional interpretations of their horizontal weight on the Court's later decisionmaking. It guardedly concludes that granting Congress such a limited role in constitutional interpretation would be legitimate and might even be a good idea. And, to invoke for what it is worth the "Father-of-our-Constitution" argument, it explains why Madison might well have agreed.

33 Circuit courts may "prescribe rules for the conduct of their business" that are "consistent with Acts of Congress and [general] rules of practice and procedure" prescribed by the Supreme Court. *See* 28 U.S.C. §§ 2071(a), 2072(a), 2074(a) (2002). Each circuit court has promulgated a local rule regarding publication of opinions and their precedential status, though their specifics vary. *See* Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251, 253–57 (2001) (setting forth local rule from each circuit).

I. LESSONS FROM THE FOUNDING: STARE DECISIS AS A LEGAL OBLIGATION WITH SEPARATION-OF-POWERS IMPLICATIONS

This Part first clears some conceptual underbrush by distinguishing declaratory-theory stare decisis from various other precedential norms that have evolved over the last two centuries to encrust American judicial processes. It then documents that the declaratory theory's approach to precedent was established common "law" around the time of the founding. The Framers' expectations regarding how this law would relate to the new Constitution were inchoate and complex. On the one hand, contrary to *Anastasoff*, they did not bury a specific doctrine regarding precedential force in the definition of the Article III "judicial power." On the other, prominent thinkers on both sides of the ratification debate expected that the new federal courts would defer to their own precedents as they accumulated. None of these founding-era jurists gave anything like a full-blown legal or constitutional analysis of the basis for this expectation, but their limited remarks suggest the importance of two principles: (1) respect for precedent is one means to prevent courts from exercising "arbitrary" (legislative or tyrannical) discretion; and (2) courts, as law-finders rather than lawmakers, cannot change the law to increase their own powers.

A. The Declaratory Theory at the Time of the Founding: Precedents as Rebuttable Evidence of Law

Any attempt to explore the constitutional status of the doctrine of stare decisis must first confront the question: which one? The notion that courts should show a measure of respect to their past decisions has been a part of Anglo-American law since the Middle Ages and has been evolving ever since.[34] On American soil, both federal and state courts now labor under an array of "horizontal" and "vertical" precedential norms—some of which are quite modern.[35] Horizontal norms address the weight courts give their own earlier decisions or those of courts of equal rank. For instance, federal circuit court panels are

34 *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1162–69 (9th Cir. 2001) (describing evolution of stare decisis in England and America); 12 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 146–57 (1938) (tracing evolution of doctrine of precedent in England); 1 THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 342–50 (5th ed. 1956) (same); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 54–91 (2001) (tracing evolution of doctrine of precedent from medieval England to post-revolutionary America).

35 For an illuminating discussion of this welter of norms and their legal sources, see especially Harrison, *supra* note 18, at 506–31.

strictly bound by earlier panel decisions from their own circuit but give only persuasive weight to decisions from other circuits.[36] By contrast, the Supreme Court treats its past decisions as neither absolutely binding nor merely persuasive; as mentioned above, it purports to defer to its past decisions to the degree of requiring a "special justification" for overruling them.[37] Vertical stare decisis, by contrast, has been commonly understood to make higher court decisions strictly binding on the lower courts within a given hierarchy.[38]

As Professor Harrison recently has explained, many of these norms are best regarded as products of statutory or common law.[39] Some have evolved to suit judicial structures that are themselves the product of serendipitous statutory design and lack any constitutional basis. For instance, the rule that a circuit court's decision operates with merely persuasive force outside its congressionally drawn jurisdiction was not inevitable; old authority suggests the proposition that one circuit could indeed "bind" another.[40] A few scholars have even argued that the Constitution does not of its own force impose the vertical stare decisis norm that higher court rulings strictly bind lower courts.[41]

Underlying the complex of doctrines that constitutes the modern law(s) of stare decisis lies an older understanding of the coercive force of judicial opinions that was entrenched in common-law jurisprudence at and about the time of founding—the declaratory theory of precedent. Again, on this view, a judicial opinion is not itself "law," but is instead rebuttable "evidence" of law. Roughly speaking, the functional effect of this doctrine is that courts should defer to precedents that fall within what might be characterized as a zone of reason-

36 *Id.* at 516–17.

37 *See supra* note 19 and accompanying text.

38 Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 820 (1994) (describing the "doctrine of hierarchical precedent" as "a virtually undiscussed axiom of adjudication").

39 *See generally* Harrison, *supra* note 18, at 525–31 (discussing history of stare decisis in American law).

40 *Id.* at 516 (citing Shreve v. Cheesman, 69 F. 785, 791–92 (8th Cir. 1895)).

41 *Id.* at 518 (concluding that "it is not obvious either that appellate jurisdiction determines the scope of [vertical] stare decisis or that the force of vertical precedent is absolute"); *see also* Paul L. Colby, *Perspectives on the Authoritativeness of Supreme Court Decisions: Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041, 1058 (1987) (describing "deductive" view that higher court opinions are "suasive" authority for lower courts); Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 85 (1990) (arguing that inferior court repudiation of higher court precedent is "not constitutionally *insubordinate*").

able legal interpretation.[42] In other words, a judge should not reject a precedent merely because she would have decided the case differently given the chance in a case of first impression. Rather, not to put a misleadingly fine point on the matter, to justify overruling a precedent, the judge must demonstrate that it is seriously flawed.

The most prominent and influential exponent of this theory was, of course, William Blackstone, whose *Commentaries* were ready at hand to jurists in the late eighteenth century.[43] For him, the source of the common law's legitimacy was that it was based on "custom" or "immemorial usage."[44] But how is one to figure out which practices are customary? One should ask the judges, for they are "the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land."[45] And how do the judges become such "depositaries"? They study the law, of course, and the judicial decisions of their predecessors "are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law."[46]

For Blackstone, old law is good law, and judges cannot legitimately make new law according to their "private sentiments" for two

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42 For an extended and informative defense of this proposition, see Nelson, *supra* note 6, at 8–45 (arguing that stare decisis in antebellum America limited discretion of judges to depart from reasonable interpretations of indeterminate law but did not prevent judges from rejecting precedents that contained "demonstrable errors," i.e., that fell outside the zone of reasonable interpretation).

43 Chief Justice Marshall described the authority of the prominent English treatise-writers, including Blackstone, as follows,

> Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them; and those opinions are afterwards carried to the bar, the bench, and the legislature . . . . [T]he definitions and the dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to respect.

United States v. Burr, 25 F. Cas. 55, 160 (C.C.D. Va. 1807) (No. 14,693). For further discussion of Blackstone's influence, see, for example, *Hart v. Massanari*, 266 F.3d 1155, 1165 (9th Cir. 2001) ("For centuries, the most important sources of law were not judicial opinions themselves, but treatises that restated the law, such as the commentaries of Coke and Blackstone."); DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 3 (1941) ("[Blackstone's] *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law."); and 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES iv–v (St. George Tucker ed., Augustus Kelley Publishers 1969) (1803) (noting that Blackstone's work constituted the sole source of legal knowledge for many students of the law in the former colonies).

44 1 BLACKSTONE, *supra* note 5, at *68.

45 1 *id.* at *69.

46 1 *id.*

reasons: (1) they simply lack the legislative power to do so; and (2) permitting judges to legislate introduces instability and uncertainty into the law.[47] It follows from all these points that a judge should generally follow the best "evidence" of old law—the decisions of his predecessors:

> For it is *an established rule to abide by former precedents*, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.[48]

This strong statement goes a long way toward giving judicial opinions the same practical effect as law, but not all the way, for Blackstone hastened to add,

> Yet this rule admits of exception, where the former determination is *most evidently contrary to reason*; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad* law, but that it was *not* law . . . .[49]

Customs, and thus the common law, must be consistent with "reason" and therefore unreasonable precedents cannot be accurate statements of law. Blackstone knew full well, of course, that this rationality caveat threatened to swallow his general rule of deference to precedent—for many people have the habit of condemning as unreasonable all propositions with which they disagree. He therefore attempted to confine the range of this exception by granting precedents a strong presumption of rationality:

> [W]hat is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule *flatly contradictory* to reason, and then the law will presume it to be well founded . . . . The doctrine of the law then is this: that precedents

47 *See* 1 *id.*

48 1 *id.* (emphasis added).

49 1 *id.* at *69–70 (first emphasis added).

> and rules must be followed, unless *flatly absurd or unjust*: for though their reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose they acted wholly without consideration.[50]

Therefore, a judge is not free to ignore a precedent stating a rule of law merely because that judge is unable to discern a rational basis for that rule. Rather, the judge must presume rationality and follow the rule unless he or she is able to explain why it is "flatly contradictory to reason" or, synonymously, "flatly absurd or unjust." Note that these formulae imply that degrees of rationality exist; the existence of "flatly absurd" opinions implies that "somewhat absurd" and "pretty bad but maybe not all that absurd" opinions must exist, too. Apparently, courts should follow rather than overrule precedents that fall into these less odious categories. The upshot of this discussion is that, for Blackstone, overruling a precedent requires, to shift to modern Supreme Court vernacular for a moment, some sort of "[really] special justification"[51]—it must somehow be seriously wrong.

The strength of the commitment to precedent in America at and near the time of the founding has been the subject of debate. Scholars have famously characterized the post-revolutionary era as a period in which courts embraced an activist, instrumentalist understanding of their role as lawmakers and would not let precedents stand in the way of improving policy.[52] Others have questioned this thesis, arguing that most judges of the time valued precedent highly and did not regard themselves as "innovators."[53] To some degree, this debate over the level of fealty to precedent is a matter of characterization of the cup half-empty or half-full variety. Clearly, for jurists of the early Republic, precedents did not function as "strictly binding" law—a concept totally at odds with the underpinnings of the declaratory theory. If one starts from an anachronistic "strict" theory as a comparative baseline, then one can safely state that that these jurists had relatively little regard for precedent. Reading early American jurists on their own "declaratory theory" terms, however, demonstrates what is for the present purpose the important point: generally speaking, they embraced the view that precedents should be treated as evidence of law

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50 1 *id.* at *70 (emphases added) (footnote omitted).

51 *See supra* note 19.

52 *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 135 (2d ed. 1985).

53 PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA 27 (1997) ("Most American jurists were extremely uneasy about upending rules that had come down to them from generations of respected English (and some American) jurists.").

that should be followed absent a demonstrably good reason to reject them. It seems clear that the strong weight of well-informed professional opinion took the obligation to defer to precedent seriously but did not treat it as an absolute.[54]

One of the most important early American commentators on the law, Chancellor Kent, provides an excellent illustration of this approach:

> A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the *highest evidence* which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, *the presumption is in favor of its correctness* . . . . When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, *except for very cogent reasons, and upon a clear manifestation of error* . . . .[55]

Like Blackstone, Kent deemed precedents as a class to be strong evidence of law, but left judges with a residual power to assess their evidentiary worth and reject those found wanting. Much like a fact witness, a precedent can be impeached as unreliable, for, to be entitled to a presumption of correctness, it must be the product of "solemn argument and mature deliberation"—points which are often ripe for dispute. Also, just as one can reject fact testimony which makes no sense, so courts may reject even those rules which have been "deliberately adopted and declared" if they have "very cogent reasons" for doing so "and upon a clear manifestation of error."[56]

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54 *See* Lee, *supra* note 19, at 683 (concluding similarly that "[t]he founding-era compromise [with regard to precedential force] seems comparable to the modern notion that only an egregious error justifies abandoning precedent").

55 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *475–76 (O.W. Holmes, Jr. ed., 14th ed. 1896) (emphases added).

56 1 *id.* Kent was very clear that, if a precedent was sufficiently bad, it was not binding and should be corrected. He continued,

> I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by perpetuity of error.

William Cranch was an early reporter of Supreme Court cases and therefore not exactly a disinterested observer of the importance of precedent—he wanted to sell his books. That said, in the preface of his first report, he wrote an apology which is entirely consistent with the proposition that precedents are strong but rebuttable evidence of law:

> In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He cannot decide a similar case differently, *without strong reasons*, which, for his own justification, he will wish to make public.[57]

In his 1791 *Lectures on Law*, James Wilson, a Framer of the first rank and an Associate Justice of the first Supreme Court, condemned "blind assent" to "authority," which he claimed should serve as a "skillful guide" to judges rather than "tyrannize" them.[58] The general tenor of his remarks suggests, however, that he did not contemplate that judges would lightly overrule the "skillful guide[s]" of precedent:

> In certain sciences, a *peculiar* degree of regard should be paid to authority. The common law is one of those sciences. Judicial decisions are the *principal and most authentic evidence*, which can be given, of the existence of such a custom as is entitled to form a part of the common law. Those who gave such decisions, were selected for that employment, on account of their learning and experience in the common law. As to the parties, and those who represent the parties to them, their judgments continue themselves to be effective laws, while they are unreversed. They should, in the cases of others, be considered as *strong evidence of law*.[59]

In his treatise, *A System of the Laws of the State of Connecticut*, Zephaniah Swift, an early Chief Justice of Connecticut, advised,

> We have introduced the English practice with respect to the authority of precedents. Courts *are not at liberty* to depart from prior decisions, in similar cases, unless they are repugnant to reason. It is

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1 *id.* at *477. This statement is, of course, completely consistent with declaratory-theory orthodoxy.

57 *Preface* to REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES, IN AUGUST AND DECEMBER TERMS, 1801, AND FEBRUARY TERM, 1803, 5 U.S. (1 Cranch) iii, iii (New York, C. Wiley 1812) (1804) (emphasis added).

58 2 JAMES WILSON, THE WORKS OF JAMES WILSON 160 (James DeWitt Andrews ed., Chicago, Callaghan and Company 1896).

59 2 *id.* at 160–61 (emphases added).

> therefore a common practice, when any dispute arises respecting a point of law, to refer to precedents.[60]

In addition to rejecting precedents that are "repugnant to reason," he also stated more generally that "[i]f a determination has been founded upon mistaken principles, or the rule adopted by it be inconvenient, or repugnant to the general tenor of the law, a subsequent court assumes the power to vary from or contradict it."[61] As always, the challenge presented by such language is to determine the degree to which such vague standards for overruling a precedent swallow the ostensible general rule of deference. Contrasting Swift's regard for the force of English and Connecticut precedents is illuminating in this regard. He discussed with approval the case of *Wilford v. Grant*, in which the Supreme Court of Connecticut rejected an English rule forbidding reversal of a judgment with regard to some but not all defendants.[62] The court concluded that this rule made no sense where partial reversal would not prejudice any rights of those defendants not granted relief.[63] In light of this conclusion, the court deemed itself free to reject the English rule because, as it explained,

> [I]t doth not appear that this rule has been adopted in practice here, *so as to become authoritative.* The common law of England *we are to pay great deference to*, as being a general system of improved reason, and a source from whence our principles of jurisprudence have been mostly drawn: The rules, however, *which have not been made our own by adoption*, we are to examine, and so far vary from them as they may appear contrary to reason or unadapted to our local circumstances, the policy of our law, or simplicity of our practice . . . .[64]

Distinguishing the force of English precedents makes considerable sense if one starts, as the *Wilford* court seemed to do, with the premises that the common law is rooted in custom and practice and that these vary between Connecticut and England; on this view, one would not necessarily expect English courts to give authoritative statements concerning Connecticut custom and law, especially after a revolution. In keeping with this logic, although English precedents were worthy of "great deference," a Connecticut court could reject them on a certain showing of inconvenience or irrationality. By implicit contrast, however, the court indicated that some stronger showing of error

60 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 45 (Arno Press, photo. reprint 1972) (1795) (emphasis added).

61 1 *id.* at 41.

62 1 *id.* at 47 (citing Wilford v. Grant, 1 Kirby 114 (Conn. 1786)).

63 *Wilford*, 1 Kirby at 116–17.

64 *Id.* (emphases added).

would be required to justify throwing out a rule after it had been enshrined in Connecticut precedent.[65]

In a similar vein, although some have charged that John Marshall did not care much for the doctrine of precedent, Professor Thomas Lee's careful and recent reading of the Marshall Court's opinions finds evidence for the proposition that it, too, adopted the mainstream view that precedents should be followed absent a substantial justification to the contrary.[66] In addition, as will be explored in more detail below, such luminaries of the ratification debates as Madison, Hamilton, and the great Anti-Federalist Brutus all seem to have subscribed to something like this same approach.[67]

Of course, this brief tour of authorities cannot establish that all jurists from at or around the time of the founding held identical views regarding the generic force of precedents taken as a class.[68] Indeed, even if we were to indulge the counterfactual that every lawyer and judge from that time were on record as subscribing to the letter of Blackstone's doctrine, one could not prove this point, for one cannot expect uniformity with regard to qualitative, contextual judgments regarding what it means for a precedent to be "reasonable," "flatly absurd," and so on.

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65 A similar dynamic may be found in the writings of Nathaniel Chipman, a chief justice of the Vermont Supreme Court. He decried that the precedents of the common law of England had "been held in too great veneration." NATHANIEL CHIPMAN, REPORTS AND DISSERTATIONS IN TWO PARTS, PART II: DISSERTATIONS ON THE STATUTE ADOPTING THE COMMON LAW OF ENGLAND, THE STATUTE OF CONVEYANCES, THE STATUTE OF OFFSETS, AND ON THE NEGOTIABILITY OF NOTES 123 (Printed by Anthony Haswell for the author, Vt., Rutland 1793). With regard to the problem of determining whether to receive an English common law rule into Vermont law, he wrote,

> If no reason can be assigned, in support of rules, or precedents, *not already adopted in practice*, to adopt such rules, is certainly contrary to the principles of our government, and the spirit of our laws, which admit not of arbitrary rules, or of arbitrary decisions, even in matters indifferent.

Id. at 128 (emphasis added). Thus, at least with regard to English precedents, Chipman rejected Blackstone's dictum that the rationality of precedents should be presumed even where no supporting rationale for them could be discerned; implicitly, however, this passage criticizing precedential dogmatism seems to grant that precedents that Vermont had "adopted in practice" should enjoy some sort of presumptive force.

66 Lee, *supra* note 19, at 679–81 (concluding that the only "true overruling decisions" from the Marshall Court suggest it required more than simple disagreement to justify rejecting a precedent).

67 *See infra* Part I.B.1.

68 *Cf.* CHIPMAN, *supra* note 65, at 123 (condemning the "too great veneration" granted to precedents).

Also, it should be noted that one can find opinions from that time declaring that courts should not follow erroneous precedents.[69] Such judicial statements must be read with care and do not necessarily prove that their authors rejected the view that precedents should enjoy the presumptive force described in the prominent treatises of their day.[70] Certainly, they are incompatible with the doctrine of strict precedent—which did not come into vogue until well into the nineteenth century.[71] They can, however, often be squared with the declaratory theory's understanding of precedents as evidence of law—an approach that permits a court to overrule a "wrong" precedent provided it first discharges its burden of overcoming the presumption that it should be followed (by demonstrating, for example, that it was very badly reasoned, no longer suits the times, etc.).[72]

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69 See, for example, *Kerlin's Lessee v. Bull*, 1 Dall. 175 (Pa. 1786), in which the Pennsylvania Supreme Court observed,

> A court is not bound to give the like judgment, which had been given by a former court, unless they are of opinion that the first judgment was *according to law*; for any court may err; and if a judge conceives, that judgment given by a former court is *erroneous*, he ought not in conscience to give the like judgment, he being sworn to judge according to law.

Id. at 178 (emphases added) (citation omitted); *cf.* Healy, *supra* note 34, at 78 (rejecting the claim that stare decisis has constitutional import, and collecting cases from at or near the founding in which courts overruled precedents).

70 *Kerlin's Lessee* aptly demonstrates this point and provides a neat opportunity to demonstrate how modern legal conceptions of precedent can color one's reading of old cases. *See Kerlin's Lessee*, 1 Dall. at 175. As noted above, *see supra* note 69, in *Kerlin's Lessee* the Pennsylvania Supreme Court observed that courts should not follow "erroneous" precedents. One author recently has cited this passage as evidence for the proposition that precedents enjoyed little force in post-revolutionary America. *See* Healy, *supra* note 34, at 78–79. In *Kerlin's Lessee*, however, the court *rejected* an invitation to overrule a precedent because the statutory interpretation at issue had "been . . . long accepted . . . as a rule of property" and, in such a situation, it was "but reasonable [the court] should acquiesce and determine the same way, in so doubtful a case." *Kerlin's Lessee*, 1 Dall. at 179. Professor Caleb Nelson has recently relied on this latter aspect of *Kerlin's Lessee* as evidence that courts would defer to reasonable precedents in a *Chevron*-like fashion. Nelson, *supra* note 6, at 16. Perhaps these two readings only differ with regard to whether they treat the precedent cup as half-full or half-empty. Healy finds significance in the court's rejection of a strict theory of precedent; Nelson is more impressed by the court's adherence to a medium-weight, *Chevron*-like form (which is perfectly consistent with declaratory theory). Whatever else may be said about this case, it does not demonstrate that the Pennsylvania Supreme Court of 1786 thought that precedents did not matter.

71 On the late arrival of "strict" precedent, see *Hart v. Massanari*, 266 F.3d 1155, 1164–65, 1168 (9th Cir. 2001); and 1 PLUCKNETT, *supra* note 34, at 349–50.

72 For an example of this dynamic, see *Cunningham v. Morrell*, 10 Johns. 203, 205–06 (N.Y. Sup. Ct. 1813), in which Chancellor Kent explained at length that two of his own court's precedents had to be overruled because they (and the English prece-

In any event, one need not document absolute unanimity regarding the doctrine of precedent among all jurists scattered across the (ex-)colonies to demonstrate the obvious: precedents *mattered* in the common-law jurisprudence of the time of the founding. It was largely common ground that they should serve as a meaningful check on judicial discretion—a judge had a legal obligation to follow an on-point precedent within his jurisdiction unless he could produce a good legal reason not to do so. To be sure, this check was (and remains) fuzzy on the margins because, inter alia: (1) determining whether sufficient justification exists for overruling requires qualitative judgments of a sort that tend to provoke disagreement; and (2) judges of differing temperaments no doubt have always tended to differ with regard to how strong a presumption they believe should protect precedents as a class. Just because a constraint is fuzzy, however, does not make it unimportant or meaningless.[73]

B. The Expected Interaction of Declaratory-Theory Stare Decisis with the New Constitution

In *Anastasoff v. United States*, Judge Arnold of the Eighth Circuit held that the declaratory view of precedential force was so deeply ingrained in the Framers' understanding of the proper operation of the courts and separation of powers that this norm must inhere in the definition of Article III's "judicial power."[74] As discussed below, this contention is likely incorrect. Nonetheless, it is undeniably true that prominent Federalist and Anti-Federalist writers expected the new federal courts to conduct their business of construing the law, including the Constitution, subject to the strictures of the declaratory theory—precedents over time would create "evidence" of law that would tend to "liquidate" constitutional meaning and help block courts from exercising "arbitrary discretion."[75] It also seems plain that, had any-

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dent on which they relied) misapplied the principles expressed by still earlier precedents and that they would, if followed, lead to "evil consequences." *But see* Healy, *supra* note 34, at 81 (citing *Cunningham*, among other cases, as evidence that courts in the post-revolutionary period felt relatively free to depart from precedents).

73 It strikes me as rather unlikely that someone firmly committed to the view that precedents are too fuzzy to matter at all would have made it to this footnote. That said, for indications that stare decisis influences outcomes even at the Supreme Court, see *supra* notes 20 and 29.

74 223 F.3d 898, 900 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

75 *See, e.g.*, THE FEDERALIST No. 37, at 226 (James Madison) (Robert Scigliano ed., 2000) (discussing role of precedent as "liquidator" of meaning); THE FEDERALIST No. 78, at 502 (Alexander Hamilton) (Robert Scigliano ed., 2000) (stating that adherence

one thought to level the charge, the Framers would have rejected out of hand the claim that the courts could defeat this expectation by abandoning this norm of their own volition. They likely would not have done so, however, because of a belief that the definition of the "judicial power" per se demands adherence to any given doctrine of stare decisis. Rather, they would have proceeded from a basic norm of the day rooted in both contemporaneous common-law jurisprudence and separation-of-powers theory: judges are law-"finders," not lawmakers, and they lack the authority to change the law in ways that increase their own power.[76]

1. Precedent as a "Liquidator" of Constitutional Meaning and a Limit on Judicial Discretion

The remarks from the time of the ratification debates of the great pamphleteers Hamilton, Madison, Brutus, and the Federal Farmer indicate that they all expected the new federal courts to adhere to something like the declaratory theory's doctrine of precedent. It is worth noting that they treated the correctness of this expectation as a given—they did not expressly defend or attack the proposition that courts *should* show deference to their earlier decisions. Rather, their brief discussions of the subject discuss what they saw as the positive or negative effects of accumulating federal court precedents. Missing from these discussions is anything approaching a full-blown analysis suggesting that the Constitution of its own force commands obedience to any given doctrine of stare decisis.

The Federalist No. 78 provides what must be the most frequently cited discussion by a Framer of the expected role of precedent in the federal courts. On inspection, it is a very slender reed upon which to attempt to build a constitutional doctrine.[77] In it, Hamilton defended life tenure for judges with the following argument:

> It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an *arbitrary discretion* in the courts, it is indispensable that they should be *bound down by strict rules and precedents*, which serve to define and point out their duty in every particular case that come before them; and it will readily be conceived from the variety of controversies

to precedent prevents courts from exercising "arbitrary discretion"). *See generally infra* Part I.B.1.

76 *See generally infra* Part I.B.3.

77 *Cf.* Lee, *supra* note 19, at 663 (describing Hamilton's discussion of precedent in *The Federalist No. 78* as a "side-bar").

> which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.[78]

In reading this brief passage, one should probably bear in mind that Hamilton had an incentive to magnify the importance of precedents—the more important they are, the more important it is to give judges lots of time to learn them all. Be that as it may, it does provide evidence that he anticipated that precedents would play an important role in limiting judicial discretion in the post-ratification legal world. Avoiding an "arbitrary discretion" in the courts would require that they be "bound down" by "precedents" (as well as "rules") in sufficient number that their "records" would "swell to a very considerable bulk."[79] One must be careful, however, to avoid reading the phrase "bound down" anachronistically. It does not represent a commitment to a theory of precedent as strictly binding law of the sort that came into favor in nineteenth-century England and that governs vertical relationships among American courts now.[80] Rather, it seems overwhelmingly likely that Hamilton regarded precedents as "binding" in the limited declaratory-theory sense—that is, a precedent is evidence of law that "binds" a court unless it is rebutted by cogent legal analysis explaining why the precedent is wrong.[81]

Both the Madison and Hamilton halves of Publius provided evidence that they expected this approach to precedent to shape the federal courts' construction of the Constitution by sounding the theme that time would clarify its meaning. In *The Federalist No. 82*, Hamilton wrote,

> The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy

78 THE FEDERALIST NO. 78, *supra* note 75, at 502–03 (emphases added).

79 *Id.*

80 *Cf.* Hart v. Massanari, 266 F.3d 1155, 1168 (9th Cir. 2001) ("The modern concept of binding precedent—where a single opinion sets the course on a particular point of law and must be followed by courts at the same level and lower within a pyramidal judicial hierarchy—came about only gradually over the nineteenth and early twentieth centuries."); 1 PLUCKNETT, *supra* note 34, at 350 (noting that "the nineteenth century produced the changes which were necessary for the establishment of the rigid theory [of precedent]").

81 *See* Lee, *supra* note 19, at 663 ("But *Federalist No. 78* was hardly conceived as a comprehensive exposition of *stare decisis*, and Hamilton's statement of a prima facie rule of adherence to precedent should not be construed to exclude the existence of exceptions or countervailing considerations."); Paulsen, *supra* note 20, at 1572–76 (setting forth a series of arguments explaining why *The Federalist No. 78* should not be "overread" to state a "strict rule of stare decisis").

> and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. Time only can mature and perfect so compound a system, *liquidate the meaning of all the parts*, and adjust them to each other in a harmonious and consistent whole.[82]

"Time," in itself, can do nothing to clarify the fuzzy parts of the Constitution, but the passage of time does create opportunities for decisionmakers to interpret them. Such interpretations (read: "precedents") cannot offer clarification and "liquidation," however, if they merely inform later decisionmakers what earlier ones have said. Indeed, if precedents merely illustrate interpretive options, one should expect them to highlight, rather than minimize, the problem of indeterminacy as their number builds and various courts hand down contradictory interpretations of law. Therefore, Hamilton's it-takes-time approach to constitutional interpretation implicitly requires that precedents exercise some measure of coercive force.

Madison-Publius provided more direct evidence for this point. As part of a defense of the proposed division between state and federal power, he made an argument for reasonable expectations—given the difficulty of the problem and the limits of language, one should not expect immediate perfection:

> All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be *liquidated and ascertained by a series of particular discussions and adjudications.*[83]

Madison steered the expected middle road in this passage regarding precedential force. Precedents must be more than merely persuasive because, if they possess no presumptive force at all, they cannot "liquidate and ascertain" the meaning of indeterminate text. On the other hand, consistent with declaratory jurisprudence, a single decision by itself is not strictly binding law. Madison instead indicated that a "series" of "particular discussions and adjudications" would be necessary to fix constitutional meaning. If a precedent is just evidence of law rather than law itself, then a "series" of opinions adopting the same legal analysis should enjoy more force than just one opinion—just as identical testimony from fifty witnesses is generally better than testimony from just one. Following this same logic, a substantial enough

82 THE FEDERALIST NO. 82, at 525–26 (Alexander Hamilton) (Robert Scigliano ed., 2000) (emphasis added).

83 THE FEDERALIST NO. 37, *supra* note 75, at 226 (emphasis added).

series of precedents could make an overwhelming case for a given interpretation of law and thereby fix its meaning. Read in this light, Madison-Publius in *The Federalist No. 37* is reassuring his readers that this same process would eventually settle the meaning of the Constitution.

Albeit long after the ratification debates, Madison confirmed this reading in the letters he wrote defending his change in position on the constitutionality of the Bank of the United States.[84] He explained that his personal judgment had been trumped by the overwhelming force of accumulating precedents, which "when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions," have "authoritative force in settling the meaning of a law"—including constitutional law.[85] He also admitted, however, that "cases which transcend all authority of precedents must be admitted, but they form exceptions which will speak for themselves and must justify themselves."[86] Thus, like Blackstone and Kent, Madison believed that some sort of "special justification" (to use again the Supreme Court's modern phrase) beyond mere disagreement is necessary to justify rejecting a precedent.

The most prominent Anti-Federalist writers likewise expected that precedents would fix constitutional interpretations. Brutus, one of the most significant and articulate of Publius's foes,[87] penned a series of letters criticizing the proposed federal judiciary which were published in the *New York Journal* from late January through March of 1788.[88] These letters appeared after the January 11, 1788 publication of *The Federalist No. 37*, in which Madison-Publius had admitted that

84 *See* Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390 (Marvin Meyers ed., rev. ed. 1981) [hereinafter MIND OF THE FOUNDER]; Letter from James Madison to C.E. Haynes (Feb. 25, 1831), *in* 9 THE WRITINGS OF JAMES MADISON 443 (Galliard Hunt ed., 1910) [hereinafter WRITINGS OF JAMES MADISON]; Letter from James Madison to N.P. Trist, *supra* note 1, *in* 4 LETTERS AND OTHER WRITINGS, *supra* note 1, at 211.

85 Letter from James Madison to Charles Jared Ingersoll, *supra* note 84, *in* MIND OF THE FOUNDER, *supra* note 84, at 391.

86 Letter from James Madison to C.E. Haynes, *supra* note 84, *in* 9 WRITINGS OF JAMES MADISON, *supra* note 84, at 443.

87 Brutus "provides an extended and excellent discussion—the best in the Anti-Federalist literature—of the judiciary to be established under the Constitution and its far-reaching implications," and his essays, which appeared in the *New York Journal* between October 1787 and April 1788, "are the most direct Anti-Federal confrontation of the arguments of the *The Federalist*." Herbert J. Storing, *Introduction to Essays of Brutus*, *in* 2 THE COMPLETE ANTI-FEDERALIST 358 (Herbert J. Storing ed., 1981).

88 *See* 2 THE COMPLETE ANTI-FEDERALIST 358–446 (Herbert J. Storing ed., 1981) (collecting the Brutus letters and specifying their publication dates).

the Constitution's federalism provisions were vague and that time and precedents would be needed to "liquidate and ascertain" their meaning.[89] With this opening, Brutus might have argued that no such "liquidation" could be expected because the Constitution did not expressly command the courts to follow precedents and they were therefore free to ignore them. For reasons explored below, he did not make this argument. Instead, he wrote that that the proposed Supreme Court would need to "assume certain principles, from which they will reason" to interpret the Constitution, and that these "principles, whatever they may be, [would] become fixed, by a course of decisions."[90] In other words, he shared Madison's basic understanding of the shaping effect of precedents on the law, including the Constitution.

The Federal Farmer, another Anti-Federalist of the first rank,[91] also thought that precedents would exercise some measure of coercive force in the proposed federal courts—indeed, his chief worry in this regard was that, as of the time of ratification, there would not be *enough* precedents to limit the Supreme Court's equitable powers:

> It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity, for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate; *we have no precedents* in this country, *as yet*, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be *mere discretion*.[92]

The Federal Farmer did not intend in this passage to give a general explanation of his understanding of the force of precedents any more than Hamilton did in *The Federalist No. 78*. Nonetheless, it is plain that he agreed with Hamilton that precedents are necessary to limit judicial discretion and forestall arbitrary power concentrating in the courts.

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89 THE FEDERALIST NO. 37, *supra* note 75, at 221.

90 Letter of Brutus No. XII (Feb. 7, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 88, at 423.

91 "The Observations of The Federal Farmer are generally, and correctly, considered to be one of the ablest Anti-Federalist pieces . . . ." Herbert J. Storing, *Introduction to Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; And to Several Essential and Necessary Alterations in It in a Number of Letters from the Federal Farmer to the Republican*, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 88, at 214.

92 Letter of the Federal Farmer No. III (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 88, at 244.

In sum, the limited direct remarks on the subject of precedent of these most prominent Federalists and Anti-Federalists show that they adhered to a theory of precedent basically consistent with the major common-law treatises of the day, and that they believed that the accumulating force of precedents would, over time, tend to authoritatively "fix" the meaning of the Constitution. One theme to be found in their remarks is that adherence to precedent forestalls the accumulation of arbitrary power in the courts—which is also a primary function of separation of powers, of course. None of them, however, makes any express argument that the Constitution *requires* adherence to a given doctrine of precedent as a necessary means for attaining the separation-of-powers end of constraining judicial discretion to acceptable levels.

2. A Modern Overreading of the Framers and a Slightly Misplaced Riposte: *Anastasoff* Meets *Massanari*

An interpreter determined to make an historical, original-intent argument that declaratory-theory stare decisis is a necessary and integral part of the Article III "judicial power" faces problems. The initial embarrassment for this claim is that the Constitution contains no express instructions to this effect. Moreover, although the Framers plainly understood the obvious point that precedent and separation of powers both serve the function of constraining judicial discretion, they did not elaborate in any detail on the nature of the relation between these doctrines. Perhaps the most natural response to these points is to argue that they mistake the way background norms work. The point of language is to communicate, and it is not worth the work to communicate the incredibly obvious. The Constitution nowhere says that the term "court" does not mean "tennis court" or "fish"; and the ratification debates do not address these points, either. Nonetheless, we can safely take as given that *everybody* knows that "court" in the Constitution bears neither of these meanings. On this view, given the dominance of declaratory theory of precedent at the time of the Framing, there was no point in discussing its relationship to the Constitution's "judicial power." Everybody knew that the new Constitution would require the new federal courts to work in this traditional framework.

Something like the preceding reasoning seems to have motivated the panel opinion in *Anastasoff v. United States*,[93] in which Judge Richard Arnold of the Eighth Circuit concluded that circuit court rules

93 *See* Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

authorizing issuance of "nonprecedents" are unconstitutional because the Constitution's definition of the "judicial power" requires courts to defer to their own precedents along the lines once demanded by the common law's declaratory theory.[94] The most glaring problem with this particular attempt to find a separation-of-powers home for the doctrine of precedent is that it posits that the Framers silently adopted a definition of "judicial power" different from Blackstone's. It seems safe to hazard that a proposition concerning the nature of the judicial power could not at once be so obvious as to warrant no discussion *and* contradict what largely amounted to a legal bible for the common-law world.

On April 13, 1996, Faye Anastasoff had mailed a refund claim to the IRS to recover an overpayment of taxes paid on April 15, 1993.[95] The claim arrived and was filed at the agency on April 16, 1996—which was, alas, three years *and one day* after the overpayment.[96] The IRS denied the refund claim on the authority of 26 U.S.C. § 6511(b), which imposes a three-year cutoff.[97] Anastasoff attempted to invoke the "Mailbox Rule" of § 7502, which, if applicable, would have deemed her refund claim to have been (timely) filed when mailed.[98] Unfortunately for her, an Eighth Circuit panel had rejected precisely this same argument four years before in the unpublished *Christie v. United States*.[99] Anastasoff gamely contended that *Christie* was not binding because it was an unpublished decision, and, under Eighth Circuit Rule 28(A)(i), "[u]npublished opinions are not precedent" and may exercise no more than "persuasive" force.[100] Judge Arnold rejected this attempt to get around *Christie* on the ground that the rule's purported elimination of precedential force of unpublished opinions was "unconstitutional under Article III, because it purports

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94 *Id.* at 900.

95 *Id.* at 899.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* (citing Christie v. United States, No. 91-2375MN, 1992 U.S. App. Lexis 38446 (8th Cir. Mar. 20, 1992) (per curiam)).

100 Rule 28(A)(i) provides,

> Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well . . . .

8th Cir. R. 28(A)(i).

to confer on the federal courts a power that goes beyond the 'judicial.'"[101]

Judge Arnold rooted this claim in what he characterized as the historical understanding of the nature of the judicial power and separation-of-powers theory. He observed that by the time of the framing, "the doctrine of precedent was not merely well-established; it was the historic method of judicial decisionmaking, and well regarded as a bulwark of judicial independence in past struggles for liberty."[102] Leaning heavily on Blackstone, Coke, and Hale, he also invoked the declaratory-theory principle that "[t]he judicial power is a power only to determine what the law is, not to invent it."[103] As precedents are, on this view, the "best and most authoritative" evidence of law, judges must follow them.[104] In addition, he relied on Blackstone, Hamilton, and Madison to support the separation-of-powers proposition that judicial obedience to precedent is necessary to ensure that judges do not transform themselves into legislators exercising "will" rather than legal "judgment."[105]

Judge Arnold was careful to emphasize that the court was not "creating some rigid doctrine of eternal adherence to precedents."[106] In keeping with a correct understanding how the declaratory theory functioned, he wrote,

> Cases can be overruled. Sometimes they should be. On our Court, this function can be performed by the en banc Court, but not by a single panel. If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed. When this occurs, however, there is a burden of justification. The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.[107]

The panel opinion in *Anastasoff* enjoyed only short life as a precedent itself, as the en banc court later vacated it as moot after the IRS and Anastasoff settled their differences.[108] It nonetheless sparked a

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101 *Anastasoff*, 223 F.3d at 899.

102 *Id.* at 900.

103 *Id.* at 901.

104 *Id.* (citing 1 BLACKSTONE, *supra* note 5, at *69–71).

105 *Id.* at 901–02.

106 *Id.* at 904.

107 *Id.* at 904–05.

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

minor firestorm over the propriety of circuit court rules authorizing issuance of "nonprecedents."[109]

The most thorough judicial riposte came from Judge Kozinski of the Ninth Circuit, who, in the lengthy and learned *Hart v. Massanari*,[110] contended that such rules were a constitutional and pragmatic "effort to deal with precedent in the context of a modern legal system."[111] As a threshold matter, he observed that it is unclear what, if any, constitutional foundation underlies many of the historical practices of the federal courts, which have evolved considerably over the course of the last two-hundred-some years.[112] For example, in situations where judges once issued seriatim opinions that spoke only for their authors, they now commonly write opinions on behalf of their courts; no one claims this change in practice violates the Constitution.[113] In short, the definition of the "judicial power" does not compel the courts to continue a practice just because it was in place a long time ago.

Much of the opinion's energy then focused on establishing that the Framers could not possibly have adhered to a *strict* doctrine of "binding" precedent given that, inter alia: (1) the declaratory theory of precedent which prevailed at the time merely gave "evidentiary" rather than "binding" weight to precedents;[114] (2) "strict binding precedent" cannot properly function in the absence of a distinct hierarchy of courts, which did not exist at common law;[115] (3) reporting of cases was biased and sketchy at best, which forced lawyers and judges to rely more on commentaries (such as Blackstone's) than actual judicial opinions;[116] and (4) a doctrine of strict precedent contradicts the tenor of the common law, which, "at its core, was a reflection of custom," which has "built-in flexibility . . . to change with circum-

109 For a sampling of commentary on the *Anastasoff* panel opinion, see *supra* note 18.

110 266 F.3d 1155 (9th Cir. 2001).

111 *Id.* at 1160.

112 *Id.* at 1160–62.

113 *See id.* According to Judge Kozinski, federal court "traditions" lacking obvious constitutional foundations include "the practices of issuing written opinions that speak for the court rather than for individual judges, adherence to the adversarial (rather than inquisitorial) model of developing cases, limits on the exercise of equitable relief, hearing appeals with panels of three or more judges and countless others that are so much a part of the way we do business that few would think to question them." *Id.* at 1160–61.

114 *Id.* at 1163–64.

115 *Id.* at 1164.

116 *Id.* at 1165–66.

stance."[117] In light of these and related points, Judge Kozinski concluded that the Framers would have found strict precedent in the modern sense quite alien and certainly did not bury it in the Article III "judicial power."[118]

Judge Kozinski's historical and constitutional analysis is forceful and persuasive. For the most part, however, it does not speak directly to the precise *Anastasoff* thesis, for, again, Judge Arnold was careful to stress that he did not claim that the Constitution imposes a strict, "rigid doctrine of eternal adherence to precedents," and he understood that any such approach would contradict the Framers' declaratory-theory jurisprudence.[119] Rather, the actual constitutional claim of *Anastasoff* is that courts must treat their own precedents as serious "evidence" of law and that this demand is far from trivial.[120]

The real problem with the actual *Anastasoff* thesis is that, even if one assumes that the Framers' rather inchoate expectations regarding the meaning of the "judicial power" should control modern interpretation, it is unlikely that they understood this generic phrase to entail adherence to the common-law doctrine of precedent.[121] The immensely influential Blackstone made plain both that the "original power of judicature" resided in all nations, and that not all nations' judicial systems relied on the common-law doctrine of precedent.[122] His discussion of this doctrine focused on its role in enabling the English courts to solve their specific interpretive problem of discerning the contours of the unwritten, common law of England—the *lex non*

117 *Id.* at 1167.

118 *See id.* at 1174–76.

119 Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

120 *Id.* at 901–03.

121 *See* Harrison, *supra* note 18, at 522–23 (noting the absence of evidence "that an American lawyer around the time of the Framing would have asserted that civil law tribunals, which did not have the common law doctrine of precedent, were exercising something other than the judicial power").

122 1 BLACKSTONE, *supra* note 5, at *266–67. Blackstone wrote,

> The original power of judicature, by the fundamental principles of society, is lodged in the society at large: but as it would be impracticable to render complete justice to every individual by the people in their collective capacity, therefore *every nation* has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints . . . .

1 *id.* (emphasis added); *see also* Harrison, *supra* note 18, at 522–23 nn.61–63 (noting instances in which Blackstone and Hamilton used the phrase "judicial power" (or "judex" or "power of judicature") to describe authority present in all governments).

scripta.[123] The judicial problem of figuring out the fine details of the law is not, however, unique to common law. Blackstone observed that, in civil-law Rome, if a statute's meaning was unclear, it would be referred to the emperor, who would issue a *rescript* interpreting the law that would be binding on the courts.[124] Blackstone compared the role of *rescripts* in the Roman civil law with that of judicial decisions in the common law:

> Upon the whole . . . , we may take it as a general rule, "that the decisions of the courts of justice are the evidence of what is common law:" in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future.[125]

Given the ready availability in the dominant treatise of the day of such information regarding alternative ways for judicial systems to create and refine definitive interpretations of law, merely inserting the unexplained phrase "judicial power" into Article III would have been a singularly bad way for the Framers to impose a constitutional obligation on the federal courts to adhere to the common-law doctrine of precedent.[126]

Of course, one might counter that Blackstone's discussions of the civil law are of little import because the peculiar meaning of the "judicial power" in the American scene must be understood in light of the Framers' obsession with a particular form of separation of powers, and that it is *this* doctrine—rather than the abstract definition of "judicial power"—which compels the conclusion that the Constitution commands the courts to respect precedent to prevent them from usurping arbitrary, legislative power. Indeed, this argument is a central thrust of *Anastasoff*,[127] which invokes Hamilton's dictum in *The Federalist No. 78*, that "[t]o avoid an arbitrary discretion in the courts, it is indispensable they be bound down by strict rules and precedent . . . ."[128]

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123 1 BLACKSTONE, *supra* note 5, at *69. Interestingly enough, Blackstone's discussion of methods of statutory interpretation (i.e., figuring out the *lex scripta*) does not refer to the doctrine of precedent. *See* 1 *id.* at *87–93.

124 1 *id.* at *58–59.

125 1 *id.* at *71 (citation omitted).

126 On Blackstone's influence, see *supra* note 43. For further evidence of cognizance in the early Republic of the fact that not all judicial systems followed the English model, see also 1 SWIFT, *supra* note 60, at 45 (noting that Connecticut had "introduced the English practice with respect to the authority of precedents," which suggests awareness of the existence of non-English practices).

127 Anastasoff v. United States, 223 F.3d 898, 902 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

128 THE FEDERALIST NO. 78, *supra* note 75, at 502–03.

This argument, however, boils down to a restatement of the claim that the Framers' understanding of separation of powers entailed adherence to the common-law doctrine of precedent. As discussed in the preceding subsection, the limited discussions from the time of the ratification debates of the relation of precedent to the Constitution's separation of powers are actually quite sketchy and do not demonstrate so strong a connection. Certainly it is true that luminaries on both sides expected precedential force to limit the discretion of the courts, and that this is also an acknowledged end of separation of powers. It is far from obvious, however, that the Constitution requires the courts to adhere to the declaratory theory of precedent as a necessary means for attaining this separation-of-powers end.[129] One cannot justify jamming stare decisis into the definition of the Article III "judicial power" merely by noting that the Framers were aware that both it and separation of powers share common goals at some level of abstraction.

3. A More Modest Original "Intent": The Framers Expected Courts To Find, Not Rewrite, Their Rules of Interpretation

Although the *Anastasoff* attempt to find a home for the declaratory theory's doctrine of precedent in the definition of Article III's "judicial power" fails, it does not follow that the Framers believed that this doctrine had no separation-of-powers import or that the federal courts would be free to abandon this doctrine at will. According to both the common-law and separation-of-powers dogmas of the day, courts were to "find" laws rather than legislate new ones. In light of this principle, the Framers would have found the notion that courts could rewrite legal interpretive norms to suit themselves quite alien, and, in this same vein, would have rejected out of hand the notion that courts could rewrite established law to release themselves from the constraints of stare decisis. In other words, from the point of view of the Framers, although the Constitution did not directly command the courts to adhere to a given doctrine of precedent, it did command them to apply rather than rewrite law—including the law of precedent.

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129 *Cf.* Hart v. Massanari, 266 F.3d 1155, 1160 (9th Cir. 2001) ("We believe that *Anastasoff* overstates the case. Rules that empower courts of appeals to issue non-precedential decisions do not cut those courts free from all legal rules and precedents; if they did, we might find cause for alarm."); Harrison, *supra* note 18, at 524 (criticizing *Anastasoff* on the ground that one cannot properly infer that the definition of Article III's "judicial power" imposes stare decisis on the courts merely from the fact that respect for precedent tends to prevent courts from exercising legislative power).

Indirect evidence for this proposition can be found by exploring the debate between Anti-Federalists and Federalists over whether the new Constitution granted the new federal courts too much interpretive discretion. One of Brutus's key arguments was that the courts would use their power to resolve cases in "equity" to justify interpreting the Constitution in light of its "spirit" to grab power from the states.[130] At first glance, the Constitution's silence regarding precedent would seem to have created another golden opportunity for Brutus to magnify fears of an unrestrained federal judiciary. He could have argued that even Publius admits that the Constitution will remain "obscure and equivocal" until its meaning has been "liquidated and ascertained by a series of particular discussions and adjudications."[131] The Constitution, however, does not command the new federal courts to respect precedents; therefore, these courts, as they follow the natural tendency of all officials to maximize their power, will refuse to be bound by them. Given his deep concern that the Constitution would be too malleable in the hands of the judiciary, why didn't Brutus seize this opening? One likely answer is that, like his Federalist opponents, he did not believe that the courts would be at liberty to change preexisting rules of legal interpretation (which would include the doctrine of precedent) in ways that would fundamentally increase their power.

The hypothetical charge that courts would abandon respect for precedent is similar to the "equity" argument Brutus *did* make in the sense that both can lead to the conclusion that the federal courts would possess an unacceptable power to "interpret" the Constitution any way they liked. They are different in an important and illuminating respect, however. Brutus's actual argument relied not on constitutional silence but on an affirmative grant of power to the federal courts to determine cases arising in "equity."[132] The courts would not

130 Letter of Brutus No. XI (Jan. 31, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 88, at 420. The Federal Farmer expressed similar worries. *See* Letter of the Federal Farmer No. XV (Jan. 18, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 88, at 322 (concluding that grant of equity authority to the Supreme Court seemed to give it power to go beyond the "spirit and true meaning" of the Constitution).

131 THE FEDERALIST NO. 37, *supra* note 75, at 226; *see also supra* note 83 and accompanying text (discussing implications of *The Federalist No. 37* for Madison's views of precedent).

132 *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and *Equity*, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." (emphasis added)).

need to change the law to seize the power to interpret the Constitution equitably because the Constitution already granted it to them.

As Brutus characterized the matter, when wearing its law hat, the Supreme Court would interpret "according to the rules laid down for construing a law"[133]—in other words, although no such rules were expressly written into the Constitution, Brutus accepted that the Court would take certain common-law interpretive rules as given, which he broadly described as follows,

> These rules give a certain degree of latitude of explanation. According to this mode of construction, the courts are to give such meaning to the constitution as comports best with the common, and generally received acceptation of the words in which it is expressed, regarding their ordinary and popular use, rather than their grammatical propriety. Where words are dubious, they will be explained by the context. The end of the clause will be attended to, and the words will be understood, as having a view to it; and the words will not be so understood as to bear no meaning or a very absurd one.[134]

But Brutus contended that when the Court wore its equitable hat, it would be empowered "to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter."[135] To justify this claim, he seized on Blackstone's discussion of equitable statutory construction, which describes a judicial power to alleviate the consequences of strict adherence to the letter of the law where such an approach would lead to harsh, unexpected consequences that the legislature itself would have wished to avoid had it foreseen them.[136] He voiced the concern that this power to depart from the Constitution could never be effectively controlled because equity's application depends "essentially upon each individual case, [so] there can be no established rules and fixed principles of equity laid down, without destroying its very essence, and reducing it to positive law."[137]

Brutus contended that the Supreme Court, freed from "fixed" and "established rules" of legal construction by the equity wild card,

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133 Letter of Brutus No. XI, *supra* note 130, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 88, at 419.

134 *Id.*, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 88, at 420. Brutus paraphrased Blackstone in this passage. *See* 1 BLACKSTONE, *supra* note 5, at *59.

135 Letter of Brutus No. XI, *supra* note 130, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 88, at 419.

136 *See* 1 BLACKSTONE, *supra* note 5, at *61.

137 Letter of Brutus No. XI, *supra* note 130, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 88, at 420 (citing 1 BLACKSTONE, *supra* note 5, at *61–62).

would construe the "general and indefinite terms" of the Constitution to the "entire subversion of the legislative, executive, and judicial powers of the individual states."[138] Worse, once the judiciary's generous constructions had become "fixed . . . by a course of decisions" (i.e., by precedents), Congress would join the overreaching fun and use them as a license to extend its own dominion as far as possible at state expense.[139]

Note well that Brutus relied on *accepted authority* to justify his claims concerning Court's equity power—that is, he invoked "law" (broadly understood to include equity jurisprudence) to support the contention that equity is lawless. That he did so suggests why he did not make the more general argument that the federal courts would be free to *make up* new interpretive principles that would transform the Constitution into putty in their hands. Today, it is a commonplace that courts "make" law. That was not the common-law jurisprudence of two-hundred-some years ago, which ostensibly required courts to "find" law. Under this theory, courts could not, willy-nilly, make up new "laws" of legal interpretation out of whole cloth. Brutus therefore did not level the charge that they would.

Much of *The Federalist Nos. 78–83* may be understood as a response to Brutus's equitable-construction broadside. The core of Hamilton's rebuttal was that the new federal courts would construe the Constitution pursuant to traditional, stable principles; therefore, the courts would not, in the name of "interpreting" the Constitution, be able to distort it.[140] Two arguments in support of this thesis are of particular interest. First, Hamilton argued that Brutus had misunderstood the nature of the "equity" power granted by the Constitution.[141] It was not a license to adopt a loose-cannon approach to constitutional interpretation. Instead, it was merely a grant of power to order remedies that would have fallen within chancery jurisdiction.[142] Furthermore, Brutus exaggerated the flexibility of equity because, over time, "the principles by which that relief is governed [had become] reduced to a regular system"—that is, equity was controlled by precedents.[143] Hamilton thus characterized the federal courts' equitable

138 *Id.*, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 88, at 420.

139 Letter of Brutus No. XII (Feb. 7, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 88, at 423–24.

140 *See* THE FEDERALIST NO. 78, *supra* note 75, at 498–503.

141 *See* THE FEDERALIST NO. 80, at 512–13 (Alexander Hamilton) (Robert Scigliano ed., 2000).

142 *Id.*

143 THE FEDERALIST NO. 83, at 540 (Alexander Hamilton) (Robert Scigliano ed., 2000).

powers as merely amounting to a grant of jurisdiction over a supplemental body of stable "law" that was embodied in earlier judicial decisions.[144] It was not a license to make the Constitution meaningless.

Second, and even more to the present point, Hamilton minimized the threat of judicial mischief by minimizing the power of the courts to manipulate interpretive norms. To start, he remarked that "[i]n the first place, there is not a syllable in the plan which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution . . . ."[145] The federal courts' interpretive powers would be no different in kind than those claimed by any state court.[146]

What general principles, then, should guide all courts—federal or state—as they interpret the Constitution? The answer, sprinkled throughout *The Federalist Nos. 78* and *81–83*, seems to be: courts must interpret the Constitution in light of principles derived from "law," "nature," "reason," "truth," "propriety," and "common-sense"—none of which courts are free to rewrite. For example, in *The Federalist No. 78*, Hamilton described the source of the rule that, where statutes contradict, courts should enforce the last enacted:

> [T]his is a mere rule of construction, not derived from any positive law, but from the *nature and reason* of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, *as consonant to truth and propriety*, for the direction of their conduct as interpreters of the law. They thought it *reasonable*, that between the interfering acts of equal authority, that which was the last indication of its will should have the preference.[147]

By contrast, when choosing whether to enforce a constitution or a later-enacted and contradictory statute, "nature and reason" dictate enforcement of the older but superior authority.[148]

For Hamilton, the Constitution did not need to include interpretive instructions because it was evident that established, rational rules

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144 THE FEDERALIST NO. 80, *supra* note 141, at 512–13.

145 THE FEDERALIST NO. 81, at 515 (Alexander Hamilton) (Robert Scigliano ed., 2000). One cannot help but wonder how Hamilton would have fired back if Brutus had responded, "Well, what about *indirectly*?"

146 *Id.*

147 THE FEDERALIST NO. 78, *supra* note 75, at 499 (emphases added).

148 *Id.*; *see also* THE FEDERALIST NO. 81, *supra* note 145, at 517 (observing that "general principles of *law* and *reason*" forbid legislatures from revising judicial sentences) (emphases added); THE FEDERALIST NO. 83, *supra* note 143, at 531–32 (stressing that "[t]he rules of legal interpretation are rules of *common-sense*" that cannot be invoked "contrary to reason").

would guide its construction.[149] Courts cannot legislate new rules out of whole cloth free from the constraints of "nature," "reason," and "law"—for example, a court could not legitimately make up a new legal maxim that any clause with a capitalized noun in it encodes a secret message from the Framers to ignore that clause. To conclude otherwise would necessarily imply that, although the Anti-Federalists' equitable-construction argument was wrong because it mistook the nature of "equity," their conclusion that the new federal courts could make the Constitution say anything they wanted was correct—in which case there would have been no point in writing it down.

If Brutus had tried to argue that the Constitution's silence with regard to precedent left courts free to abandon stare decisis, a similar logic would have applied. The legal orthodoxy of the common-law world was that courts must treat precedents as evidence of law that should be followed absent countervailing evidence. Abandoning this orthodoxy would have amounted to a fundamental change in the law governing how courts perform their work.[150] Hamilton would likely

149 *See* THE FEDERALIST No. 78, *supra* note 75, at 498–99.

150 For a set of illuminating arguments suggesting a contrary conclusion as well as a strong critique of the *Anastasoff* opinion, see Lee & Lehnhof, *supra* note 18. Professor Lee and Mr. Lehnhof contend that the norms of stare decisis were in flux before, during, and after the time of the founding and that nothing about the history of this doctrine suggests that the Framers wished to "freeze" it into the Constitution. *See id.* at 166–68. They also argue that courts have long accorded differing levels of evidentiary weight to different kinds of opinions; for instance, federal courts have long treated decisions from the trial court level as nonprecedential. Therefore, there is little reason to think the Framers would have regarded judicial issuance of a class of unpublished, nonprecedential appellate opinions as marking any fundamental departure from the malleable law of precedent of their day or their conception of the "judicial power." *Id.* at 168–73.

A few brief points in response: it is certainly plain from our modern vantage point that stare decisis norms have evolved considerably over the centuries in America and England—mostly toward strictness. It does not follow from this observation that: (1) jurists from the time of the founding were equally aware of this evolution; or (2) they would have accepted that the evolving nature of precedent gave courts a license to create rules releasing themselves from the contemporaneous understanding of its force.

It is also certainly true that courts have granted differing levels of deference (evidentiary weight) to differing classes of opinions, but the implications of this point are contestable. As a threshold matter, it is possible to find opinions from the early Republic suggesting that, as one would expect under the declaratory theory, trial court decisions merited some evidentiary weight. *See, e.g.*, Waite v. The Antelope, 28 F. Cas. 1341, 1341 (D.C.D.S.C. 1807) (No. 17,045) (observing in district court opinion that "[t]he case is new, and important, both as respects the parties, and as tending to establish a precedent"); Ellison v. The Bellona, 8 F. Cas. 556, 557 (D.C.D.S.C. 1798) (No. 4406) (expressing concern that district court's opinion "may lead to the estab-

have demolished such an argument somewhere in *The Federalist Nos. 78–83* by retorting that courts, which are "law-*finders*," lack the power to change the legal principles that govern interpretation. The most obvious explanation for Brutus's failure to attack the constitutional silence on precedent is that he agreed; the notion that courts possessed a legislative authority to alter fundamentally the law governing exercise of their power was off the table.

Summarizing this Part, the *Anastasoff* conclusion that the definition of the "judicial power" as used in Article III necessarily entails respect for precedent is implausible. Nonetheless, both Federalists and Anti-Federalists expected that the new federal courts would operate subject to the constraints of the declaratory theory of precedent. One supporting rationale for this expectation was that this norm, like separation of powers, helps to control judicial discretion and prevent it from reaching "arbitrary" levels. Another rationale can be gleaned from a big dog-that-didn't-bark: a likely explanation for the Anti-Federalist's failure to attack the Constitution for failing to require respect for precedent is that they, like their Federalist adversaries, believed that the rules for construing law were defined by "law," "reason," "truth," and the like. Courts, which were regarded as law-finders rather than lawmakers by the common law and separation-of-powers theory of the day, would lack the authority to change these rules to enhance their own power.

II. CONGRESS, NOT THE COURTS, ENJOYS THE POWER TO ELIMINATE THE HORIZONTAL FORCE OF PRECEDENTS

Neither the Constitution nor early commentary provides a great deal of help for solving the problem of whether the courts or Congress may eliminate the horizontal force of precedents. The Constitution itself has nothing express to say on the subject. The Framers' limited discussions of precedent and the rules of legal interpretation suggest that they would have rejected the notion that courts, which they regarded as law-finders, possessed any such power. Perhaps the modern force of this expectation is suspect, however, given that it is a

lishment of a precedent"). More generally, in a system that accords "evidentiary" or presumptive weight to precedents, it is to be expected that courts would tend to "weigh" different opinions (or classes of opinions) differently. That courts do so does not suggest that they should also have the power to create new rules of "admissibility" that permit them to refuse to give any weight at all to some opinions regardless of their intrinsic merit or importance. Put another way, declaratory-theory stare decisis obligates courts to give precedents their due weight; the Framers would regard judicial abandonment of this obligation as marking a substantial, illegitimate change in the law.

twentieth (and twenty-first) century commonplace that the courts make—rather than find—the law; we do not believe in the declaratory theory anymore. Of course, the Framers had even less occasion to discuss congressional authority to alter the rules governing legal interpretation.

This absence of guidance suggests a need to analyze the problem in light of the core purpose of separation of powers—to prevent tyranny by imposing external controls (i.e., law) on official discretion. Legal limits on an official's discretion cannot serve this function if the official is free to repeal them. One upshot of this principle is that, regardless of whether one chooses to style courts as "law-finders" as the Framers did, or as interstitial "lawmakers" in the more modern fashion, the rule-of-law principles underlying separation-of-powers block the courts from legislating increases to their own discretionary power, which would be an effect of abandoning the constraint of horizontal stare decisis.[151]

It does not follow, however, that the Constitution has frozen stare decisis as the Framers knew it forever into place as a limit on judicial action. Separation of powers is not hostile to official discretion per se; rather, it is hostile to excessive, uncontrolled official discretion. Although courts cannot change the law to *grab* discretionary power for themselves, there is considerable space for Congress, consistent with the tyranny-blocking function of separation of powers, to change the law to grant such power—provided doing so falls within the scope of its enumerated powers.

The best place to look for congressional authority to regulate precedential force is the Sweeping Clause, which permits Congress to enact "all Laws . . . necessary and proper for carrying into Execution the . . . Powers vested" in the various departments of the federal government—including, of course, the judiciary.[152] To fall within the reach of this clause, a statute regulating the courts' methods for resolving cases must be amenable to the characterization that it "carr[ies] into [e]xecution" judicial power. This requirement brings us back to a fundamental issue emphasized by the Framers' discussion of precedent: the courts cannot, as Hamilton put the matter, exercise "arbitrary discretion."[153] The power to create arbitrary rules of conduct is properly legislative, and therefore any statute that grants the

151 *Cf. infra* notes 157–68 and accompanying text (discussing rule of law as a core rationale for separation of powers).

152 U.S. CONST. art. I, § 8, cl. 18; *cf. infra* note 195 (noting alternative potential sources of congressional power).

153 *Cf.* THE FEDERALIST No. 78, *supra* note 75, at 502.

courts such authority could not implement properly "judicial" power. An analysis of the constitutionality of removing the constraining effects on courts of stare decisis therefore should explore whether doing so might increase the courts' discretion to impermissible levels in some contexts.

Drawing the line between legislative and properly judicial (or executive) authority is a famously difficult problem that highlights a fundamental tension within separation-of-powers theory. For government to function, its enforcement officials must possess some measure of discretion; for the rule-of-law to exist, there must be meaningful (legal) limits on this discretion. There is no good, abstract answer to the problem of determining how much such discretion is too much. The Supreme Court's response to this conundrum has been to fashion the nondelegation doctrine, which ostensibly stands for the principle that Congress may not delegate its legislative power to others but, as practical matter, has been understood to permit it to vest vast, virtually unlimited, discretion in enforcement branch officials.[154] For reasons discussed below, it is possible that a broad effort by Congress to eliminate the horizontal force of precedents would spur the courts to try a stricter approach to this doctrine. That said, its current state suggests that Congress should have ample "elbow room" to dispense with the horizontal force of many cases or categories of cases without impermissibly increasing the discretion of judges to "legislative" levels.

The preceding might strike some, however, as skipping past a still more basic separation-of-powers issue: does Congress have any business interfering with how courts go about determining the meaning of the law in such a manner? If congressional alteration of stare decisis norms were to interfere with the independence of the judiciary the Constitution demands, then it would both violate separation of powers and fail Sweeping Clause analysis, for it cannot be "proper" to usurp another branch's power.[155] On inspection, however, this objection is misplaced. As a threshold matter, Congress has been regulating judicial operations in rather intrusive ways for hundreds of years, which at least suggests that such regulation does not constitute improper usurpation as a class. More to the present point, however, it would seem a strain to characterize congressional elimination of horizontal force of precedents as seizing or usurping judicial power be-

154 *See infra* notes 175–84 and accompanying text (discussing contours of the nondelegation doctrine).

155 *See* Lawson, *supra* note 9, at 203–04 (condemning as "improper" congressional regulation of precedential norms).

cause, in a given case, it would *increase* judicial discretion—freeing the courts from the weight of certain precedents could not force them to adopt congressionally favored legal interpretations or case outcomes. This analysis suggests that Congress may, with "propriety," release the courts from the horizontal force of (many) precedents.[156]

A. *Background Principles: Separation of Powers, Rule of Law, and How Much Discretion Is Too Much?*

Any government of laws exists in a state of permanent tension between the immovable rock that law must constrain arbitrary official power and the irresistible force that officials must possess enough discretion to govern. The immovable rock: for the Framers, it was a given that tyranny, that undesirable state, exists where officials enjoy absolute and arbitrary power (i.e., discretion) to do what they please to those whom they govern.[157] The rule of law imposes limits on official discretion and is thus tyranny's opposite. For law to constrain an official's discretion, it must be the case that the official does not get to make it up as she goes along. It follows that the official must consult legal norms created on some other occasion—lawmaking must be *separated* in some meaningful fashion from law-application. The opposing irresistible force: law obviously cannot eliminate official discretion—the limits of language and the exigencies of government both require that officials enjoy a measure of discretionary power to figure out the law and apply it sensibly as circumstances warrant.[158]

156 An actual challenge to the constitutionality of any congressional attempt to eliminate precedential force could call into play at least one more separation-of-powers doctrine, but its analysis will be confined to this footnote. Scholars have characterized the Court as oscillating between highly formalistic and ad hoc, "balancing" (or "functionalist") approaches to separation-of-powers issues. *See, e.g.*, Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 5 (1994). Under the latter approach, the Court essentially inquires whether a statute grants one branch undue power to interfere with the "core" operations of another. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856–57 (1986) (observing that constitutionality of delegation of authority to an Article I court turned on whether it "impermissibly undermined" the judicial branch); McCutchen, *supra*, at 5. For present purposes, perhaps the most one can usefully say about this balancing approach is that its ad hoc nature would leave substantial room for judges offended by a given form of congressional regulation of precedent to justify protecting their turf by declaring a separation-of-powers violation.

157 *See, e.g.*, THE FEDERALIST NO. 47, at 307–10 (James Madison) (Robert Scigliano ed., 2000).

158 *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372 (1989) (noting that the Court applies the nondelegation doctrine in light of "a practical understanding that in our increasingly complex society, replete with ever changing and more technical

This clash creates a line-drawing problem: how much enforcement discretion is "too much" to be consistent with the rule of law and separation of powers? Confronted with a question that is basically impossible to answer in the abstract, the judicial solution has been, in a word, to punt. The Supreme Court has come close to giving Congress carte blanche to grant as much discretion as it chooses as a matter of policy to the other departments.[159] The Court's easy acceptance of massive delegations of discretionary power does not, however, render separation of powers a dead letter. At a minimum, it should remain the case that discretion must be granted by law, not seized by the enforcers.

Regarding the tyranny-limiting function of separation of powers, Madison famously observed in *The Federalist No. 47*,

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that . . . [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[160]

This notion that, to forestall tyranny and preserve liberty, governmental powers should be assigned to distinct sets of officials had formed an important strand of British political and legal thought since at least the mid-seventeenth century.[161]

The most famous exponent of separation of powers, and the one most frequently cited by the Framers, was Montesquieu.[162] He set

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problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives").

159 *See generally* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (discussing laxness of nondelegation precedents); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 370–72 (2002) (describing the moribund state of nondelegation doctrine at the Supreme Court).

160 THE FEDERALIST NO. 47, *supra* note 157, at 307–08.

161 For a discussion of separation-of-powers thought of the seventeenth and eighteenth centuries preceding Montesquieu, see GWYN, *supra* note 9, at 3–99.

162 *See* MARTIN REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 105 (1995) ("Despite Locke's influence, Montesquieu was invoked more often than any other political authority in eighteenth-century America."). Madison described Montesquieu's work as follows:

> The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system.

himself the task of devising an explanation for a fact he treated as given—that the unwritten constitution of Britain maximized the "political liberty" of its subjects, an attribute he defined as "a tranquillity [sic] of mind arising from the opinion each person has of his safety."[163] For this happy state to exist, "it is requisite the government be so constituted as one man need not be afraid of another."[164] To eliminate such fear, the three great governmental powers—the legislative, executive, and judicial—must be properly (though not hermetically) separated.[165] Montesquieu defined these powers as follows:

> In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.
>
> By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have already been enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.[166]

Hundreds of years of legal and political struggle demonstrate that determining the *precise* boundaries between the departments is a more difficult project than this quick sketch might suggest.[167]

THE FEDERALIST NO. 47, *supra* note 157, at 308.

163 1 CHARLES-LOUIS DE MONTESQUIEU, THE SPIRIT OF THE LAWS 163 (Thomas Nugent trans., J.V. Prichard rev. ed., 1991) (1748).

164 1 *id.*

165 *See* 1 *id.* at 162–74.

166 1 *id.* at 162–63.

167 Depending on the rhetorical occasion, Madison in his guise of Publius seemed to be of two minds concerning the difficulty of this project. In *The Federalist No. 37*, his goal was to persuade readers that expectations for the proposed Constitution had to be framed in light of the difficulties inherent in committing a governmental design to paper. In this vein, he noted,

> Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary . . . . Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

THE FEDERALIST NO. 37, *supra* note 75, at 225–26. Later, in *The Federalist No. 48*, Publius's goal was to persuade his readers that they had more to fear from legislative usurpations than power-grabs by executive or judicial authorities. In a passage that is a little galling to anyone who has read many separation-of-powers opinions, he reassures his audience that "the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by

That said, their broad outlines are clear enough to make sense of Montesquieu's claim that separating them ensures that "one man need not be afraid of another" and Madison's proposition that combining them constitutes tyranny. The central division is between legislative and executive functions where the latter are broadly defined to include any efforts to enforce the law. These executive functions are further subdivided into an "executive power" which, among other functions, "establishes the public security" and a "judiciary power" which resolves criminal and civil disputes. The tyrant who combines all three can make up the law as she goes along and enforce it as she pleases against anyone she chooses to prosecute for any reason, i.e., by definition, the official possessing all three of the powers has absolute discretion over the lives, liberty, and property of the governed.

James Wilson aptly described the dangers of combining legislative and judicial powers as follows:

> Let us suppose the legislative and judicial powers be united: what would be the consequence? The lives, liberties, and properties of the citizens would be committed to arbitrary judges, whose decisions would, in effect, be dictated by their own private opinions, and would not be governed by any fixed or known principles of law. For though, as judges, they might be bound to observe those principles; yet, Proteus-like, they might immediately assume the form of legislators; and, in that shape, they might escape from every fetter and obligation of law.[168]

A central point of separation of powers is to keep us all out of Judge Proteus's court and ensure that governmental officials with direct power over individuals find their power constrained by preexisting laws that they do not get to make up on the spot to suit the occasion. Political liberty (in Montesquieu's sense) and rule of law are coextensive.

But of course both the executive and judicial departments must exercise discretion (smidgens of "tyranny") in many contexts—the condition of being sufficiently constrained by law is a matter of degree. The President is to "take Care" that the laws are executed;[169] the courts are to exercise the "judicial Power" of the United States.[170] At a rock-bottom minimum, some level of *interpretive* discretion neces-

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landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves." THE FEDERALIST NO. 48, at 317 (James Madison) (Robert Scigliano ed., 2000).

168 1 WILSON, *supra* note 58, at 365.

169 U.S. CONST. art. II, § 3.

170 *Id.* art. III, § 1.

sarily inheres in these law-enforcement functions.[171] No legislature could (or should) write laws sufficiently detailed that their application is clear for all possible eventualities; no matter how specific the statute (or Constitution), the enforcing powers always face the problem of figuring out just what it "means" and what to do about it.

Moreover, our governmental system in many respects treats enforcement-branch discretion not as a necessary evil to be minimized but as a positive good to be used rather than feared. In this regard, a remarkable passage from *The Federalist No. 78* bears noting; in it, Hamilton defends the proposed federal courts on the ground that, like state courts, they would use their interpretive discretion to "mitigat[e] the severity and confin[e] the operation" of "unjust and impartial laws" that Congress might enact when subject to "occasional ill humors."[172] No doubt Congress would reject this stop-the-gouty-legislature-before-it's-ill-humored-again school of interpretation. As a matter of brute political fact, however, it frequently chooses as a matter of policy to grant vast discretionary powers to the enforcers. Sometimes such grants take the form of extraordinarily vague statutory language that the executive and the judiciary must "interpret" to greater clarity.[173] Sometimes Congress is more direct and grants express and wide discretion to administrators or judges to promulgate "rules" which function, for almost all intents and purposes, with the same force of law as statutes.[174]

To protect against a tyrannical imbalance, it might be helpful to draw clear, bright-lines that define acceptable maximum levels of discretion for enforcement officials. The federal courts, however, have more or less given up on this task, as demonstrated by the state of the nondelegation doctrine. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United

171 *Cf.* Lawson, *supra* note 159, at 337–43 (discussing the discretion inherent in the interpretation and execution of laws).

172 THE FEDERALIST No. 78, *supra* note 75, at 501.

173 For instance, § 1 of the Sherman Act, an extraordinarily important statute, proscribes "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 1 (2000). Taking this provision at face value presents problems because "[e]very agreement concerning trade . . . restrains." Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918). Rather than follow the literal text of the Sherman Act, the courts have instead treated it as a command from Congress to develop a federal "common law" of antitrust. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 52 (2d ed. 1999).

174 *See, e.g.*, 15 U.S.C. § 78j(b) (authorizing the SEC to prescribe rules and regulations it deems "necessary or appropriate in the public interest or for the protection of investors").

States."[175] That Congress may not delegate this legislative power to another department is implicit in the very notion of separation of powers, for, were Congress to do so, that department would impermissibly combine the legislative power with its own—and we would find ourselves facing a Judge (or Commissioner or Tyrant) Proteus who enjoys "arbitrary discretion."[176]

The great problem, of course, is to identify the point at which the discretionary power incident to enforcing law becomes so great as to become arbitrary or legislative. As a matter of hornbook doctrine, the Supreme Court has stated that delegations of power to enforcement officials will survive such challenges provided Congress has provided an "intelligible principle" to guide their actions which enables the courts to determine compliance.[177] This empty formula does nothing to specify how vague "principles" can be and still be "intelligible" enough to pass muster. In 1935, the Supreme Court invoked it to strike provisions of the National Industrial Recovery Act (NIRA), which granted President Roosevelt more or less total authority to run the nation's economy as he saw fit to drag the country out of depression.[178] Since this 1935 aberration, however, the Supreme Court has been willing to find "intelligible principles" wherever it looks.[179]

Famous examples of delegations the court has deemed suitably "constrained" by law to survive a nondelegation challenge have in-

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175 U.S. CONST. art. I, § 1.

176 For an alternative, textual route to this same conclusion, see Lawson, *supra* note 159, at 350 (arguing that Congress may not delegate its legislative power because it lacks any enumerated power to do so, and that its Sweeping Clause authority to enact laws "necessary and proper" for carrying into execution the powers of the other branches does not extend to improperly granting legislative power to executive or judicial officials). By contrast, for a judicial rejection of the nondelegation doctrine, see *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 489–90 (2001) (Stevens, J., concurring) (opining that nothing in the Constitution blocks Congress from delegating legislative power and that the Court should therefore abandon attempts to fashion a nondelegation doctrine).

177 J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

178 A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935) (striking provisions of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, that authorized executive creation of "fair competition" codes); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (striking provisions of NIRA granting President discretionary power to prohibit transportation in interstate commerce of oil produced or shipped in violation of state law).

179 *See, e.g.*, *Whitman*, 531 U.S. at 474–75 (noting that the Court has not found a nondelegation violation since *Schecter* and *Panama Refining* in 1935).

cluded: the FCC's power to regulate in the "public interest, convenience, or necessity";[180] the power of the Office of Price Administration during World War II to set "fair and equitable" commodity prices;[181] the power of the United States Sentencing Commission, "an independent commission in the judicial branch of the United States," to issue binding sentencing guidelines for the punishment of federal crimes in light of a mélange of vague, indeterminate "goals," "purposes," and "factors";[182] and, most recently, the power of the EPA to issue air quality regulations that are "'requisite to protect the public health' with 'an adequate margin of safety.'"[183] Reconciling such cases with the Court's decision to strike NIRA suggests that the nondelegation doctrine boils down to: do not let somebody other than Congress decide *everything*.

Justice Scalia, a champion of bright-lines if ever there were one, has aptly summarized why the nondelegation doctrine has failed to delineate meaningfully the *amounts* of permissible enforcement-branch discretion:

> Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree . . . . [I]t is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.[184]

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180 Nat'l Broad. Co. v. United States, 319 U.S. 190, 226–27 (1943).

181 Yakus v. United States, 321 U.S. 414, 427 (1944).

182 Mistretta v. United States, 488 U.S. 361, 374–76 (1989). As evidence that the Sentencing Reform Act of 1984, which created the Commission, suitably restrained its discretion, the Court observed that the Act requires the Commission to craft its sentences in light of three "goals," four "purposes," and eighteen "factors." *Id.* The four "purposes" give a sense of the constraining effect of this mélange; as the Commission creates its sentencing guidelines, it should consider that sentences are supposed "'to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense'; 'to afford adequate deterrence to criminal conduct'; 'to protect the public from further crimes of the defendant'; and 'to provide the defendant with needed . . . correctional treatment.'" *Id.* at 374 (quoting 18 U.S.C. § 3553(a)(2) (2000)).

183 *Whitman*, 531 U.S. at 465, 476 (upholding section 109(b)(1) of the Clean Air Act, 42 U.S.C. § 7409(b)(1), against nondelegation challenge and noting that it "fits comfortably within the scope of discretion permitted by our precedent").

184 *Mistretta*, 488 U.S. at 415–16 (Scalia, J., dissenting).

The upshot of this observation, and decades of Supreme Court jurisprudence permitting the rise of the modern administrative state with its massive delegations, is that courts will stoutly reject almost all claims that Congress has granted *too much* discretionary authority to other officials. Every couple of centuries or so, a truly huge delegation may, like NIRA, prove more than the Court can tolerate, but, this caveat notwithstanding, nondelegation-doctrine-type tests (which would include Hamilton's dictum that courts may not exercise "arbitrary discretion") are not a promising means for blocking the accumulation of tyrannical authority.

It does not follow from this conclusion, however, that separation of powers must be meaningless. A key remaining barrier to tyranny is, bluntly, that the rule of law requires the enforcing branches to *obey the law.* The impossibility of devising and administering meaningful "amount-of-discretion" tests means that the "law" binding the enforcers may be very vague indeed and grant them vast discretion. Still, it is an obvious, almost self-evident, requirement of separation of powers that the enforcers cannot expand their own powers by altering the law defining the scope of their authority. Indeed, acceptance of this principle by both Federalists and Anti-Federalists may be the best explanation for the relative absence of substantive discussion of the nature of the judicial power during the ratification debates; there was no pressing need to discuss speculative issues such as whether the Article III "judicial power" by definition entails respect for precedent because the courts would not be at liberty to increase their power by abandoning the legal rules limiting it.[185] Were matters otherwise, if, for example, executive or judicial officers could "legislate" their way to greater powers which they could then enforce, tyranny would naturally ensue as they followed their natural inclinations to expand their authority.[186]

In short, given the lax state of the nondelegation doctrine, Congress has immense power to decide for itself the amount of discretionary power to grant to the enforcers—executive and judicial officials. The rule of law, however, forbids the enforcers from seizing more discretionary power than the law has granted them.

185 *Cf. supra* Part I.B.3.

186 *Cf.* THE FEDERALIST NO. 48, *supra* note 167, at 316 ("It will not be denied, that power is of an encroaching nature . . . .").

B. The Federal Courts Lack Authority To Abandon the Stare Decisis Constraints with Which They Started

The federal courts began their lives with an obligation to defer to precedents as required by the declaratory theory then in vogue, i.e., they were to treat precedents as evidence of law and either follow them or give a good reason why not.[187] This rule limited the courts' interpretive discretion. They cannot, consistent with rule of law and separation of powers, increase this discretion by abandoning this particular constraint absent authorization from *some law* to do so. Neither the Constitution nor common-law principles grant this authorization; therefore, the courts are stuck with this obligation to defer to precedent except to the degree Congress relieves them of it.

Reflect for a moment on the unpleasantness of Judge Proteus's traffic court, where the judge decides the speed limit even as he decides whether you broke it, thus combining legislative and judicial powers.[188] Stare decisis helps block such discretion both by requiring the judge to defer to *past* speed-limit decisions as well as by forcing her to consider that whatever rule she creates today she may have to apply tomorrow in a different case.[189] Of course, application of measured deference to precedent requires fuzzy, qualitative judgments—bright lines and clear rules cannot *precisely* calibrate just how bad a precedent should be to justify overruling it or specify *exactly* the range and weight of the qualitative factors that a court should consider when making this decision (for example, stability of the law, policy concerns, etc.). One should not, however, permit the difficulty of applying this form of stare decisis in close cases to obscure the obvious limiting effects of precedents in the run of cases. It is easy to see the force of this point by contrasting the power available to a court inter-

187 *See generally supra* Part I.

188 *See supra* note 168 and accompanying text (introducing Judge Proteus).

189 *Bush v. Gore*, by and by, provides an interesting example of the Supreme Court seemingly trying to minimize the impact of the prospective force of precedent in order to expand its decisionmaking power. Bush v. Gore, 531 U.S. 98 (2000) (*Bush II*). The per curiam opinion in that case capped its equal protection analysis with the observation that "[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Id.* at 109. In one sense, this remark was gratuitous—a common-law court's opinion can always be distinguished by a later court deciding a case it concludes presents different operative facts. The Justices who joined the per curiam opinion nonetheless included dicta limiting it to its facts. Presumably, they felt that by minimizing or eliminating the force of *Bush II* as an equal protection precedent, they would minimize the danger that this hurried opinion crafted in emergency circumstances would distort election law going forward. In short, minimizing *Bush II*'s future impact helped the Court maximize its decisionmaking freedom.

preting the meaning of "due process" in a case of first impression with that of a court with an obligation to fit its interpretation into the fabric of scores of precedents. The thicker the case law that "liquidates" a bit of vague constitutional (or other legal) text, the less interpretive freedom a court will have in further expounding it.[190]

Once one characterizes stare decisis as law that limits judicial discretion, it becomes plain that courts cannot abandon it absent some sort of legal authorization to do so in light of the principle that the enforcing branches cannot seize power for themselves. At first blush, it might seem obvious that the courts do possess such authority, and the argument might run as follows: at the time of the founding, stare decisis was a creature of the common law. Although (old, dead, silly) legal thinkers of that time commonly held that the courts "find" or "discover" common-law principles, we moderns know that they really just make them up. What the courts have the common-law power to make, they have the common-law power to destroy—and so they have the power to abandon the constraints of stare decisis.

This argument fails to recognize that what we now choose to call the "lawmaking" power of courts operating in a common-law tradition is a function of the limitation that stare decisis has placed on their power to interpret law in the first place. Judicial decisions have law-like effects beyond an individual case precisely because, as a predictive matter, we know that judges in later cases will tend to follow them.[191] A court that develops a new wrinkle of contract or tort law has "made" new "law" in the sense that other courts can be expected to follow its lead. So long as a court exercises this power incrementally and as an incident to its case resolution function, such de facto "lawmaking" does not amount to an improper seizure of legislative power. Rather, it is better characterized as an unavoidable side effect of subjecting the courts' function of interpreting the law to the rigors of stare decisis. In such an environment, judicial interpretations will tend to act so much like law that it does no violence to language to take the positivist stance and state that they *are* law. It is nonsensical, however, to suggest that a limited power to make "law," *which flows from the existence of* stare decisis, can form a legal basis for the courts to abandon that doctrine.

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190 *Cf.* Richards & Kritzer, *supra* note 29 (analyzing effects of precedents on Supreme Court decisionmaking).

191 As Professor Harrison has aptly remarked, "Courts do not follow precedent because other courts conclusively gloss the law. Courts can conclusively gloss the law because other courts follow precedent." Harrison, *supra* note 18, at 512.

Nor should one construe the Constitution to grant such authority. It contains no express instructions on respect for precedent, but it does provide courts with the "judicial power" to resolve certain categories of "Cases" and "Controversies."[192] Exercise of that power requires courts to use independent judgment concerning the meaning of law. It may be tempting to conclude that, because courts in some sense "control" interpretation and stare decisis is a sort of interpretive norm, they must possess authority to determine whether to adhere to it. The power to interpret law does not carry with it, however, authority to rewrite at will the norms that govern interpretation of law. Were courts free, constitutionally speaking, to make up new, arbitrary norms for themselves, then nothing would stop a court from, for instance, declaring a new "interpretive" norm that even-numbered amendments in the Constitution do not count. If courts possess such power, then there was no point to writing down the Constitution or other law.[193]

Some interpretive norms have, through repeated invocation over the years (or centuries), evolved into something more than mere accepted understandings or rules of thumb to aid interpretation; they have, for relevant intents and purposes, hardened into law—for example, Blackstone and others make clear that common-law courts at the time of the founding had an *obligation* to follow rational precedents rather than impose their own "best" readings of indeterminate law.[194] As they exercise their judicial power in any given case, courts enjoy independent authority to interpret and apply this meta-law of interpretation—it is up to a court to determine if precedents are on point and reasonable enough to command deference in a given case. This power to interpret and apply stare decisis does not fairly carry with it, however, authority to "interpret" it out of existence.

Separation of powers must at minimum forbid the enforcing branches from increasing their own powers beyond those authorized by law. Neither the courts' common-law "lawmaking" powers nor the Constitution's grant of "judicial power" authorize courts to abandon the original constraints of stare decisis with which they started. The only other place to look for such authority is Congress.

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192 U.S. CONST. art. III, § 2.

193 *Cf. supra* Part I.B.3 (discussing Hamilton and Brutus on rules of legal interpretation).

194 *Cf.* Harrison, *supra* note 18, at 529 ("The norms of precedent as the federal courts know them consist mainly of unwritten principles that are characterized as binding law but that reflect substantial judicial input, custom, and practice. Those are the hallmarks of general law."). *See generally supra* Part I.A.

C. *Congress's Sweeping Clause Power To Release the Courts from Stare Decisis and Its Separation-of-Powers Limits*

The principle that courts may not seize extra-legal power does not prevent Congress, subject to constitutional limits, from granting it—that is, making it legal. One potential source of congressional power to regulate the operation of precedent in the courts is the Sweeping Clause, which authorizes Congress "[t]o make all laws which shall be *necessary* and *proper* for *carrying into Execution . . . all . . . Powers vested* by this Constitution in the Government of the United States, or in any Department or Officer thereof"[195]—including the judicial department.

To fall within the scope of this clause, a statute regulating the force of precedent would need to satisfy several related requirements. First, it must be the case that the statute is a means for "carrying into execution" the power that the Constitution vests in the courts for resolving cases, that is, the "judicial" power. For present purposes, the most salient application of this principle is that Congress may not eliminate the coercive force of so much precedent as to grant "arbitrary discretion" to the courts in violation of the nondelegation doctrine (or something like it, at all odds), because doing so would force the courts to wield legislative, rather than judicial, power.

In addition, a statute regulating precedent would have to be both "necessary" and "proper" for carrying the judicial power into execution. On a standard *McCulloch v. Maryland* analysis, this twin standard is quite lax—in essence, a statute will satisfy it so long as one can say

195 U.S. CONST. art. I, § 8, cl. 18 (emphases added). Two other constitutional clauses speak to congressional power over the courts. The Tribunals Clause of Article I grants Congress the power "[to] constitute Tribunals inferior to the Supreme Court," *id.* art. I, § 8, cl. 9, and some have argued that the greater power to "constitute" carries with it the "lesser" power to regulate the operations of these courts. *See* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 105–08 (collecting and criticizing judicial authority and scholarly commentary on this point). Power to regulate the operation of the Supreme Court (at least in cases outside its small original jurisdiction) has been said to flow from Article III's Exceptions Clause, which provides that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2. For present purposes, it is not necessary to determine whether any congressional power that might exist under these two clauses extends to regulation of stare decisis norms because the Sweeping Clause provides sufficient authority in itself. It should be noted that one reason to avoid relying on the Tribunals and Exceptions Clauses is that Professor David Engdahl has recently made a strong case that the Sweeping Clause is the exclusive source of any congressional power to regulate judicial operations. *See* Engdahl, *supra*, at 104–32.

that it amounts to a minimally reasonable means to accomplish a permissible constitutional end.[196] Many potential stare-decisis-stripping statutes ought to be able to satisfy the rationality requirement for "necessity"—if for no other reason than that it would not seem irrational for Congress to conclude that the judicial power would function better if courts based their legal conclusions on their own "best," independent judgments rather than submitting to the coercive force of opinions that they now deem incorrect.[197]

The "propriety" requirement that legislation seek to achieve a permissible end is of special concern in this context, however, because statutory regulation of precedent amounts to congressional control of the operation of *another department's* power.[198] We once again must circle back to separation of powers, for, as Professor Gary Lawson has recently argued, it cannot be "proper" for a busybody Congress to regulate the operation of the judicial power in a manner that unduly intrudes on the independence of the Article III courts.[199] The better view on both theoretical and practical grounds, however, is that separation of powers does not protect the independence of the courts by preventing Congress, the lawmaker, from using *laws* to regulate the courts, the law-enforcers. Rather, separation of powers protects judicial independence by preventing Congress from *usurping* the judicial power for itself. Congressional abrogation of horizontal stare decisis would not enable Congress to control case outcomes directly by issuing judgments itself or to force the courts to adopt any given interpretation of the Constitution. As explained below, adoption of this practice therefore would not usurp the judicial power in any constitutionally offensive sense.

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196 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819) (Marshall, C.J.) (construing "necessary" as "convenient, or useful, or essential to another").

197 *See* Harrison, *supra* note 18, at 533–38 (making standard-form *McCulloch* arguments to support a variety of hypothetical statutes regulating precedential norms to achieve systemic ends such as enhancing stability, predictability, and uniformity of the law).

198 *Cf.* Engdahl, *supra* note 195, at 158–64 (stressing the importance of this point for Sweeping Clause analysis, and arguing that, rather than apply standard *McCulloch* rational basis test, courts should exercise independent judgment to determine whether congressional regulation of the judiciary in fact helps effectuate exercise of the judicial power, which would call into question statutes regulating prudential standing, abstention, and remedies).

199 Lawson, *supra* note 9, at 203–05; *cf.* Engdahl, *supra* note 195, at 164–74 (arguing that courts should adopt more aggressive scrutiny of congressional efforts to regulate judicial operations).

1. Stare-Decisis-Stripping Statutes Seen Through a Nondelegation Lens

Any law implicitly delegates to those charged with enforcing and applying it the interpretive discretion to figure out what it means. The vaguer the law, the greater the implicit grant. Stare decisis tends to obscure the otherwise obvious point that vague laws delegate power to the courts that apply them because, over time, it tends to limit discretion as repeated expounding "liquidates" meaning, to use one of the terms Madison favored.[200] Stripping precedents of their coercive effects may be thought of as throwing this process into reverse—of expanding the judiciary's power to either "make" or "interpret" law, as the case may be. One separation-of-powers problem, then, is to determine the degree to which Congress may strip cases of precedential force without leaving the courts with so much discretion as to transform them from *bona fide* judicial interpreters of the law into legislators.[201]

In the past, courts have developed and applied the nondelegation doctrine to determine whether an affirmative grant of power by Congress to the enforcing branches (for example, to grant licenses, fix prices, etc.) grants them excessive discretion. As Justice Scalia explained in *Mistretta*, attempts to draw bright, abstract lines around the outer bounds of such discretion are basically doomed by the nature of the task, which calls for qualitative judgment regarding a "question of degree" rather than a "point of principle."[202] The meaningless black-letter standard is that a delegation will pass muster so long as Congress encodes some sort of "intelligible principle" (i.e., smidgen of

200 *See* THE FEDERALIST NO. 37, *supra* note 75, at 226.

201 Nondelegation challenges are perhaps more typically made to grants of power to executive branch officials, but, as the doctrine forbids Congress to delegate legislative power to *any* other entity, it also applies to delegations to the courts. Mistretta v. United States, 448 U.S. 361, 415–16 (1989) (Scalia, J., dissenting) (indicating that nondelegation doctrine applies both to "officers executing the law and to the judges applying it"); Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) (Marshall, C.J.) (turning back nondelegation challenge to statute that granted authority to the Supreme Court to prescribe the "forms of writs, executions, and other processes" applicable in lower federal courts). For discussion of the point that if a statute is too vague, it delegates "legislative" power to the courts that then graft meaning onto it, see Lawson, *supra* note 159, at 340 ("The courts and the President exceed their enumerated powers by purporting to give meaning to gibberish just as surely as they would exceed their enumerated powers by directly inserting their own texts into the Statutes at Large.").

202 *Mistretta*, 488 U.S. at 415–16 (Scalia, J., dissenting).

law) into it.[203] Only the most extreme, vast, unintelligible delegations have failed this so-called test, for example, the Supreme Court struck Congress's effort to authorize President Roosevelt to do whatever he saw fit to drag the country out of the Great Depression.[204] Thus, application of the nondelegation doctrine in its traditional context has boiled down to a sort of shock-the-judicial-conscience test: a statutory increase to enforcement branch discretion can only violate this "doctrine" if the judges deciding the matter intuit that Congress has gone *way* beyond the pale.[205]

A stare-decisis-stripping statute would expand judicial discretion not by affirmatively granting the courts some new sphere of authority (for example, to "interpret" to relative clarity some new, regulatory statute) but by negating the constraining force of precedents on their decisionmaking. In one sense, this is a distinction without a difference: regardless of whether Congress increases judicial discretion by granting power or removing restraints, the generic question is whether Congress has taken an action which lets the courts make law in some impermissible sense.

Nonetheless, although a stare-decisis-stripping statute would not fundamentally change the nature of the separation-of-powers question, it might well cause courts to approach and answer it differently. Again, courts must use qualitative judgment to determine the outer bounds of permissible "nonlegislative" discretion. In the past, they have made such judgments in a system that *expects* deference to precedent. It seems quite plausible that judicial intuitions regarding the outer limits on vague delegations have been influenced by judges' background knowledge that stare decisis may both clarify and confine the discretion of executive and judicial officers over time.[206] Were Congress to undermine this fundamental expectation, one can easily

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203 *See supra* notes 175–84 and accompanying text (sketching contours of nondelegation doctrine).

204 *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935) (invalidating the National Industrial Relations Act's delegation of authority to President to promulgate "fair competition" codes).

205 For a recent argument that the Constitution demands a stricter nondelegation doctrine than the Supreme Court's deferential approach, see generally Lawson, *supra* note 159, *passim*.

206 Executive-branch "precedents" may trigger a similar dynamic. Courts grant a limited form of stare decisis force to agency actions in the sense that they require "an agency changing its course" on matters of policy to supply a "reasoned analysis" justifying its decision. Motor Vehicles Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). The force of its past decisions therefore modestly limits agency discretion going forward—an effect that may make courts, at least on some level, somewhat more comfortable with vast delegations to executive officials.

imagine that courts would find it much easier to "intuit" nondelegation violations, thus forcing Congress to provide such clarity itself.

Stipulate then, that courts might not apply the same extraordinarily deferential nondelegation approach in a world rife with aggressive stare-decisis-stripping statutes. Even so, once one accepts the irresistible premise that separation of powers permits judicial enforcement of laws of far less than crystal clarity, it should easily follow that there are *many* contexts in which Congress could deprive select cases or categories of cases of horizontal precedential force without expanding judicial discretion beyond acceptable levels. Any field occupied by a moderately detailed statute might be considered to have enough law to control the courts. It is perfectly plausible that code-type laws could pass muster without the "thickening" effects of coercive precedents—indeed, that is the way the "judicial power" tends to work in civil systems.

Also, there are obviously many thousands of trivial decisions in the thousands of volumes of reported federal cases; because such decisions do little if anything to add to the "law," they do little if anything to reduce the discretion of the courts going forward. It would therefore be odd to conclude that a congressional move to deprive such trivial decisions of precedential weight would impermissibly increase judicial discretion.

Of course, freeing the courts from the coercive effects of more important and controversial cases would grant them more discretion than freeing them from repetitious trivia.[207] Even so, stripping individual cases of their coercive stare decisis effects—especially recent ones that have not yet had much formative effect on the law—should not be problematic as a general matter. Suppose opinion *X* is a recent and important Supreme Court decision that is the hundredth case to interpret the meaning of "due process," "speech," "unreasonable searches," or any other vague bit of the Constitution prone to stirring up controversy. If Congress were to strip *X* of its coercive stare decisis effect, then, when case *Y* comes along raising the same issue, the Court would find itself with the same degree of interpretive discretion that it had when it decided case *X* in the first place. If the Court did not have unconstitutionally broad discretionary power when it decided *X*, then it should not have excessive discretion when it later decides *Y* without being subject to any coercive force from *X*.

207 This is, of course, the sort of targeting Professor Paulsen has in mind. *See* Paulsen, *supra* note 20, at 1541 (arguing for the abrogation of horizontal force of *Roe* and *Casey*).

For instance, the Court did not have unconstitutionally broad discretion to determine the meaning of the Commerce Clause when it decided the 1995 case *United States v. Lopez*,[208] a controversial, five-to-four opinion that marked the beginning of an effort to undermine some of the more expansive New Deal interpretations of the Commerce Power. Stripping *Lopez* of its precedential force (along with *United States v. Morrison*,[209] a 2000 case that followed *Lopez*) would put the Court back into the interpretive posture it inhabited in 1994—and it was hardly illegal for courts to construe the Commerce Power at that time.

Following a similar logic to a perhaps less provocative conclusion, Congress could, without offending separation of powers by granting the courts too much interpretive discretion, enact a statute providing that any five-to-four opinions issued by the Supreme Court in the future will lack horizontal precedential force. If the Court did not have unconstitutionally broad discretion to decide a given five-to-four opinion, then it could not have unconstitutionally broad discretion to revisit the legal issues resolved in that opinion free of its constraining effects. Such legislation could have two potentially beneficial effects. First, it would do away with the unseemliness of narrowly divided, five-to-four decisions purporting to "settle" the law. Second, to the degree justices want the imprimatur of "precedent" on their opinions, it would encourage them to engage in more consensus decisionmaking—deals would have to be made to acquire the critical sixth vote.

But could Congress destroy the precedential force of so many cases as to step over the nondelegation line by granting the courts "arbitrary" discretion? As qualitative, judicial judgments form the outer limits of acceptable delegations, answering this question necessarily veers into speculation. This cautionary point duly noted, the answer to the question is: probably yes—at least in the limited sense that one can imagine that such aggressive congressional interference might prompt courts to put teeth in the nondelegation doctrine and strike statutes that easily survive scrutiny under the doctrine's current form.

Analysis of the nondelegation-type implications of such statutes depends in part on whether they target statutory or constitutional con-

208 514 U.S. 549, 561 (1995) (striking a provision of the Gun-Free School Zones Act of 1990 that made it a federal crime to knowingly possess a firearm in a school zone for exceeding congressional power to regulate activities that substantially affect interstate commerce).

209 529 U.S. 598, 613 (2000) (following *Lopez* and striking the civil remedy provision of the Violence Against Women Act for exceeding congressional power to regulate activities that substantially affect interstate commerce).

structions. As a political matter, it would of course be far more provocative for Congress to target constitutional constructions than constructions of statutes that it has the power to rewrite in any event. It is therefore ironic that stripping the precedential force from statutory constructions may pose the greater nondelegation concern as a legal matter.

a. Stripping Precedential Force from Judicial Statutory Interpretations

The structure of the nondelegation doctrine suggests that, as a matter of formal doctrine, Congress should be able to eliminate the precedential force of all judicial statutory constructions without *causing* a violation. As suggested above, however, a wholesale effort to deprive the courts of the power to "fix" the meaning of statutes through precedents could prompt them to limit the scope of permissible delegations more aggressively. The upshot: Congress might find that, were it to block courts from using precedents to narrow and clarify statutory meaning, they might respond by striking statutes that would easily survive any challenge under traditional nondelegation norms.

Formally speaking, judicial statutory constructions should only be able to affect nondelegation analysis if their narrowing effects can legitimize delegations that are otherwise impermissibly broad. If precedents lack such "curative" effects, then, by hypothesis, they cannot alter outcomes—either a statute violated the nondelegation doctrine from its inception or it did not, and no gloss a court might add later can change the result. By contrast, if the law does permit precedents to cure violations, then stripping them of their stare decisis force could cause statutes that were impermissibly broad standing by themselves to suffer a relapse of their nondelegation disease.

Dicta from the Supreme Court's recent opinion in *Whitman v. American Trucking Associations* strongly suggest that such judicial cures are not possible.[210] In its opinion below, the D.C. Circuit had held that EPA's broad authority under the Clean Air Act to issue national ambient air quality standards (NAAQs) "requisite to protect the public health" violated the nondelegation doctrine.[211] It also made the novel suggestion that this violation could be cured were EPA to adopt a narrowing construction of its authority.[212] The Supreme Court, in short order: (1) ruled that EPA's NAAQ power plainly did not violate

210 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

211 Am. Trucking Ass'ns v. U.S. Envtl. Prot. Agency, 175 F.3d 1027, 1034 (D.C. Cir. 1999), *modified by* 195 F.3d 4 (D.C. Cir. 1999).

212 *Id.* at 1038.

the nondelegation doctrine;[213] and (2) stated in dicta that, if there had been a violation, EPA could not have cured it after the fact.[214] The Court reasoned,

> The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.[215]

Although aimed at executive officials, the logic of this observation seems to apply with equal force to the courts. A judge seeking to narrow a *truly* "standardless" delegation would have no choice but to rewrite it, that is, to legislate the standards that Congress left out. As *Whitman* concisely explained, it is a self-contradiction to suggest that an enforcement official could legislate a cure to a violation of the nondelegation doctrine, which forbids such officials—whether judicial or executive—from legislating. It should follow that, at least on the level of formal doctrine, judicial statutory constructions cannot cure true nondelegation violations. If this conclusion is correct, it should follow that Congress could strip away the precedential force of all such opinions without creating a "fresh" violation.

Even if one grants, however, that the nondelegation doctrine should not logically pose a barrier to congressional elimination of the precedential force of judicial statutory constructions, legislation seeking to accomplish this end could surely have a profound impact on the courts' application of that doctrine. Again, the nondelegation doctrine forces courts to intuit how much enforcement discretion is "too much." Stare decisis narrows enforcement discretion. Even if its narrowing effects are in some formal sense irrelevant to nondelegation analysis, destroying them would surely affect judges' qualitative, intuitive judgments regarding how much discretion is "too much" and could prompt them to take a harder line against broad, vague delegations.

For example, few would suggest that the Sherman Act,[216] as amplified by mountains of precedents, violates the nondelegation doctrine.[217] Section 1 of the Sherman Act makes contracts in "restraint of

213 *Whitman*, 531 U.S. at 474.

214 *Id.* at 472–73.

215 *Id.* at 473.

216 Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2000)).

217 A Westlaw search in ALLFEDS and ALLFEDS-OLD for the term "nondelegation" in the same paragraph as "Sherman Act" found no cases. At least one scholar,

trade" criminal.[218] The problem with taking this statutory command literally is that *all* contracts "restrain" trade,[219] but obviously not all contracts are crimes. This provision must mean something else and, if courts are totally free to determine that "something else" for themselves on an ad hoc basis, then they threaten to become the "tyrants" of business. Congress, of course, never intended to grant the courts such power. Rather, it drafted this extraordinarily vague statute with the understanding that the courts would develop a consistent body of case law interpreting it—a federal "common law" of antitrust.[220] Suppose that Congress had instead included a provision in the Sherman Act that courts must never give any weight to their precedents interpreting it. One can easily imagine that it would cause courts to reject § 1 as an impossibly vague violation of separation of powers—regardless of whether the existence of constraining precedents technically should be irrelevant to the nondelegation problem.

b. Could the Constitution Left to Itself Leave the Courts with Unconstitutionally Broad Discretion?

The most provocative issues regarding congressional power to eliminate precedential force arise in the context of constitutional construction—after all, Congress can rewrite statutes to void the force of statutory constructions it dislikes, but it cannot rewrite the Constitution. It is actually quite difficult, however, to support the argument that stripping constitutional constructions of their precedential force could violate the nondelegation doctrine. The key problem with such a claim is that it presupposes that the Constitution granted its early interpreters a level of discretion that would now be considered unconstitutionally broad.

Recall the *Lopez* argument—the effect of removing the precedential force from a recent Supreme Court opinion would be simply to put the Court back into the interpretive posture it occupied prior to issuing that decision.[221] Taking this argument to its extreme, one

however, has contended that, given the Supreme Court's loose approach to interpreting it, the Sherman Act does violate the nondelegation doctrine. *See* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 266, 328 n.367 (1986).

218 15 U.S.C. § 1 (2000) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

219 *See* Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains.").

220 *See* HOVENKAMP, *supra* note 173, at 52.

221 *See supra* notes 207–09 and accompanying text.

might argue that it could not possibly grant the courts unconstitutionally broad discretion to strip *all* constitutional constructions of their precedential weight because doing so would simply put the courts back into the position they confronted immediately after ratification. It was not unconstitutional for the first Supreme Court to construe the Constitution without the benefit of precedents; *ergo*, it could not be unconstitutional for later courts to do so.

Indeed, stepping back, one could argue that the Constitution itself is the best evidence that something roughly as lax as the current nondelegation doctrine is an appropriate separation-of-powers test for determining the validity of delegations of interpretive authority to the courts. Although some bits of the Constitution are as specific as anyone could like (for example, no one has suggested that the President need only be thirty-five "dog-years" old),[222] other bits, to put the matter mildly, are indeterminate and leave room for a vast zone of reasonable interpretation. Were this not the case, we would not, two-hundred-some years after the fact, be debating the meaning of words and phrases like "judicial power" and "due process." By definition, the *Constitution* cannot vest *unconstitutionally* broad discretion in officials. This point suggests that a law cannot violate separation of powers due to vagueness so long as it is no fuzzier than the most indeterminate bits of the Constitution.

Taken to this extreme, however, the argument has shifted into question-begging because it has not excluded the uncomfortable possibility that the Constitution does not permit the courts to retain the level of interpretive discretion that they necessarily had immediately after ratification. An argument for this position could run as follows: the Framers faced the enormous problem of drafting a *constitution*—a broad, foundational document that needed to be brief and general and that most people would agree to ratify. They could not and were not trying to draft a code. They made the trade-off that it would be better for specific constitutional interpretations to grow organically from a course of practice (as precedents "fixed" and "liquidated" vague text) than to try to circumvent this process by writing an impossibly specific document.[223] That courts would necessarily enjoy enormous interpretive discretion as they decided constitutional cases of first impression should be regarded as a necessary evil and not as an

222 *Cf.* U.S. CONST. art. II, § 1, cl. 5 (stating that "neither shall any Person be eligible to [the office of the Presidency] who shall not have attained to the Age of thirty five Years").

223 Compare *supra* notes 82–84 and accompanying text, discussing expectations of Madison and Hamilton that precedents would "liquidate" constitutional meaning over time.

indication that it would be constitutional for courts to continue to exercise so much discretion in later cases.

The key premise of this argument is that litigants in the early days of the Republic could be subjected to levels of "judicial" discretion that would be considered "nonjudicial" or "legislative" as applied to later litigants. If one is willing to accept this jarring proposition, then one can argue that modern courts could invoke some form of the nondelegation doctrine to block stare-decisis-stripping statutes from granting them the same vast amounts of interpretive discretion which the Constitution itself "constitutionally" delegated to the courts of the early Republic. Such an argument would require a court to embrace the uncomfortable proposition that the Constitution is, after a fashion, unconstitutionally vague. If a court were willing to bite this conceptual bullet, however, given: (1) the extreme fuzziness of many important constitutional provisions; and (2) that the outer limits of properly "judicial" discretion are a matter of qualitative judgment, the contention that Congress could not constitutionally eliminate the force of *all* constitutional precedents is at least plausible. Such reasoning could also lead to the conclusion that Congress could not, for example, wipe the Supreme Court's "due process" slate clean.

In sum, without enough law on hand to constrain their discretion, courts cannot exercise judicial power—for a judge with too much arbitrary (legislative) power is actually a tyrant. The great difficulty is to determine the tipping point where discretion exceeds constitutional limits. In all but the most extreme cases, courts have in the past deferred to congressional determinations with regard to how much discretion enforcement officials may permissibly exercise. Stare-decisis-stripping statutes, however, could undermine longstanding judicial expectations regarding the narrowing and clarifying effects of precedents on the law, which could prompt courts to adopt a more aggressive approach to nondelegation enforcement. The effective outer limits of any congressional stare-decisis-stripping power must therefore remain hazy. That said, given the courts' traditional willingness to permit executive and judicial officials to exercise significant discretion, Congress should possess sufficient elbow room to strip many cases or categories of cases of their precedential force (including many "important" ones) while still leaving the courts sufficiently constrained to exercise merely judicial power. It follows that many potential stare-decisis-stripping statutes could be characterized as "carrying into execution" properly the "judicial power" within the meaning of the Sweeping Clause.

2. Congress May "Properly" Eliminate the Horizontal Coercive Force of Precedents

The next issue to consider is whether Congress could enact a stare-decisis-stripping statute as a "necessary and proper" means for carrying into execution the judicial power pursuant to the Sweeping Clause.[224] Under a standard *McCulloch* analysis, an executory law will fall within the ambit of this congressional power provided it amounts to a minimally rational means of accomplishing a permissible end.[225] Again, it would be difficult to make the argument that removal of the coercive effects of select precedents or categories of precedents would have an irrational effect on how the judicial power is carried into execution. Such a statute would amount to Congress asking the courts to base their judgments on their "best" interpretations of law rather than to distort them by deferring to the force of precedents they deem incorrect. Asking courts to do their own independent best work is not obviously irrational.

A more interesting Sweeping Clause objection is that, notwithstanding Congress's acknowledged power to regulate judicial procedure,[226] congressional regulation of stare decisis norms could not accomplish a permissible end because it would "improperly" intrude upon the courts' independent decisionmaking authority, or, to cast the matter in *Marbury*-type terms, any attempt by Congress to use law to tell the courts *how* to interpret other laws would infringe on their power "to say what the law is."[227]

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224 For earlier discussions of this point, see Paulsen, *supra* note 20, at 1567–70 (maintaining that Congress has Sweeping Clause power to strip Supreme Court constitutional constructions of their precedential force). *Cf.* Harrison, *supra* note 18, at 531–39 (contending that Congress has Sweeping Clause power to enact "systemic" controls on precedential force but balking at Paulsen thesis that this power extends to targeting disfavored cases); Lawson, *supra* note 9, at 203–14 (concluding that Sweeping Clause does not authorize congressional regulation of precedential force).

225 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

226 *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 472 (1965) (observing that Congress has the power under the Necessary and Proper Clause "to make rules governing the practice and pleading in [federal] courts").

227 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (claiming the courts have the peculiar "province and duty . . . to say what the law is"); *cf.* Paulsen, *supra* note 20, at 1568 (observing that it cannot be constitutionally "proper" for Congress to enact laws that "infringe on the autonomous constitutional powers of other branches").

An initial problem for this objection is that, as Professor Paulsen has ably demonstrated, Congress, often with explicit judicial approval, has regulated in important respects how courts go about determining facts, applicable law, and remedies for well over 200 years.[228] If two centuries' worth of congressional and judicial practice is any guide, then broad congressional regulation of judicial operations is commonplace and not, as a category, constitutionally suspect. On this view, a law releasing the courts from horizontal stare decisis might be novel, but would not be substantially more intrusive or "improper" than, for instance, the innumerable statutes that control burdens of proof and standards of review;[229] the command of the Full Faith and Credit Act that federal courts give preclusive effect to state court judgments;[230] or the Anti-Injunction Act's sharp curtailment of federal court injunctive authority.[231]

There we might be tempted to let matters stand had not Professor Gary Lawson recently used a critique of Paulsen's analysis as a springboard for raising fundamental questions concerning the relation of the legislative and judicial departments; his thesis: Congress may not use its Sweeping Clause authority to substantively regulate how courts go about finding facts or interpreting law because doing so would infringe the independence demanded by Article III's judicial power.[232] As a threshold methodological matter, Lawson observes

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228 Paulsen, *supra* note 20, at 1567–70, 1582–90. Professor Paulsen should be credited with developing many of the examples of congressional regulation of the judiciary discussed below. *See infra* notes 229–31, 252–63.

229 *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 706 (2000) (requiring courts to review certain categories of administrative fact-finding under the "substantial evidence" or "arbitrary and capricious" standards).

230 28 U.S.C. § 1738 ("The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the court of such State, Territory, or Possession from which they are taken.").

231 *Id.* § 2283 (providing that federal courts may only enjoin state court proceedings as authorized by Congress or to protect their jurisdiction or judgments).

232 *See generally* Lawson, *supra* note 9 (critiquing and rejecting thesis that Congress may abrogate stare decisis on the ground that doing so would improperly interfere with judicial decisional independence). This Article uses Professor Lawson's critique as its primary foil for exploring congressional power to regulate judicial decisionmaking. For other arguments that Congress may not constitutionally interfere with the operation of stare decisis in the courts, 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, 837–38 (1998); and Fallon, *supra* note 25, *passim.*

Briefly, Professors Liebman and Ryan contend that a primary function of the federal courts is to ensure the supremacy of federal law and that they may only achieve this end if their judgments are "effectual," which requires that judicial opin-

that "there is simply no way to understand . . . the 'executive' and 'judicial' powers or the scope of congressional authority to regulate the execution of these powers without reference to theoretical back-

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ions have stare decisis effects. Liebman & Ryan, *supra*, at 837–38. It is not clear, however, why judicial opinions must have horizontal precedential force to enable the federal courts to ensure federal supremacy. For instance, eliminating the horizontal force of Supreme Court opinions would not relieve litigants of the duty to obey the Court's judgments, nor would it release lower federal or state courts from their *vertical* obligation to defer to its interpretations of law.

Liebman and Ryan draw indirect support for their argument from the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which held that the Religious Freedom Restoration Act (RFRA) was unconstitutional. Liebman & Ryan, *supra*, at 838; *see also* Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2469–70 (1998) (suggesting *Boerne* may indicate that Congress must allow Article III court judgments to have "ordinary" stare decisis effects). RFRA was a reaction to the Court's decision to abandon its interpretation of the Free Exercise Clause as requiring a "compelling state interest" to justify laws imposing substantial burdens on religious practices. *Boerne*, 521 U.S. at 512–13 (citing Employment Div. v. Smith, 494 U.S. 872 (1990)). RFRA sought to reimpose this test pursuant to Congress's remedial powers under section 5 of the Fourteenth Amendment. *Id.* at 515–17. The Court rejected this attempt to use section 5 on the ground that RFRA did not represent a measured, appropriate effort to enforce the Free Exercise Clause's substantive protections; rather it amounted to an attempt to evade the Court's interpretation of them in *Smith*. *Id.* at 532–36. Near the close of its opinion, the majority included the following broad observation:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed.

Id. at 536. This passage suggests that the Court would look askance at a congressional attempt to regulate the precedential force of its opinions. Nonetheless, the Court's primary concern in *Boerne* was to address the federalism problem of determining whether Congress had exceeded its section 5 power; this case does not represent a definitive Supreme Court statement on the subject of the relation of precedent to separation of powers. *See* Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary"*, 78 TEX. L. REV. 1513, 1543 n.112 (2000) (noting *Boerne*'s focus on federalism and that its separation-of-powers implications are unclear); Jackson, *supra*, at 2469 (offering similar assessment of *Boerne*).

Professor Fallon argues that a correct understanding of the proper method of interpreting the Constitution in light of the sources of its legitimacy rules out any possibility that Congress may eliminate stare decisis. Fallon, *supra* note 25, at 585–94. To oversimplify his argument, he contends that stare decisis should enjoy constitutional status because it is an entrenched, accepted part of our jurisprudence and makes excellent policy sense. *Id.* at 582–88. This Article will not attempt to wrestle with Professor Fallon's subtle analysis except to note, as he himself did, that norms that earn their constitutional status through "acceptance" may lose that status if we lose faith in them. *Id.* at 589–90.

ground norms about the Constitution's separation of powers."[233] Constitutional text by itself cannot do the job—the meaning of the "judicial power" was neither well-developed nor much-discussed at the time of the framing.[234]

Confronted with such fuzziness, Lawson hangs his doctrinal hat on the background norm of "decisional independence," which requires that "each department of the national government must be independent of the other departments in its exercise of enumerated functions unless the Constitution directs otherwise."[235] It follows that Congress may not use laws to affect how the courts find facts or interpret laws.[236] He explains,

> The judicial power of course includes the power to reason to the outcome of a case. One cannot decide cases without bringing to bear some decision-making methodology for identifying and applying the relevant facts and law, so a grant of the judicial power must include a grant of the power to reason from facts and law to conclusions. Can Congress control that reasoning power by using the Sweeping Clause to dictate the decision-making methodology that courts must employ? The answer, as an inference from the principle of departmental independence, must be no. The process of decision-making is so tied up with the process of reaching a decision that it must be the "proper" province of the judicial department in the same way and to the same degree as the power to reach an outcome. Indeed, it is almost *silly* to say that the core of the judicial power is merely the power to reach a result, without reference to the process by which that result is reached. Accordingly, Congress can pass substantive laws, but it cannot tell the courts how to identify, construe, and apply them.[237]

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233 Lawson, *supra* note 9, at 200.

234 *Id.* at 202–03.

235 *Id.* at 204.

236 The caveat to this proposition is that Lawson allows that Congress's Sweeping Clause power may "properly" extend to enactment of "procedural" rules. *Id.* at 224. He writes that "[p]rocedural rules concerning such matters as forms of pleading, methods for executing judgments, empanelling of juries, etc. are surely precisely the kinds of laws 'for carrying into Execution' the judicial power that the Sweeping Clause is designed to authorize." *Id.* It might sound as if this "procedural" exception threatens to swallow Lawson's proposed rule. This is not the case, however, as he makes plain that many statutes and rules that some might characterize as safely "procedural," for example, standards of review, amount, in his view, to substantive intrusions into the operation of the judicial power. *See id.* at 223 (concluding, albeit with "unease," that "the bottom line must be that federal statutes that prescribe a standard of proof for federal courts are per se unconstitutional").

237 Lawson, *supra* note 9, at 210–11 (emphasis added).

Lawson therefore concludes that congressional interference with stare decisis is a non-starter.[238] In addition, he gleefully traces his argument to the conclusion that the very same statutes (and congressionally authorized rules) that Paulsen cited as historical support for his proposition that Congress can regulate stare decisis are all in fact constitutionally suspect intrusions on the judiciary's independent power.[239]

The most illuminating approach to Lawson's argument is to wrestle with it more or less on its own terms and analyze how much power Congress *should* have to regulate the judiciary in light of basic separation-of-powers norms.[240] He is surely right that one such norm is decisional independence—otherwise, one branch could absolutely control another and make separation a matter of meaningless form rather than meaningful function.[241] Plainly, there would be something seriously wrong with any theory of separation of powers that would permit Congress to use its lawmaking powers to force the courts to "interpret" all references to years in the Constitution as dog-years, thus enabling a five-year-old (in human years) to be President.[242]

On the other hand, it is not obvious why one should regard *all* congressional regulation of judicial decisionmaking as illegitimate interference given that one of the core purposes of enacting statutes is to provide rules for deciding cases and controversies, i.e., to limit judicial discretion. Understood in this light, a law that tells the courts how to interpret other laws need not be regarded as an infringement on their power "to say what the law is"; rather, such a (meta)law merely provides them with *more* laws to interpret. Put another way, the "decisional independence" norm, by itself, does not provide a sufficient

238 *See id.* at 211 ("This conclusion straightforwardly rules out a statute regulating the courts' use of precedent.").

239 *See id.* at 224–26.

240 For Paulsen's own (very different) response to Lawson, see Michael Stokes Paulsen, *Lawson's Awesome (Also Wrong, Some)*, 18 CONST. COMMENT. 231 (2001). He would no doubt condemn separation-of-powers analysis in terms of dueling "background norms" as a game fit for "fuzzy-wuzzy . . . functionalist-pragmatist-balancers." *See id.* at 238. Let ten thousand fuzzy-wuzzy flowers bloom.

241 *Cf.* THE FEDERALIST NO. 48, *supra* note 167, at 315–16. Madison argued,

> It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers.

Id.

242 *Cf.* U.S. CONST. art. II, § 1, cl. 5 (setting minimum age limit of thirty-five years for the Presidency). Martian, Jovian, and Venusian years are also right out.

basis for determining which *laws* improperly infringe on judicial power to interpret the *laws*.

To understand the proper scope of judicial decisional independence, one must turn to the most fundamental separation-of-powers norm of all—prevention of tyranny through rule of law.[243] Rule of law requires that law-enforcers—the officials who actually possess the power to hurt people—find their discretion (zone of arbitrary power) constrained by law created prior to its application. Congressional regulation of judicial operations is often perfectly consistent with this rule-of-law value. That such regulations constrain the courts is no objection in itself given that a primary goal of separation of powers *is* to constrain the courts (and the executive) with law. By way of stark contrast, an aggressive vision of judicial independence that encourages courts to strike any laws they might plausibly characterize as regulating their decisionmaking would invite arbitrary, lawless judicial action. The vagueness of the concept of the "judicial power" magnifies this danger, and a spate of (remarkable) state supreme court decisions demonstrates that it is far more than theoretical.[244]

It is easy to think of hypothetical congressional efforts to regulate judicial interpretation that seem unproblematic from a rule-of-law perspective. For example, suppose some "interpretive" statute *Y* instructs a court how to read some substantive statute *X*, e.g., *Y* might provide that the word "black," as used in *X*, means "white." Provided *X* and *Y* are both statutes, it is difficult to see how requiring the courts to read them together would adversely affect judicial independence to interpret the law considered as a whole—it just so happens that the relevant law in the stated case is composed of *both X* and *Y*. Indeed, to question-beg for a moment, provided that Congress acted within its constitutional powers in enacting these laws, the rule of law *requires* that the courts enforce them both.

At the risk of sounding tautological, congressional statutes that instruct the courts how to interpret or implement other laws will only pose a rule-of-law problem if they prevent the courts from enforcing law. If the law were always what Congress says it is, then this result could not happen. The law is not what Congress says it is, however, where a statute conflicts with the Constitution, which was designed in large part to prevent Congress (or anyone else) from seizing tyranni-

243 *See supra* notes 157–68 and accompanying text.

244 For an illuminating survey of state supreme courts' unfortunate habit of striking legislation for intruding on their "judicial power" prerogatives on sometimes astonishingly dubious grounds, see Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 373–90.

cal power. It follows that Congress may not properly enact laws that prevent the courts from interpreting and enforcing the Constitution in a manner that keeps Congress in its place.

There is no need for a broad proscription of congressional regulation of judicial decisionmaking to protect the judicial independence necessary to enforce the Constitution. One merely needs to recognize that Congress cannot use lower, statutory law to rewrite the Constitution and therefore cannot use "interpretive" statutes to *force* the courts to adopt constitutional constructions they deem incorrect.[245] Thus, Congress could not get rid of a 60-year-old President by enacting a law declaring that the term "thirty-five" as used in the Constitution means "seventy" until the next election. Note that this constitutional "exception" is actually just an application of the general rule in light of the supremacy of the Constitution: if a court construes together both constitutional provision *X* and statute *Y* purporting to force a "wrong" interpretation of *X* on the courts, the analysis is simple—statutory *Y* has no effect on constitutional *X*.

An additional obvious limitation on Congress is that it cannot use its legislative authority to seize for itself the judiciary's power to resolve cases by determining facts and applying law to them.[246] Although Congress can affect case outcomes indirectly by enacting (constitutional) laws, it may not, for instance, constitutionally enact a statute forcing a court in a given case to find that the defendant violated preexisting law and to award the plaintiff one million dollars in compensation.[247]

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245 Congress plainly cannot force the courts to adopt interpretations of the Constitution that they deem flat-out wrong. It is less obvious whether Congress could legislate that courts grant something like *Chevron* deference to congressional constitutional interpretations. *Cf.* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing that judicial review should operate subject to a "clear error" rule pursuant to which courts should set aside statutes only where the legislature "ha[s] not merely made a mistake, but ha[s] made a very clear one—so clear that it is not open to rational question"). Whether Congress could constitutionally enact some such rule of deference need not be resolved for present purposes, however, because abrogation of horizontal precedential force would not require the courts to defer to congressional interpretations; rather, it merely would allow courts to exercise their own independent judgments on constitutional meaning free from any distorting effects of past decisions.

246 *Cf.* U.S. CONST. art. III, § 1 (vesting judicial power in the courts).

247 Of course, the line between a legitimate "law" and an illegitimate legislative verdict is obscure. *Cf.* Lawson, *supra* note 9, at 207 (addressing this point in a discussion of *State v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855)). For instance, suppose that, rather than declare that a plaintiff must win $1 million in a case because the defendant violated a law already on the books, Congress were instead to enact a statute that retroactively condemned the defendant's conduct and

These two limitations—that Congress cannot force wrong constitutional interpretations on the courts and cannot exercise the judicial power to resolve cases itself—work together to prevent Congress from distorting the Constitution to increase improperly its (or anyone else's) power. The principle that Congress may not itself resolve cases prevents it from enforcing distorted, self-serving interpretations of the Constitution in that context; the principle that the courts are independent interpreters of the Constitution prevents Congress from taking an indirect route to this same end by forcing the courts to accept such distortions.

Note that, from the point of view of enhancing the rule of law, this function of ensuring that the legislature remains within constitutional limits is the most critical purpose served by judicial independence from legislative control—as reflection on a separation-of-powers puzzle demonstrates. The commonly stated danger posed by legislative seizure of judicial power is that such a coup would leave the resolution of litigants' cases subject to the legislature's "arbitrary" control.[248] If, however, a legislature has sovereign power to make up any arbitrary laws that it likes, and the rule of law requires that the courts enforce these laws, then it is not so clear that granting the legislature an additional "judicial" power to *arbitrarily apply the arbitrary laws it made up in the first place* would substantially increase its power to oppress. Impartial application of arbitrary, oppressive laws may be of small comfort to those on the receiving end of them. The Constitution has a simple answer to this puzzle—Congress does *not* enjoy sovereign lawmaking power but instead may only legislate pursuant to its enumerated powers as limited by various provisions designed to prevent oppression; for example, Congress may not enact bills of attain-

imposed $1 million in liability for it. Bona fide "law" or illegitimate "verdict"? An attempt to draw this line is beyond the scope of this Article. Suffice for the moment to note, however: (1) the courts, as independent interpreters of the Constitution, have the power to draw this line and thus block congressional usurpations of the judicial power; and (2) the Constitution itself ameliorates the problem that Congress will attempt to enact laws that improperly target and oppress individuals by proscribing bills of attainder and ex post facto laws. *See* U.S. CONST. art. I, § 9, cl. 3.

248 *See, e.g.*, Plaut v. Spendthrift Farm, 514 U.S. 211, 241 (1995) (Breyer, J., concurring) ("For one thing, the authoritative application of a general law to a particular case by an independent judge, rather than by the legislature itself, provides an assurance that even an unfair law at least will be applied evenhandedly according to its terms."); 1 MONTESQUIEU, *supra* note 163, at 163 ("Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control . . . .").

der or ex post facto laws.[249] Given these limits on Congress's law*making* power, the danger of granting it the power to *apply* the Constitution to resolve cases is plain—given the chance, it would ignore or distort the constitutional limits on its powers were it to become the judge of their scope.[250]

Subject to the proviso that Congress may not use its lawmaking power in a way that enables it to evade the courts' power to enforce constitutional limitations, one may regard legislative control of judicial operations as quite a good thing—the lawmaker is *supposed* to use law to channel enforcement discretion in a separation-of-powers system. By contrast, permitting courts to strike as unconstitutional any laws they could plausibly characterize as regulating their decisionmaking processes would undermine rather than enhance the rule of law.

Many statutes and rules could be characterized as congressional efforts to regulate activities that are in some respect fundamental to the operation of the judicial power to resolve cases and controversies.[251] Consider the omnipresence of standards of review that control judicial fact-finding. Section 706 of the APA requires that courts affirm agency fact-finding that, depending on the context, is either supported by "substantial evidence" or is not "arbitrary and capricious;" numerous agency organic statutes contain similar standards.[252] Federal Rule of Civil Procedure 52(a), which Congress authorized after a fashion through the Rules Enabling Act,[253] provides that district court

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249 U.S. CONST. art. I, § 9, cl. 3.

250 As Hamilton put the matter,

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

THE FEDERALIST NO. 78, *supra* note 75, at 497; *see also id.* at 498 (rejecting the notion "that the legislative body are themselves the constitutional judges of their own powers"; countering that one of the functions of the courts is "to keep the [legislature] within the limits assigned to their authority").

251 *See* Paulsen, *supra* note 20, at 1582–90 (discussing examples of congressional regulation of judicial operations).

252 *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 706 (2000); 29 U.S.C. § 660(a) (providing that factual findings of OSHRC, "if supported by substantial evidence on the record considered as a whole, shall be conclusive").

253 Rules Enabling Act, 28 U.S.C. §§ 2071–2074 (2000) (providing lawmaking mechanism for Supreme Court to promulgate—subject to congressional approval—procedural rules of court).

findings of fact must be affirmed provided that they are not "clearly erroneous."[254] A similar statutory standard applies to district court review of certain magistrate judge determinations.[255] Such deferential standards of review represent a legislative policy judgment that, over the run of cases, they are beneficial because they enhance respect for initial decisionmakers, promote finality, and reduce the risk of error by reviewing courts.[256]

Of course, to the degree the Federal Rules of Evidence can be laid at Congress's door—via its passive approval of some rules through the Rules Enabling Act or its direct legislation of others—they represent a massive legislative intrusion into the judicial world of factfinding.[257]

The Full Faith and Credit Act, enacted in 1790, provides an especially ancient example of intrusive congressional regulation of judicial operations.[258] It commands federal courts to grant state court judgments the same preclusive effects as they receive in the courts that render them.[259] Doing so requires federal courts, in appropriate cases, to adopt state court findings of fact and interpretations of law.[260] In a sense, the Act thus imposes a decisionmaking process—on occasion federal courts must accept somebody else's fact-finding and legal interpretations rather than decide for themselves how to conduct these tasks. Moreover, before a federal court can give effect

254 FED. R. CIV. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

255 28 U.S.C. § 636(b)(1)(A).

256 *See, e.g.*, Anderson v. Bessemer City, 470 U.S. 564, 573–76 (1985) (stating rationales for FED. R. CIV. P. 52(a)).

257 For a brief summary of congressional efforts to rewrite the Federal Rules of Evidence, see Eileen A. Scallen, *Analyzing "The Politics of [Evidence] Rulemaking"*, 53 HASTINGS L.J. 843, 853–56 (2002). Rules 413–15, which govern admission of the past sexual conduct of defendants in sexual assault cases, provide an excellent recent example of this practice; Congress added them to the Federal Rules of Evidence as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135–2137 (1994).

258 *See* Act of May 26, 1790, ch. 11, 1 Stat. 122.

259 28 U.S.C. § 1738 ("The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.").

260 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When [1] an issue of fact or law is [2] actually litigated and determined by [3] a valid and final judgment, and [4] the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

to a state court judgment, it must first figure out what is in it. The Act regulates this process as well, designating by statute what evidence counts for "proving" and "admitting" state court records.[261]

Some have suggested that the power to fashion remedies is an integral part of the judicial power.[262] Many statutes control judicial remedies. Since 1793, the Anti-Injunction Act has sharply limited federal court power to enjoin state court proceedings.[263] Many state legislatures have capped punitive damages for common-law causes of action.[264] Congress attempted to enact such a cap for product liability actions but was foiled by President Clinton's veto.[265] Given that Republicans now control both houses of Congress and the executive branch, it seems likely that similar efforts at "tort reform" may soon become federal law.[266]

Courts commonly describe their contempt power as an "inherent" part of their judicial power.[267] The need for law to limit arbitrary

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261 28 U.S.C. § 1738 (providing that records of state court proceedings shall be proven by means of clerk's attestation, seal, and judge's certificate); *cf.* Lawson, *supra* note 9, at 218–19 (admitting that provision "specifying the manner in which the applicable law must be proved" represents a "founding-era example of congressional regulation of judicial decision-making").

262 *See* Engdahl, *supra* note 195, at 170 (observing that "[s]urely 'remedy' is the most fundamental and essential element of judicial power . . . [g]iving relief *as deemed appropriate by the courts* is an inherent and indispensable part of the federal judicial power"); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

263 28 U.S.C. § 2283. The Prison Litigation Reform Act of 1995 provides a more recent example of congressional regulation of equitable remedies. *See* 18 U.S.C. § 3626(b)(2) (requiring the lifting of prison injunctions in the absence of certain statutorily required findings).

264 *See generally* BMW of N. Am. v. Gore, 517 U.S. 559, 614–19 (1996) (Ginsburg, J., dissenting) (collecting in an appendix information regarding state legislative reforms of punitive damages, including caps).

265 The Common Sense Legal Standards Reform Act of 1995, H.R. 956, 104th Cong. (1995), would have capped products liability punitive damages awards at the greater of twice compensatory damages or $250,000 in actions against companies worth more than $500,000.

266 John D. McKinnon, *Bush To Seek Curbs on Legal Costs*, WALL ST. J., Nov. 27, 2002, at A5 (discussing likelihood of congressional action to cap medical malpractice and punitive damages awards).

267 *See, e.g.*, Michaelson v. United States *ex rel.* Chi., St. Paul, Minn. & Omaha Ry. Co., 266 U.S. 42 (1924). The Court observed,

> That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into

discretion is at its very peak where the power to punish is concerned. Contempt law therefore presents a real separation-of-powers problem. Left unchecked, this power permits courts to define offending conduct, adjudicate whether it has occurred, and determine an appropriate punishment or harsh "civil" remedy.[268] That it is dangerous to give courts plenary power to determine how to hurt those who somehow offend them should be obvious. In any event, Congress has regulated the contempt power by statute since 1789.[269]

Standards of review, the Full Faith and Credit Act, the Federal Rules of Evidence, the Anti-Injunction Act, caps on damages, and regulation of the contempt power: all of these laws *affect* how the courts find facts, determine law, or fashion remedies of one sort or another. An especially aggressive Lawsonian court might therefore strike them as impermissible intrusions into the operation of the judicial power.[270] None of these laws, however, seem to amount to congressional *usurpations* of enforcement power that could endanger impartial administration of the rule of law—they are just *more* laws to enforce.

On the other hand, granting courts plenary control over how they go about resolving cases would naturally tend to *increase* rather than constrain their zone of arbitrary power. It would in essence create a vague zone of "judicial power" immunity *from* the rule of law. Of course, if the Constitution clearly granted the courts such a zone by virtue of vesting the "judicial power" in them, one could not trump this grant with separation-of-powers "background norms." Here, however, we are trying to determine if the "judicial power" should be con-

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existence and vested with jurisdiction over any subject, at once became possessed of the power.

Id. at 65–66.

268 *Cf.* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 822 (1987) (Scalia, J., concurring) ("In light of the broad sweep of modern judicial decrees, which have the binding effect of laws for those to whom they apply, the notion of judges' [sic] in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth . . . vividly . . . the prospect of 'the most tyrannical licentiousness.'" (citing Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 228 (1821))).

269 *See id.* at 821 (noting that Congress "conferred" contempt power on the courts in the Judiciary Act of 1789, sec. 17, 1 Stat. 83); *see also* 18 U.S.C. § 401 (2000) (criminalizing contempt).

270 For Lawson's own analysis of the validity of various statutes under the standard he proposes, see *supra* note 9, at 219–26. Compare with Vermeule, *supra* note 244, at 359–60, 373–90 (extensively documenting state supreme courts' invocation of their exclusive control over "judicial power" to justify invalidating legislative regulation of, inter alia, standards of review, rules of evidence, contempt power, and damages caps).

strued as a grant of such immunity and, in this context, it is certainly worth pondering whether too broad a construction of judicial independence might have the effect of granting an uncomfortable amount of uncontrolled, arbitrary power to appointed law-enforcement officials with life tenure and salary guarantees.

The state court systems form fifty natural laboratories that illustrate the threat to the rule of law posed by courts that too eagerly invoke a fuzzy "judicial power" immunity (under their state constitutions) to be free of legislative interference. In an illuminating study of this practice, Professor Vermeule documents that state supreme courts, pursuant to what he calls "the paranoid style of American judicial review," have indicated that legislatures intrude on judicial prerogatives by, inter alia: altering common-law liability rules and remedies; regulating the contempt power; enacting standards of review, rules of evidence, or other procedural rules; or failing to grant the judiciary as much funding as a court determines it requires.[271] Vermeule concludes, quite persuasively, that such decisions "sweep beyond any defensible conception of judicial power."[272]

Two recent instances of judicial interference with major legislative tort reform efforts provide excellent examples of this sort of unjustified "judicial power" overreach into the political realm. The Illinois Civil Justice Reform Amendments of 1995, among other reforms, imposed a $500,000 limit on "non-economic" compensatory damages for pain and suffering.[273] One can make policy arguments either way for such a rule—for example, one might argue that judges and juries should decide such damages on a fact-specific basis, or, alternatively, one might argue that pain-and-suffering damages are ad hoc attempts to monetize what cannot be meaningfully measured in dollars, and should not be permitted to drive litigation and insurance costs. In any event, the constitutionality of this cap was challenged in *Best v. Taylor Machine Works*.[274] Following the usual dance in constitutional cases, the Illinois Supreme Court nominally eschewed policy analysis.[275] It then took the remarkable step of striking the cap for violating separation of powers and for intruding on the court's exclu-

271 *See* Vermeule, *supra* note 244, at 359–60.

272 *Id.* at 360.

273 735 ILL. COMP. STAT. ANN. § 5/2-1115.1 (West Supp. 1996), *held unconstitutional by* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1064 (Ill. 1997).

274 *Best*, 689 N.E.2d at 1057.

275 *Id.* at 1063 ("We recognize that we should not and need not balance the advantages and disadvantages of reform.").

sive control over the judicial power.[276] Its theory was that the legislature had improperly asserted control over "remittitur," which is the common-law procedure courts use to reduce damages awards they deem so grossly excessive as to "shock the judicial conscience."[277] Application of remittitur requires a court to exercise vast discretion to determine how large an award it can tolerate and then to give the winning plaintiff a choice between accepting that award in lieu of the jury's verdict or proceeding to a new trial on damages.[278] The legislature's procrustean cap offended separation of powers because it "unduly encroache[d] upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law."[279] The court's explanation for why remittitur was "fundamental" enough to deserve constitutional status on a separation-of-powers theory was unclear, to put the matter mildly.[280]

In any event, the upshot was that the Illinois Supreme Court invoked separation of powers to prevent the legislature from displacing common-law judicial discretion (of a kind that many deem arbitrary) with a bright-line rule of law (albeit a controversial one). Given that a primary purpose of separation of powers *is* to constrain the discretion of executive and judicial officials with law, this result is ironic. From a rule-of-law point of view, *Best* has nothing to recommend it.

The Ohio Supreme Court was not to be outdone. In the astonishing *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, it struck down a major tort reform package for violating separation of powers by trenching on the judicial power—among a litany of other state-consti-

276 *Id.* at 1078–81. In addition, the court struck the cap for violating the "special legislation" clause of the state constitution. *Id.* at 1069–78.

277 *Id.* at 1079 (citing Richardson v. Chapman, 676 N.E.2d 621 (Ill. 1997)).

278 *See id.* at 1080 (discussing remittitur mechanism).

279 *Id.*

280 *See id.* at 1079–81. The court based its decision on a mix of factors, including: a long "tradition" of judicial remittitur; remittitur makes good policy sense; and, perhaps most nonsensically, a legislative *cap* on damages "undercuts the power, and obligation, of the judiciary to reduce excessive verdicts." *Id.* at 1080. In addition, the court found persuasive certain dicta in *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989). In that case, the Washington Supreme Court concluded that a damages cap might violate separation of powers because it amounted to a form of "legislative 'remittitur,'" which was impermissible because a legislature cannot make the case-by-case determinations necessary to assess damages. *Id.* at 721 (cited with approval by *Best*, 689 N.E.2d at 1080–81). Of course, the whole point of a legislative cap is to supercede judicial, case-by-case determinations with *law*.

tutional sins.[281] The Ohio legislature and courts have struggled over tort reform for a number of years; the court had struck earlier legislative efforts to impose statutes of repose and require judges rather than juries to determine punitive damages awards.[282] The legislature responded by enacting a comprehensive statute which, inter alia, again imposed various statutes of repose and capped punitive damages and certain categories of compensatory damages as well. The legislature acknowledged that some of its efforts were inconsistent with judicial precedents, but that it "respectfully disagree[d]" with them.[283]

As a matter of constitutional analysis, the court might have chosen to invalidate the law by reaffirming and elaborating upon the precedents with which the legislature had "respectfully disagree[d]." Instead, it opined that the *very act of enacting a statute which disagrees with a judicial constitutional construction* violates separation of powers! In the court's view, the legislature, by passing laws that contradicted precedents, had "usurp[ed the] court's constitutional authority by refusing to recognize [its] holdings,"[284] and had attempted to make itself the "final arbiter of the validity of its own legislation."[285] Given that the new law was subject to judicial review, this assertion was plain nonsense.[286]

A constitutional rule proscribing legislative regulation of judicial decisionmaking processes would create a severe danger of further encouraging courts to invoke their vague "judicial power" prerogatives to protect or expand their range of arbitrary power with little in the way of countervailing rule-of-law benefits. This danger is in obvious tension with the separation-of-powers goal of imposing legal controls

281 715 N.E.2d 1062 (Ohio 1999). The tone of this opinion is captured by the subtitle with which it begins, "Am.Sub.H.B. No. 350 [the tort reform law] Converts the Drive for Civil Justice Reform into an Attack on the Judiciary as a Coordinate Branch of Government." *Id.* at 1071.

282 *See id.* at 1072 n.5 (collecting numerous cases in which court had struck tort reform statutes as unconstitutional, and citing, inter alia, *Cyrus v. Henes*, 640 N.E.2d 810 (Ohio 1994) (striking statute of repose); and *Zoppo v. Homestead Insurance Co.*, 644 N.E.2d 397 (Ohio 1994) (striking statute that assigned determination of punitive damages to court rather than jury)).

283 *See, e.g., Sheward*, 715 N.E.2d at 1086 (quoting the legislature's deferential apology).

284 *Id.*

285 *Id.* at 1096.

286 And also just a plain bad idea. As Professor Vermeule observes, the rule of *Best* "would prevent a court from ever changing its past constitutional rulings on the validity of legislation . . . because the legislature would be constitutionally barred from supplying the reenactment needed to provide a case or controversy in which the reconsideration could occur." Vermeule, *supra* note 244, at 389.

on the discretion of the enforcers. While it is true that separation of powers also seeks to prevent Congress from seizing enforcement powers which would enable it to distort and apply law arbitrarily, congressional efforts to regulate the judiciary do not as a class pose any such threat.

In light of these concerns and in the absence of determinate text, the better understanding of the Sweeping Clause's interaction with the judicial power is that congressional regulation of judicial decisionmaking does not "improperly" infringe upon judicial independence unless it enables Congress to block the courts from effectively using the Constitution as a checking device, e.g., Congress may not force the courts to adopt congressionally favored constitutional interpretations they deem incorrect, and it may not sidestep the courts completely by seizing their power to decide individual cases. This standard leaves ample room for Congress to dispose of the horizontal force of many precedents or categories of precedents. This claim may, at first blush, seem problematic because subjecting constitutional precedents to such treatment would permit Congress to *affect* judicial constitutional interpretation. It would not do so in a way offensive to separation of powers, however, because asking courts to implement their best, *independent* judgments when interpreting the law could not *force* them to adopt congressionally favored constructions of the Constitution (or any other law, for that matter).[287] A court would remain

287 Some scholars have argued or suggested that such preservation of judicial interpretive independence cannot save the constitutionality of selective abrogation of stare decisis because Congress would presumably exercise this power to expand the courts' discretion with an eye toward affecting substantive doctrine. *See* Fallon, *supra* note 25, at 595 (condemning notion that Congress may manipulate precedent to "skew the substantive outcome of judicial deliberations"); Harrison, *supra* note 18, at 531–32 (observing that it would be illicit for Congress "[t]o adopt or apply a rule of precedent in order to reach a doctrinal result"); *cf.* Caminker, *supra* note 232, at 1545 n.120 (suggesting that congressional manipulation of precedential force to affect doctrine might violate separation of powers). *But see* Paulsen, *supra* note 20, at 1596–97 (abrogating stare decisis would not impair judicial power because it would leave courts free to decide cases "on the merits"). They are no doubt correct if one starts from the premise that Congress has no constitutional authority to attempt to influence judicial constitutional constructions in any manner whatsoever—no matter how noncoercive. In a republic that counts majority rule as one of its core values, however, it would seem logical to consider the alternative, "qualified majoritarian" premise that the popular branches should be able to participate in constitutional interpretation to the degree they can do so without unduly undermining the power of the courts to use the Constitution to hold them in check. Both of these premises lead to one fundamental conclusion to which all agree: plainly, Congress cannot force the courts to adopt "wrong" constitutional interpretations that Congress favors, for then the Constitution could not control Congress. The qualified-majoritarian premise,

perfectly free to affirm a precedent based on its inherent persuasive value. Nor would such a statute enable Congress to usurp the judicial power of resolving case outcomes—a law which *expands* rather than *contracts* judicial options cannot be a means for Congress to concentrate arbitrary power in itself.

Thus, as discussed earlier, from the point of view of Sweeping Clause and separation-of-powers analyses, the only danger that would be posed by a statute that eliminated the horizontal stare decisis force of precedents would be that it might effectively delegate legislative rather than judicial discretion to the courts in some extreme context. Such an overreaching statute could not fairly be said to "carry into execution" the "judicial power." Subject to this caveat, Congress may, consistent with separation of powers, grant considerable discretion to the courts and may, pursuant to the Sweeping Clause, "properly" increase this discretion by eliminating the coercive effects of many precedents.

III. BACK TO *ANASTASOFF*: CONGRESS COULD LEGITIMIZE THE NONPRECEDENT RULES

We are now ready to trek back to *Anastasoff* and reassess the constitutional implications of Eighth Circuit Rule 28(A)(i), which purported to authorize appellate panels to issue select opinions as "nonprecedents" that later panels of the same court were free to ignore.[288] As Judge Richard Arnold put the matter:

> At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does

however, leaves room for stare-decisis-stripping statutes, which would not force constitutional constructions on the courts and therefore would not rob them of their ability to check Congress, but at the same time would modestly (?) expand the congressional voice in the process of constitutional construction. If it is correct that Congress should be able to exercise such limited, noncoercive influence on judicial constitutional interpretation, then the Sweeping Clause could offer an avenue to exercise that influence: where Congress disagrees with a judicial constitutional construction, abrogating its horizontal precedential force would amount to a "necessary" (reasonable) and "proper" (permissible) enactment for "carrying into execution" (improving the operation of) the judicial power. For a discussion of the normative implications of increasing the popular voice in constitutional construction, see *infra* Part IV.

288 *See generally* Anastasoff v. United States, 223 F.3d 898, 899–905 (8th Cir. 2000) (surveying history of the precedent doctrine), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). For the full text of Rule 28(A)(i), see *supra* note 100.

> not bind us today, and, what's more, you cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not *fiat*.[289]

He concluded that "the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'"[290]

This conclusion relies on a strained and narrow understanding of the meaning of "judicial power." Even if one grants that the Framers' understanding of that term should be binding now, it seems implausible to suggest that they silently believed that its definition necessarily entailed adherence to the common law's doctrine of precedent, in light of Blackstone's discussion of legal systems that failed to follow this same approach.[291] Nor, on reflection, is it plausible to maintain that separation of powers demands that *every* judicial opinion, no matter how trivial, command precedential force to prevent courts from wielding "arbitrary" or "legislative" discretion.[292]

Judge Arnold was correct, however, to sense an important link between separation of powers and the fundamental role that respect for precedent played in the common-law courts of the ex-colonies around the time of the founding. According to the dominant "declaratory theory" of that day, precedents were "evidence" of law that courts should follow absent an affirmative showing of unreasonableness.[293] There can be, of course, no constitutional requirement that twenty-first century judges adopt this jurisprudence as a matter of personal belief—the Constitution does not tell judges that they must "believe" that their opinions are "evidence" of law. Abandonment of the conceptual trappings of the declaratory theory, however, does not require or authorize the courts to abandon the fundamental limitation on their discretion that came along with it—their legal obligation to show measured respect for their own precedents. Indeed, courts cannot—consistent with separation of powers and rule of law—increase

289 *Anastasoff*, 223 F.3d at 904.

290 *Id.* at 899.

291 *See supra* notes 121–26 and accompanying text.

292 *See supra* Part II.C.1 (discussing application of nondelegation doctrine (or a close cousin) to stare-decisis-stripping statutes); *see also* Hart v. Massanari, 266 F.3d 1155, 1180 (9th Cir. 2001) ("Unlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority.").

293 *See supra* notes 46–48 and accompanying text; *see generally supra* Part I.A.

their discretionary power beyond that granted by law.[294] Therefore, although the definition of the "judicial power" does not preclude issuance of "nonprecedents," the nonprecedent rules are unconstitutional if they amount to an *unauthorized* power grab by the courts.

Clearly, the Supreme Court would run afoul this principle were it, for example, to declare that henceforth it would disregard all of its First Amendment jurisprudence, for doing so would radically expand its discretion to decide cases implicating this amendment going forward. Any judicial attempt to strip the precedential force from a case that states a new, important principle of law would also seem problematic.

In theory, however, the nonprecedent rules are supposed to alleviate judicial burdens by speeding relatively trivial cases through the system. If a case is genuinely trivial, then, by definition, it cannot impose new precedential limits on the courts. It arguably follows that stripping such cases of their precedential force on issuance should not amount to an impermissible power grab.

The preceding view unduly minimizes the importance of the nonprecedent rules and their effects on judicial operations. For one thing, sometimes courts make what are presumably mistakes and categorize cases as nonprecedents even though they are actually cases of first impression within their circuit. Indeed, the *Anastasoff* panel opinion only came into being because the court found itself wrestling with the problem of determining the precedential force of a "nonprecedent" that happened to be a case of first impression within the Eight Circuit.[295] Moreover, quite aside from evident "mistakes," circuit courts dump *large* percentages of the cases they decide into the nonprecedent category;[296] erasing the force of thousands of opinions per year must leave courts with more decisional maneuvering room than they would possess if all of them functioned as precedents. In short, the nonprecedent rules enable the courts to exercise more power, and it is at least doubtful whether courts could properly authorize them of their own volition in light of the no-power-grabs principle.

Congress, not the courts, is the proper source of increases in judicial discretionary authority. As discussed above, it may strip cases of their horizontal precedential force and, on the face of the matter,

294 *See supra* Part II.B.

295 *See supra* text accompanying notes 95–101.

296 *Hart*, 266 F.3d at 1177 (discussing heavy dependence of circuit courts on nonprecedent rules, and noting that only twenty percent of all federal appellate court decisions are "published").

there is no reason why it could not delegate a measure of this power to the courts as a means of improving judicial administration. Perhaps it already has: the Eighth Circuit, like other circuits, promulgated its rule regarding the precedential status of unpublished opinions pursuant to the Rules Enabling Act.[297] This Act delegates authority to circuit courts to promulgate local rules subject to the limitations that they must not alter any "substantive rights" and must be consistent with congressional legislation and the general rules of practice and procedure prescribed by the Supreme Court.[298] Provided the nonprecedent rules satisfy these requirements, Congress has, technically speaking, given its permission for them.

In any event, regardless of whether the nonprecedent rules fall within the scope of the Rules Enabling Act, Congress has the power to remove any separation-of-powers clouds that may hover over them. The theoretical separation-of-powers limitation on congressional authority to eliminate horizontal stare decisis effects is that Congress must not grant arbitrary discretion to the courts in violation of the nondelegation doctrine.[299] The circuit courts' nonprecedent rules pose no such threat as they only authorize courts to deprive cases of precedential effect on issuance, and it is difficult to see how such prospective action could create a nondelegation problem. To maintain such an argument, one would need to contend that designating opinion *X* as a nonprecedent on its issuance would either: (1) enable a court to exercise unconstitutionally vast discretion when later deciding case *Y* raising the same issue; or (2) enable a court to exercise such discretion when deciding case *X* itself because it would not need to worry about the potential distorting effects of its opinion on later cases. Neither claim seems plausible.

Claim (1) depends on the premise that the narrowing effects of opinion *X* as a precedent could ratchet judicial discretion from unconstitutional to acceptable levels in some later case *Y* raising the same legal issue. The most basic objection to this argument is that opinion *X* could not enjoy precedential force until *after* it was decided. Therefore, the *Y* court could only have constitutionally excessive discretion if the *X* court exercised such discretion first. To say the least, this condition is extremely unlikely to hold given the state of the

297 Every circuit has promulgated a rule that limits, to one degree or another, the precedential effects of unpublished opinions. For a table setting forth these rules, see Serfass & Cranford, *supra* note 33, at 253–57.

298 *See* 28 U.S.C. §§ 2071(a), 2072(a), (b) (2000).

299 *See supra* Part II.C.1.

nondelegation doctrine.[300] Even more to the point, it makes little sense to try to save the constitutionality of *Y* by insisting that unconstitutional *X* must function as a precedent.[301]

Claim (2) is even weaker. Certainly, the ability to issue nonprecedents affects judicial incentives—courts can work more quickly and less carefully on opinions that they know will have less effect on other cases in the future.[302] Circuit court opinions, however, are public documents; they are easily available online regardless of their "precedential" or "publication" status, and they are subject to en banc or Supreme Court review (albeit not in many cases as a practical matter). In light of such constraints, a court cannot exercise arbitrary discretion when deciding a case merely because it could choose to issue its opinion as a nonprecedent.[303]

In sum, Judge Arnold was right to claim that the doctrine of precedent has separation-of-powers implications for Rule 28(A)(i) (and its fellows in other circuits) but wrong about their nature. The federal courts cannot release themselves from the stare decisis obligations with which they started. Congress, however, can, and it possesses the power to legitimize the circuit courts' nonprecedent rules.

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300 *See supra* notes 175–84 and accompanying text (sketching contours of nondelegation doctrine).

301 The Supreme Court made essentially this same point in *Whitman*, in which it observed that it was nonsensical to suggest that an agency could "cure an unconstitutionally standardless delegation of power" by providing the necessary limiting standards itself as the act of providing such standards would itself violate the nondelegation doctrine. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001). For a discussion of the implications of *Whitman* for "curative" effects of limiting judicial statutory constructions on improperly broad delegations, see *supra* notes 210–15 and accompanying text.

302 *Cf.* Hart v. Massanari, 266 F.3d 1155, 1177–78 (9th Cir. 2001) ("An unpublished disposition is . . . a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the . . . decision. Deciding a large portion of our cases in this fashion frees us to spend the requisite time drafting precedential opinions in the remaining cases.").

303 *See id.* at 1177 n.35 ("Sufficient restrictions on judicial decisionmaking exist to allay fears of irresponsible and unaccountable practices such as 'burying' inconvenient decisions through nonpublication"); Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision To Publish*, 3 J. APP. PRAC. & PROCESS 325, 340–41 (2001) (reviewing Ninth Circuit publication procedures and norms and concluding that "judges do not make decisions not to publish absent-mindedly," and "keep each other in line by asking questions, reminding each other of the guidelines, and discussing the issue collectively").

IV. A Brief Normative Rumination on Expanding Congress's Role in the Constitutional Conversation

The least radical implication of the conclusion that Congress may eliminate the horizontal precedential force of (many) judicial opinions is that it could, if it chose, legitimize circuit court nonprecedent rules. The most radical is that Congress could, as Paulsen suggests, strip such force from the Supreme Court's constitutional interpretations. Congress could not, by asking the Court to implement its best, independent interpretation of the Constitution free from the distorting effects of earlier decisions, force the Court to adopt a congressionally favored construction. Thus, freeing the Court from the law of stare decisis even in this targeted fashion should not unduly trench on its power to "say what the [constitutional] law is."[304] Still, some may find it wildly implausible, not to mention deeply troubling, to suggest that Congress may exercise even so passive a role in that process.

By way of ameliorating this concern: not everyone has always held the view that courts should be the sole creators and controllers of precedents. For James Madison, an interpretation of law did not have to flow out of a judicial pen to bear precedential weight—congressional, executive, state, and popular judgments could count in this regard, too. He made this point in a letter to President Monroe, in which he contrasted the weakness of precedents supporting the constitutionality of road-building legislation with the strength of those supporting the Bank of the United States:

> As a precedent, the case is evidently without the weight allowed to that of the National Bank, which had been often a subject of solemn discussion in Congress, had long engaged the critical attention of the public, and had received reiterated and elaborate sanctions of *every* branch of the Government; to all which had been superadded many positive concurrences of the States, *and implied ones by the people at large.*[305]

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

305 Letter from James Madison to James Monroe, *supra* note 4, *in* 3 Letters and Other Writings, *supra* note 1, at 55–56 (second emphasis added). Of course, in keeping with declaratory theory, not all such precedents are entitled to equal evidentiary weight. *See id.*, *in* 3 Letters and Other Writings, *supra* note 1, at 55–56 (noting that acts of Congress and Executive should not be invoked as precedents unless they were subject to careful consideration); Letter from James Madison to Judge Roan (May 6, 1821), *in* 3 Letters and Other Writings, *supra* note 1, at 217, 221 (observing that many congressional decisions are not subject to "full examination and deliberation" and that such "midnight precedents . . . ought to have little weight in any case"). It may also bear noting in this regard that Madison expected that, due to the nature

In this same vein, in addition to offering the standard rationale that obedience to precedents enhances the stability of the law,[306] Madison also argued that they should be followed

> [b]ecause an exposition of the law publicly made, and repeatedly confirmed by the constituted authority, carries with it, by fair inference, the sanction of those who, having made the law through their legislative organ, appear, under such circumstances, to have determined its meaning through their judiciary organ.[307]

In other words, precedents declare the *will of the people*—the ultimate source of governing authority.[308]

This Madisonian take on precedent does not license the majority to rewrite the Constitution (or any other law) as it pleases because, although precedents may "expound" or "fix" interpretation of a law, they may not "repeal" or "alter" it.[309] Thus, no precedent has the power to force an unreasonable construction of the law on any court. This broad approach does acknowledge, however, that majoritarian institutions have a role to play in choosing among reasonable interpretations of the Constitution. On this view, the process of "fixing" and "liquidating" the Constitution should be a sort of great conversation among the various branches of the government and the governed. Abandonment of declaratory theory, however, leaves no conceptual room for nonjudicial constructions to play the role Madison envisioned as "evidence" of legal meaning—after all, if judicial opinions do not constitute such "evidence," then neither can anybody else's.

Acknowledging a legislative power to free the Court from the coercive force of targeted precedents could provide an alternative doctrinal framework for legitimizing a congressional role in such a constitutional conversation. No doubt, given Congress's nature, its participation would be messy and often far from edifying as its mem-

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of judicial operations, "[w]ithout losing sight . . . of the co-ordinate relations of the three departments to each other, it may always be expected that the judicial bench, when happily filled, will . . . most engage the respect and reliance of the public as the surest expositor of the Constitution." Unaddressed Letter from James Madison (1834), *in* 4 LETTERS AND OTHER WRITINGS, *supra* note 1, at 349, 350.

306 Letter from James Madison to Charles Jared Ingersoll, *supra* note 84, *in* MIND OF THE FOUNDER, *supra* note 84, at 390.

307 *Id.*, *in* MIND OF THE FOUNDER, *supra* note 84, at 390.

308 *See* Letter from James Madison to N.P. Trist, *supra* note 1, *in* 4 LETTERS AND OTHER WRITINGS, *supra* note 1, at 211 (stating that "in the case of a Constitution as of a law, a course of authoritative, deliberate, and continued decisions, such as the bank could plead, was an evidence of the *public judgment*, necessarily superseding individual opinions" (emphasis added)).

309 *Id.*, *in* 4 LETTERS AND OTHER WRITINGS, *supra* note 1, at 211.

bers push for political advantage, but its voice could also prove beneficial. Legal principles do not offer clear, determinate answers to many of the constitutional issues that reach the Court; often, the law can only fuzzily define a range of reasonable outcomes. To state the obvious, the Court's choice of an outcome within this range of reason frequently has a strong political element. The ultimate authority and legitimacy of all governmental institutions rest at some level on the will of the governed, albeit as mediated by the rule of law. At the spot where rule of law more or less runs out (i.e., within the zone of reasonable interpretation), it makes sense that the law-interpreter should consider the will of the governed. Sometimes the Court expressly admits to doing so—for instance, it purports to base its Eighth Amendment jurisprudence on "evolving standards of decency" and to rely on state legislative judgments as the best source of objective information concerning those standards.[310] No doubt the Court's finger to the popular wind affects its judgment in many other contexts both on conscious and not-so-conscious levels. As flawed a vessel as it may be for this purpose, Congress, by opining directly on the more controversial constitutional issues of the day, could provide information to the Court concerning that will—which the Court would be free to accept or reject as it chose.

The increasingly legislative role of the modern Supreme Court provides a further justification for expanding Congress's role in the constitutional conversation to some degree. One of the reasons for leaving constitutional interpretation to the courts is that, as Hamilton wrote in *The Federalist No. 78*, they exercise "judgment" rather than "will."[311] It is the nature of legislative and executive officials to seek to achieve policy ends, and there is always the danger that their "will" to do so may pollute their legal judgments—we all have the tendency to confabulate rationalizations that permit us to do what we want anyway. The courts' passive role as arbiters of legal controversies that litigants bring to them (whether the courts like it or not) minimizes this danger of "will" tainting "judgment." The modern Supreme Court, however, is anything but passive. It grants certiorari to a small handful of the thousands of requests it receives each year. The Court controls its

310 *See* Atkins v. Virginia, 122 S. Ct. 2242, 2247 (2002) (observing that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" and that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures" (citations omitted)).

311 THE FEDERALIST NO. 78, *supra* note 75, at 496.

agenda and is, in this sense, inevitably "activist."[312] This shift in the Court's nature magnifies its political aspect and weakens the case for the proposition that any political influence exercised by the other branches on the Court's interpretive processes must be illegitimate.

Acknowledging a congressional power to eliminate the stare decisis effects of targeted cases on Supreme Court decisionmaking could spark a vigorous new kind of constitutional conversation that could increase the role of the popular will in constitutional interpretation without unduly intruding on the judiciary's power to invoke the Constitution to check other governmental authorities. One can only speculate concerning the ultimate and perhaps unexpected effects of adopting such a practice, which would require acceptance of a new understanding of the relations among Congress, the Court, and the Constitution. Perhaps it bears noting in this regard that mutations tend to be dangerous. Nonetheless, given that this practice could not force the Court to adopt any constitutional interpretation it deemed unreasonable, it is not obvious that its effects would be illegitimate.

CONCLUSION

The power of the courts and Congress to eliminate the horizontal precedential force of judicial opinions has been the subject of much lively judicial and scholarly discourse of late on the nature of the judicial power and the extent of legislative authority to control its mode of operation. By way of adding to this discussion: at the dawn of the Republic, the new federal courts were subject to the (common) *law* that they should, roughly speaking, defer to reasonable precedents, and separation of powers forbade and forbids them from seizing more discretionary power by abandoning this constraint. The principle that courts may not seize power does not, however, prevent Congress from granting it. Congress could, consistent with separation-of-powers principles and pursuant to its Sweeping Clause power, free the courts from the horizontal stare decisis effects of many precedents or categories of precedents. The limitation on this power is that Congress may not so increase judicial discretion as to transform judges into legislators. In the past, the nondelegation doctrine has provided the lens for determining the maximum amount of discretion enforcement officials may exercise. It evolved into its current toothless state in a system that expects judicial deference to precedent, and undermining this expectation with stare-decisis-stripping statutes could cause courts to at-

312 For a forceful discussion of how the certiorari power transforms judges into lawmakers with agendas, see generally Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891 (2002).

tempt to enforce it more vigorously. That said, one can conceive of many such statutes which should be well within Congress's power, for example, it could strip all future Supreme Court five-to-four opinions of their horizontal force or directly authorize the circuit courts' non-precedent rules.

On more normative notes, one can only speculate concerning the ultimate and perhaps complex effects on the body politic and constitutional interpretation of acknowledging a congressional power to eliminate the horizontal precedential force of judicial opinions—particularly were Congress to exercise it with the hope of influencing the Supreme Court's interpretations of the Constitution. That said, in a republic committed to balancing the rule of law *and* the sovereignty of the people, it would seem fair to hazard that majoritarian voices should be permitted to participate in the process of constitutional interpretation insofar as they can do so without unduly undermining the rule of law. Given that Congress could never use its "stripping" power to force a constitutional construction it favored on the Court, it is not obvious that permitting this majoritarian institution such a limited but formal voice in the "constitutional conversation" would have such an effect. And, to invoke the Father-of-our-Constitution argument, Madison might approve.